STATE OF MINNESOTA

IN SUPREME COURT

CX-89-1863

ORDER FOR HEARING TO CONSIDER PETITION FOR ADOPTION OF A RULE OF PROCEDURE FOR THE RECOGNITION OF TRIBAL COURT ORDERS AND JUDGMENTS

IT IS HEREBY ORDERED that a hearing be held before this Court in Courtroom 300 of the Minnesota Supreme Court, Minnesota Judicial Center, on October 29, 2002 at 2:00 p.m., to consider the petition of the Minnesota Tribal Court State Court Forum to amend the Rules of General Practice to include a rule of procedure for the recognition of tribal court orders and judgments. A copy of the forum's petition and proposed amendment is annexed to this order.

IT IS FURTHER ORDERED that:

1. All persons, including members of the Bench and Bar, desiring to present written statements concerning the subject matter of this hearing, but who do not wish to make an oral presentation at the hearing, shall file 14 copies of such statement with Frederick Grittner, Clerk of the Appellate Courts, 305 Judicial Center, 25 Constitution Avenue, St. Paul, Minnesota 55155, on or before October 15, 2002, and

2. All persons desiring to make an oral presentation at the hearing shall file 14 copies of the material to be so presented with the Clerk of the Appellate Courts together with 14 copies of a request to make an oral presentation. Such statements and requests shall be filed on or before October 15, 2002.

Dated: August 26, 2002

BY THE COURT:

Kathleen A. Blatz
Chief Justice

OFFICE OF
APPELLATE COURTS

AUG 29 2002

FILED

STATE OF MINNESOTA
IN SUPREME COURT

IN RE: RULES OF PROCEDURE
FOR THE RECOGNITION OF TRIBAL
COURT ORDERS AND JUDGMENTS

PETITION FOR ADOPTION OF A RULE OF PROCEDURE FOR THE RECOGNITION OF TRIBAL COURT ORDERS AND JUDGMENTS

MINNESOTA TRIBAL COURT STATE COURT FORUM

Honorable Henry M. Buffalo, Jr., Chair
Minnesota Tribal Court Association
246 Iris Park Place
1855 University Avenue West
Saint Paul, Minnesota 55104
(651) 644-4710

Petitioners

Honorable Robert H. Schumacher, Chair
State Court Committee
330 Minnesota Judicial Center
25 Constitution Avenue
Saint Paul, Minnesota 55155
(651) 297-1009

Petitioners

Henry M. Buffalo, Jr., Chair of the Minnesota Tribal Court Association, and Robert H. Schumacher, Chair of the State Court Committee, petition this Court on behalf of the Minnesota Tribal Court/State Court Forum to adopt a proposed rule of procedure to provide a mechanism for the recognition and enforcement of tribal court orders and judgments by Minnesota state courts.

The Proposed Rule is attached as Appendix A.

HISTORY

In the summer of 1996, several state court judges, tribal court judges, and lawyers met informally to explore the possibility of initiating a regular exchange of information and a court-to-court visitation between State Courts and Tribal Courts to increase the minimal exchanges taking place between jurisdictions. The first joint meeting of twelve Tribal Court representatives and members of various levels of the State judiciary convened on July 18, 1997, at the Prairie Island Mdewakanton Dakota Community Tribal Court. This group, now called the Tribal Court/State Court Forum (hereinafter "the Forum"), has continued to meet on a quarterly basis to develop a more structured approach to enhancing communications and reducing confusion arising from inter-jurisdictional exchange of orders.

Several working groups within the Forum have met regularly to examine specific issues common to the various courts. There is general agreement that such communication has helped the respective jurisdictions to more easily deal with cross-border issues. However, the Forum participants have focused on developing a proposal for the enforcement of a full faith and credit rule by the Minnesota Supreme Court that would provide much needed assistance to judges, lawyers and litigants in this complicated area of law. Since December 2000, the participants in the Forum have specifically examined the most efficient way to reduce difficulties encountered in inter-jurisdictional enforcement of orders and judgments. *See* Appendix B.

1. The rule proposed to this Court found unanimous support in both the Minnesota Tribal Courts Association and the State Court Committee and is a product of a cooperative effort between committees.

GROUNDS FOR ADOPTION OF THE RULE OF PROCEDURE

The Minnesota Tribal Court/State Court Forum proposes that Minnesota adopt a Full Faith and Credit Rule to ensure that tribal court orders and judgments are afforded the appropriate level of respect and that full faith and credit is acknowledged equally by all Minnesota district courts.

2. Through retained sovereignty, Indian tribes possess adjudicatory authority over disputes involving persons and property within the subject matter and personal jurisdiction of the court. Many tribes' powers to create problem-solving fora are acknowledged by tribal constitutions enacted pursuant to Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-469. Not all tribes chose to organize under the Indian Reorganization Act, instead enacting their organic documents and creating judicial systems solely on the basis of their inherent sovereign authority. Determining tribal court jurisdiction can be a complex matter. Factors subject to scrutiny in such analysis include the identity of parties as tribal members or non-members, the nature of the action or transaction, the situs of the action or transaction, and any limitations imposed on tribal court jurisdiction by the tribe itself or by federal law.

Judgment enforcement is important to the people who live and go about their business on Indian reservations. It touches the lives of both non-Indian and Indian people quite directly off and on reservations.

It has been widely reported that the tribal-state Coordinating Council of the Conference of Chief Justices of State Supreme Courts found that tribal-state jurisdictional disputes "had arisen most frequently in the areas of the Indian Child Welfare Act, domestic relations, contract law as well as taxation, hunting and fishing, and certain other areas." Arizona Court Forum: "Building Cooperation" (1990). The Arizona Court Forum was part of a project of the Conference of Chief justices of State Supreme Courts, the National Center for State Courts, and the State Justice Institute.

Several states with large Indian populations have developed court rules to establish a consistent process for recognizing tribal orders and judgments. Both Wisconsin and Michigan, for instance, provide full faith and credit to tribal orders and judgments by court rule. Washington has similarly established reciprocity by court rule. Some states have established full

faith and credit through legislation. The Oklahoma Supreme Court promulgated a full faith and credit rule pursuant to legislative authorization. *See* Appendix C.

There now exist more than 560 federally-recognized tribes in the United States. Each of those tribes has long-standing traditional means of dispute resolution, typically not constrained by an adversarial system but directed more by consensus. The twelve tribal courts currently operating within the geographical confines of Minnesota make up a part of the 295 tribal court systems that Indian nations and Alaska Native villages have established.

3. The well-established tribal courts now operating within the State of Minnesota include (along with their date of creation): the 1854 Treaty Court (1989); the Fond Du Lac Tribal Court (historical origin); the Leech Lake Band of Ojibwe Tribal Court (1971); the Bois Forte Tribal Court (1975); the White Earth Band of Chippewa Tribal Court (1978); the Mille Lacs Band of Ojibwe Court of Central Jurisdiction (1983); the Grand Portage Tribal Court (1997); the Tribal Court of the Shakopee Mdewakanton Sioux (Dakota) Community (1988); the Lower Sioux Community in Minnesota Tribal Court (1993); the Upper Sioux Community Tribal Court (1993); the Prairie Island Mdewakanton Community Dakota Tribal Court (1994); and the Red Lake Nation Tribal Court (1884). *See* Appendix D.

Full faith and credit oftentimes critically intersects with people's daily lives. It is not uncommon for confusion regarding the enforcability of an order to cause potentially dangerous situations. In one recent case, an emergency child protection order, including a custody directive for a cocaine-addicted newborn, was not acknowledged by a hospital in the metropolitan area because it was a tribal court order. Without recognition of the order the child would be released to its addicted mother. The tribal court order could not be readily enforced in the county of origin because compliance with the Uniform Enforcement of Foreign Judgments Act of Minnesota was required by the district court. In a second case, originating on a different reservation in a different county, a hold and protect order for two delinquent teenagers who were on the run was not enforced by local police because they were instructed that they did not have to enforce a tribal court order. The district court of that county also understood that the only mechanism for enforcement of the order was the Uniform Enforcement of Foreign Judgments

Act of Minnesota. As a result, the teenagers were left without protection for an additional month. These circumstances arose notwithstanding the full faith & credit direction of the Indian Child Welfare Act. 25 U.S.C. § 1911(d).

Recently the Mille Lacs Band of Ojibwe Court of Central Jurisdiction declined to grant relief, either by full faith and credit or comity, in an action seeking enforcement of a state court order to garnish wages of the defendant, a Mille Lacs Band employee. The Court wrote that as a matter of comity, state court judgments should be honored and enforced routinely, provided the original court had clear jurisdiction to issue the judgment and provided that it did not violate the public policy of that tribe. The Court further commented that unless a state court judgment violates tribal law, the comity approach should be the general rule. The Court, however, cited a Mille Lacs Band statute that directed the court to grant full faith and credit to civil judicial proceedings of [state] courts ". . . that have enacted a full faith and credit provision in their Constitution or Statutes or, on a case-by-case basis, have granted full faith and credit to judicial determinations of the Court of Central Jurisdiction." The Court found no provision of the Minnesota Constitution or Minnesota Statutes that required state courts to honor judgments from the Mille Lacs Court or any other tribal court and therefore the enforcement of judgment was denied.

4. The intent of the proposed rule is to ensure that tribal court orders are afforded the requisite respect due any other jurisdiction and that full faith and credit is acknowledged equally by all Minnesota district courts. Under the proposed rule, a tribal court order or judgment would be given full faith and credit unless: personal or subject matter jurisdiction were lacking; the tribal courtorder or judgment was obtained by fraud, duress, coercion, or absent fair notice and hearing; or if the order or judgment was not final under the laws of the rendering court, with the exception of certain protective orders as noted in the proposed rule.

Many tribal courts within the geographical confines of the State of Minnesota already have enabling legislation or rules that guide their decisions regarding the grant of full faith and credit to a state court judgment or order. Within many of those jurisdictions, full faith and credit

is granted to the same extent another jurisdiction extends full faith and credit to that tribal court. The following jurisdictions have their own distinct legislation or rules that speak directly to the grant of full faith and credit to the orders and judgments of other tribal, state or federal courts: the Mille Lacs Band of Ojibwe Court of Central Jurisdiction; the Grand Portage Tribal Court; the White Earth Band of Chippewa Tribal Court; the Leech Lake Band of Ojibwe Tribal Court; the Upper Sioux Community Tribal Court; the Tribal Court of the Shakopee Mdewakanton Sioux (Dakota) Community; the Lower Sioux Community in Minnesota Tribal Court; and the Prairie Island Mdewakanton Community Dakota Tribal Court. Bois Forte Tribal Court representatives and Band officials have met for some time with their St. Louis County counterparts to facilitate cooperative efforts in the enforcement of orders for protection, off-reservation placement of delinquent youth, implementation of the Indian Child Welfare Act, and arrest warrant recognition. Many of the other 295 tribal court systems of other Indian nations and Alaska Native villages also have rules or statutes regarding the enforcement of orders and judgments.

CONCLUSION

Adoption of the proposed rule would provide guidance for Minnesota courts and would improve communication and understanding between state and tribal court jurisdictions. With twelve established tribal courts and an Indian resident reservation population of well over 20,000 tribal members, interaction among state and tribal courts will benefit directly from the adoption of the proposed rule. Minnesota state court systems, and tribal court systems both within and without the geographical confines of the state of Minnesota, will be able to execute their respective functions among jurisdictions more effectively with enhanced cooperation and with clear guidance from this Court to the lower state courts regarding full faith and credit.

The proposed rule is the result of substantial work and compromise by the various entities represented on the Minnesota Tribal Court/State Court Forum. Petitioners request that this Court adopt a rule of procedure for granting full faith and credit to tribal court orders and judgments.

RESPECTFULLY SUBMITTED this 11th day of April, 2002.

MINNESOTA TRIBAL COURT/STATE COURT FORUM

/s/ HENRY M. BUFFALO, JR.
HONORABLE HENRY M. BUFFALO, JR.
Chair, Minnesota Tribal Court Association

/s/ ROBERT H. SCHUMACHER
HONORABLE ROBERT H. SCHUMACHER
Chair, State Court Committee

APPENDIX A: PROPOSED RULE

A) **Recognition.** A judgment, decree, order, apprehension order, protection order, warrant, subpoena, record or other judicial act of a tribal court of a federally-recognized Indian tribe, as defined in 25 U.S.C. § 450b(e)[1], is presumed valid and enforceable and shall be given full faith and credit by the courts of the State of Minnesota. To overcome the presumption, an objecting party must demonstrate that:

1) the tribal court lacked personal or subject matter jurisdiction; or

2) the order or judgment was obtained by fraud, duress, or coercion; or

3) the order or judgment was not obtained through a process that afforded fair notice and a fair hearing; or

4) the order or judgment is not final under the laws and procedures of the rendering court, unless the order is a non-criminal order for the protection or apprehension of an adult, juvenile or child, or another type of temporary, emergency order.

[1] The 25 U.S.C. § 450b(e) definition of an Indian tribe is codified in the following Minnesota Statutes:

M.S.A. § 626.93 MINNESOTA STATUTES ANNOTATED CRIMINAL PROCEDURE CHAPTER 626. TRAINING; INVESTIGATION, APPREHENSION; REPORTS TRIBAL PEACE OFFICERS 626.93 Law enforcement authority; tribal peace officers;

M.S.A. § 254A.02 MINNESOTA STATUTES ANNOTATED PUBLIC WELFARE AND RELATED ACTIVITIES CHAPTER 254A. TREATMENT FOR ALCOHOL AND DRUG ABUSE 254A.01.Definitions;

M.S.A. § 518D.102 MINNESOTA STATUTES ANNOTATED DOMESTIC RELATIONS CHAPTER 518D. UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT GENERAL PROVISIONS 518D.104. Application to Indian Tribes;

M.S.A. § 260.755 MINNESOTA STATUTES ANNOTATED PUBLIC WELFARE AND RELATED ACTIVITIES CHAPTER 260. JUVENILES MINNESOTA INDIAN FAMILY PRESERVATION ACT 260.755. Definitions;

M.S.A. § 462A.03 MINNESOTA STATUTES ANNOTATED LOCAL GOVERNMENT POLICE POWERS CHAPTER 462A. HOUSING FINANCE AGENCY 462A.03. Definitions;

M.S.A. § 260B.007 MINNESOTA STATUTES ANNOTATED PUBLIC WELFARE AND RELATED ACTIVITIES CHAPTER 260B. DELINQUENCY GENERAL PROVISIONS 260B.007 Definitions;

M.S.A. § 268.0111 MINNESOTA STATUTES ANNOTATED ECONOMIC SECURITY CHAPTER 268. DEPARTMENT OF ECONOMIC SECURITY 268.035. Definitions.

B) **Procedures.**

1) **Money judgments.** Money judgments filed for full faith and credit under this rule are subject to the notice of filing, stay of enforcement, and fee provisions contained in Minn. Stat. § 548.26 to § 548.33. Other judgments or judicial acts are subject to those provisions only to the extent practicable, and not to the extent that alternate procedures are available under this Rule.

2) **Emergency orders.**

a) Any order for protection issued by any Tribal jurisdiction, consistent with the Violence Against Women Act of 1994, shall be accorded full faith and credit by the Courts of Minnesota pursuant to the provisions contained in the Violence Against Women Act, Pub. L. No. 103-322 (codified at 18 U.S.C. § 2265).

b) Non-criminal tribal court orders for the protection or apprehension of an adult, juvenile or child, and other emergency orders may be granted full faith and credit under the following conditions and shall not be subject to the provisions of Minn. Stats. § 548.26 to § 548.33:

i) to obtain full faith and credit for such orders, the tribal court administrator or clerk shall file such orders with the court administrator of any county; and

ii) the court administrator of any county shall stamp the orders as filed in the district court and then forward the file-stamped order to the local law enforcement agencies, and to the tribal court administrator.

c) Once a non-criminal tribal court order for the protection or apprehension of an adult, juvenile or child, or other emergency order is stamped as filed in a district court, it shall be enforced in the same manner as an order issued by a Minnesota court.

d) For the sole purposes of this subsection, filing by facsimile shall be permitted.

C) **Exceptions.**

1) **Federal Law.** If federal law, including but not limited to the following Acts, requires that an order or judgment of a tribal court be given full faith and credit, then federal law and not this Rule shall govern the manner in which full faith and credit is given: the Indian Child Welfare Act (25 U.S.C. §1901-1963); the Violence Against Women Act (18 U.S.C. §2265); and the Full Faith and Credit for Child Support Orders Act (28 U.S.C. §1738B). If federal law does not specify the procedures by which

full faith and credit shall be given, then the procedures established by this Rule shall apply.

2) **Criminal Orders.** This Rule shall not affect the criminal orders issued by the Red Lake Band of Chippewa. Neither shall it affect the criminal orders issued by the Bois Forte Band of the Minnesota Chippewa Tribe or other Tribes or Bands exercising criminal jurisdiction consistent with applicable federal law. Additionally, this Rule shall not affect the co-operative practices voluntarily established among Tribal jurisdictions and the State or counties thereof for the enforcement of criminal orders.

APPENDIX B: TRIBAL COURT/STATE COURT FORUM

STATE COURT COMMITTEE

Honorable Robert H. Schumacher, Chair
Minnesota Court of Appeals

Honorable Thomas Bibus
First Judicial District

Honorable Robert Blaeser
Fourth Judicial District

Honorable Bruce Christopherson
Eighth Judicial District

Honorable James Clifford
Tenth Judicial District

Honorable Lawrence Cohen
Retired, Second Judicial District

Honorable John Oswald
Sixth Judicial District

Honorable David Peterson
Fifth Judicial District

Honorable Steve Ruble
Seventh Judicial District

Honorable John Solien
Ninth Judicial District

Honorable Rex D. Stacey
First Judicial District

Honorable Robert Walker
Fifth Judicial District

MINNESOTA TRIBAL COURT ASSOCIATION

Honorable Henry M. Buffalo, Jr., Chair
Tribal Court of the Shakopee Mdewakanton Sioux (Dakota) Community

Honorable Paul Day
Mille Lacs Band of Ojibwe Court of Central Jurisdiction

Honorable Anita Fineday
Grand Portage Tribal Court
White Earth Band of Chippewa Tribal Court

Joseph F. Halloran, Esq.
Jacobson, Buffalo , Schoessler & Magnuson, Ltd.

Vanya S. Hogen, Esq.
Faegre & Benson, L.L.P.

Honorable Wanda L. Lyons
Red Lake Nation Tribal Court

Honorable John Jacobson
Tribal Court of the Shakopee Mdewakanton Sioux (Dakota) Community

Jessica L. Ryan, Esq.
BlueDog, Olson & Small, P.L.L.P.

Honorable Lenor A. Scheffler
Upper Sioux Community Tribal Court

Honorable Tom Sjogren
1854 Treaty Court

Honorable Andrew M. Small
Prairie Island Mdewakanton Dakota Community Tribal Court
Lower Sioux Community in Minnesota Tribal Court

Honorable Margaret Treuer
Bois Forte Tribal Court
Leech Lake Band of Ojibwe Tribal Court

APPENDIX C: SURVEY OF STATE APPLICATION OF FULL FAITH AND CREDIT TO TRIBAL COURT JUDGMENTS

STATE	COURT RULES	LEGISLATION	CASE LAW
Alaska		ALASKA STAT. § 25.23.160 Recognition of foreign decree affecting adoption [see *Hernandez v. Lambert,* which notes that this section would afford full faith and credit to tribal court adoption orders] (1974)	Hernandez v. Lambert, 951 P.2d 436, 439 n.4 (Alaska 1998) (acknowledging superior court judge's determination that Alaska native communities afforded federal recognition as Indian tribes could assert jurisdiction over adoptions, and such orders are entitled to full faith & credit under 25 U.S.C. § 1911(d), and alternatively, even if tribal court lacked "formal jurisdiction," its order would be entitled to full faith and credit under Alaska Stat. § 25.23.160) John v. Baker, 982 P.2d 738 (Alaska 1999) (state and tribal courts have concurrent jurisdiction in child custody matters; remand to superior court required for application of comity doctrine to tribal court decision awarding shared custody)
Arizona	17B A.R.S. Tribal Court Involuntary Commitment Orders, Rules 1-6 (1994)	ARIZ. REV. STAT. § 12-136 Indian tribal courts; involuntary commitment orders; recognition (1992)	Brown v. Babbit Ford, 571 P.2d 689 (1997) (in action for penalties in repossession proceeding on Navajo reservation, court held that state courts are not required to give full faith & credit to enactments of tribal council; though comity should be extended if enactments are not contrary to state public policy, parties had by contract excluded possibility that it would be affected by tribal resolution).
Arkansas		ARK. STAT. § 9-15-302 Full faith and credit. [Domestic abuse; tribal court protection orders] (1995)	
California			People v. Superior Court of Kern County, 274 Cal. Rptr. 586 (1990) (witness request ordered by tribal court entitled to recognition under Uniform Act to Secure Attendance of Witnesses From Without the State in Criminal Proceedings)
Colorado		CO. STAT. § 24-61-102 Taxation compact between the Southern Ute Indian tribe, La Plata County, and the State of Colorado (1996)	

Last Revised: 9/2000

Connecticut			Mashantucket Pequot Gaming Enterprise v. DiMasi, 25 Conn. L. Rptr. 474 (Conn. Super Ct. 1999) (judgment of tribal court enforceable in state court under principle of comity)
Idaho			Sheppard v. Sheppard, 655 P.2d 895 (1982) (full faith and credit to tribal court adoption decree)
Maryland		MD. CODE ANN., Family Law § 4-508.1 Out-of-state protective orders (1996)	
Michigan	M.C.R. 2.615 Enforcement of Tribal Judgments (1996) M.C.R. 2.112 Pleading Special Matters [requiring particularity in pleadings alleging existence of tribal court judgment or tribal law] (1996)		
Minnesota		MINN. STAT. § 260.771 Child Placement Proceedings; subd. 4 Effect of tribal court placement order [tribal court custody orders have same force and effect as state court orders] (1999; formerly codified at MINN. STAT. § 257.354)	Desjarlait v. Desjarlait, 379 N.W.2d 139 (1985) (declining to accord comity or full faith and credit to tribal court custody order) Welfare of R.I. et al., 402 N.W.2d 173 (Minn. Ct. App. 1987) (district court had jurisdiction to consider Indian child custody proceedings and properly transferred jurisdiction to tribal court)
Montana			Whippert v. Blackfeet Tribe, 260 Mont. 93, 107, 859 P.2d 420, 428 (1993) (reaffirming validity of tribal court judgment on loan default) Dav v. Montana, 272 Mont. 170, 900 P.2d 296 (1995) (tribal child support order and judgment enforceable by state's Child Support Enforcement Division without initiating action in state district court) Anderson v. Engelke, 287 Mont. 283, 954 P.2d 1106 (1997) (state court could not enforce tribal court judgment within exterior boundaries of reservation via state law or Uniform Foreign Money-Judgments Recognition Act because such enforcement would undermine authority of tribal courts over reservation affairs and infringe on right of Indians to govern themselves)

Nebraska		NEB. REV. STAT. § 28-311.10 Foreign harassment protection order; enforcement (1998)	Walksalong v. Mackey, 250 Neb. 202, 549 N.W.2d 384 (1993) (affirming denial of full faith & credit to tribal custody order because tribe lacked jurisdiction over child at time of custody determination)
New Mexico		N.M. STAT. § 40-13-6 Service of order; duration: penalty; remedies not exclusive [Domestic Affairs; tribal orders of protection] (1999)	Jim v. CIT Financial, 87 N.M. 362, 533 P.2d 751 (1975) (Navajo Nation is a "territory" within meaning of federal statute and therefore entitled to full faith & credit, but choice of law determination must be made) Spear v. McDermott, 121 N.M. 609, 916 P.2d 228 (Ct. App. 1996) (Ex parte order of Cherokee Nation court enforceable in state court civil contempt action) Halwood v. Cowboy Auto Sales, Inc., 124 N.M. 77, 946 P.2d 1088 (Ct. App. 1997) (tribal court punitive damages award entitled to both comity and full faith & credit)
North Carolina		N.C. STAT. 50B-4(d) Enforcement of orders [Domestic violence] (rev. 1999)	Jackson County Child Support Enforcement Agency v. Smoker, 341 N.C. 182, 459 S.E.2d 789 (1995) (state courts could not assume jurisdiction over county's action seeking reimbursement of AFDC and reasonable child support because tribal court had already assumed jurisdiction and issued order, and doing so would infringe on tribal sovereignty)
North Dakota	N.D.R.Ct. 7.2 Recognition of Tribal Court Orders and Judgments (1995)	N.D. STAT. § 27-01-09 Reciprocal recognition of certain state and tribal court judgments, decrees, and orders - Conditions (1995) N.D. STAT. § 14-07.1-02.2 Foreign domestic violence protection orders - Full faith and credit recognition and enforcement (1999)	Fredericks v. Eide-Kirschmann Ford, 462 N.W.2d 164 (N.D. 1990) (tribal court judgment enforceable in state court as matter of comity)
Oklahoma	Ok. Dist. Ct. Rule 30 Standards for Recognition of Judicial Proceedings in Tribal Courts - Full Faith and Credit (1994)	OKLA. STAT. § 728 Standards for recognizing records and proceedings of tribal courts - Reciprocity (1992)	Barrett v. Barrett, 878 P.2d 1051 (Okla. 1994) (tribal court divorce judgment entitled to full faith & credit in state courts, but wife entitled to present evidence showing she was induced to consent to personal jurisdiction of tribal court through husband's extrinsic fraud)
Oregon			Marriage of Red Fox, 23 Or. App. 393, 542 P.2d 918 (1975) (tribal court divorce decree barred subsequent divorce action in state court)

Last Revised: 9/2000

South Carolina		Catawba Indian Claims Settlement Act S.C. STAT. § 27-16-80 Tribal courts - original and appellate civil; full faith and credit [...] (rev. 1993)	
South Dakota		S.D. STAT. § 1-1-25 When order or judgment of tribal court may be recognized in state courts (1986)	Red Fox v. Hettich, 494 N.W.2d 638 (S.D. 1993) (tribal member who obtained tribal court judgment against nonmember failed to establish in state court that tribal court had authority to adjudicate claim, so that tribal judgment could not be enforced) Gesinger v. Gesinger, 531 N.W. 2d 17 (S.D. 1995) (comity properly granted to tribal court judgment even though still on appeal)
Virginia	Va. R. Civ. P. Code § 19.2-152.10 Protective order in cases of stalking (1997; rev. 1999)	VA. STAT. § 16.1-279.1 Protective order in cases of family abuse (1996)	
Washington	Wa. R. Super. Ct. 82.5 Tribal Court Jurisdiction [enforcement of Indian tribal court orders, judgments or decrees] (1995)		Adoption of Buehl, 87 Wash.2d 649, 555 P.2d 1334 (1976) (tribal court custody order entitled to full faith & credit because child was domiciled on reservation when made a ward of tribal court and tribe did not intend change of domicile during child's temporary stay in Wash.) City of Yakima v. Aubrey, 85 Wash. App. 199, 931 P.2d 927 (1997) (defendant convicted in state district court of drunk driving on reservation; tribal court order prohibiting defendant from leaving reservation to attend district court hearing was not entitled to full faith and credit because tribal court lacked subject matter jurisdiction since there was no case in controversy in tribal court) Welfare of Benjamin W.E. v. Susan C., No. 16474-8-III, 1998 WL 289167 (Wash. Ct. App. 1998) (unpublished opinion) (tribal court's use of writ of habeas corpus in child custody proceeding converted to de facto dependency action; because child did not reside on reservation, tribal court writ and order were unenforceable in state court)
West Virginia		W.V. STAT. § 48-2A-3 Jurisdiction; [...] full faith and credit [...] [Domestic relations; tribal court protective order] (1998)	

Last Revised: 9/2000

Wisconsin		WIS. STAT. § 806.245 Indian tribal documents; full faith and credit (1982; rev. 1991, 1995)	Teague v. Bad River Band of the Lake Superior Tribe of Chippewa Indians, 229 Wis.2d 581, 599 N.W.2d 911 (Ct. App. 1999) (tribal court's judgment that contracts were unenforceable entitled to full faith and credit) In re Elmer J.K., III, 224 Wis.2d 372, 591 N.W.2d 176 (Ct. App. 1999) (state's prosecution of enrolled juvenile member if Indian tribe for new delinquent act committed off reservation did not undermine or interfere with tribal court's previous order adjudicating juvenile delinquent and thus did not violate full faith & credit or comity or tribal court order)
Wyoming		WY. STAT. § 5-1-111 Full faith and credit for tribal acts and records [accorded to Eastern Shoshone and Northern Arapaho Tribes of the Wind River Reservation] (1994) WY. STAT. § 20-6-202 Definitions [Domestic relations; child support enforcement; tribal court child support order] (rev. 1997)	

Last Revised: 9/2000

APPENDIX D: TRIBAL COURTS IN MINNESOTA

1854 TREATY COURT

4428 Haines Road
Duluth, Minnesota, 55811
Telephone: (218) 722-8907
Facsimile: (218) 722-7003

The 1854 Treaty Court was established in 1989 pursuant to a stipulated settlement of a federal district court action involving the State of Minnesota and the Bois Forte and the Grand Portage Bands of Chippewa Indians regarding disputed hunting, fishing and gathering rights within that area of northeastern Minnesota conveyed to the United States by the Chippewa in the Treaty of 1854 negotiated at La Pointe, Wisconsin. The settlement agreement was ratified by a majority vote of Band members and also approved by the Minnesota legislature.

The court has exclusive civil jurisdiction to hear matters arising under the 1854 Ceded Territory Conservation Code enacted by the tribal governing bodies of the Bois Forte and Grand Portage Bands meeting jointly as the "1854 Authority". The Code is only applicable to members of those two Bands. Citations alleging conservation violations by Band members within the Ceded Territory may be issued by either 1854 Authority conservation officers or state DNR officers.

Only a handful of alleged violations are heard by the court each year. Hearings are conducted at the Bois Forte Reservation, the Grand Portage Reservation or the Duluth offices of the 1854 Treaty Court. The Court is empowered to impose civil remedial forfeitures, natural resource assessments, order restitution, levy court costs and revoke, suspend or limit the hunting, fishing and gathering privileges of Band members found to have violated code provisions.

JUDGE

Judge Thomas Sjogren received a juris doctor degree from William Mitchell College of Law in 1963, and is admitted to the Bars of the State of Minnesota and the United States District Court for the District of Minnesota. From 1971 through 1978, Judge Sjogren was the assistant county attorney for St. Louis County, Minnesota, and was chief counsel to the county Welfare Board. Judge Sjogren worked for the Indian Legal Assistance Program in Duluth as a staff attorney in addition to his own private practice. In 1989, he was appointed Judge of the 1854 Treaty Court by the governing bodies of the Bois Forte and Grand Portage Bands of Chippewa Indians.

Last Revised: 9/2000

BOIS FORTE TRIBAL COURT

Court Administrator, Lucille Morrison
12907 Palmquist Road, P.O. Box 16
Nett Lake, Minnesota, 55772
Telephone: (218) 757-3462
Facsimile: (218) 757-3166

The Bois Forte Tribal Court was formed in 1947. As a consequence of the retrocession of criminal jurisdiction in 1975 and the assumption of full civil jurisdiction, the Court exercises both misdemeanor criminal jurisdiction and general civil jurisdiction. Matters before the Court are heard in Nett Lake, Minnesota.

JUDGE

Chief Judge Margaret Treuer received a juris doctor degree from Catholic University in 1977, and is admitted to practice before the Bar of the State of Minnesota. From 1983 through 1989, Judge Treuer served as a United States Magistrate (part-time) for the United States District Court for the District of Minnesota. She was the Chief Judge of the Red Lake Nation Tribal Court from 1989 to 1990, and has been the Chief Judge of the Leech Lake Band of Ojibwe Tribal Court from 1998 to the present, and has served as the Chief Judge of the Bois Forte Tribal Court from 1990 to the present. She has served as an adjunct professor at the Hamline University School of Law, and is a member of the White Earth Band of Ojibwe.

FOND DU LAC BAND OF CHIPPEWA TRIBAL COURT

Court Administrator, Dorothy Leifeste
105 University Road
Cloquet, Minnesota, 55270
Telephone: (218) 878-8002
Facsimile: (218) 878-4854

The Fond du Lac Band of Chippewa Tribal Court exercises general civil jurisdiction and serves as the conservation court for the Band as well. Its beginning is of historical origin, spanning a period as far back as the Indian Reorganization Act.

Matters before the Fond du Lac Tribal Court are heard in Cloquet, Minnesota. Appeals from the trial court are taken to the Fond du Lac Court of Appeals, which is comprised of a three-judge panel. The Court of Appeals positions have not yet been filled.

JUDGE

Chief Judge Kurt V. BlueDog has been practicing law for nearly 25 years, specializing in the area of Indian law. After he graduated from the University of South Dakota he served as a Commissioned Officer in the Army paratroopers. Judge BlueDog graduated from the University

of Minnesota School of Law in 1977 and was named one of its distinguished alumni in the fall of 2001. He is a member of the State Bars of Minnesota and Wisconsin, several Tribal Courts, the United States Supreme Court and numerous Federal District and Appellate Courts. He has served as a Tribal Court Judge since 1994. Additionally, he has served as an adjunct professor at William Mitchell College of Law and the Hamline University School of Law in St. Paul, Minnesota. Judge BlueDog was born and raised on the Sisseton-Wahpeton Sioux Indian Reservation in South Dakota.

GRAND PORTAGE TRIBAL COURT

Contact: Dana Logan
P.O. Box 428
Grand Portage, Minnesota, 55605
Telephone: (218) 475-2239

5. The Grand Portage Tribal Court exercises general civil jurisdiction. The Grand Portage Code permits the appointment of deputy judges to serve in the event of a judge's disqualification or recusal. Matters before the Grand Portage Tribal Court are heard in Grand Portage, Minnesota. Appeals from the trial court are taken to the Grand Portage Court of Appeals, which is comprised of the three judges who did not hear the matter at the trial level. The Band also has established a panel of elders that can sit in on any phase of a case at the request of one of the litigants. Cultural causes of action are heard only by a panel of elders.

JUDGES

Chief Judge Anita Fineday received a juris doctor degree from the University of Colorado in 1988, and a master of public affairs degree from Harvard University in 1997, when she was a Bush Foundation Leadership Fellow. She is admitted to the Bars of the State of Minnesota and the United States District Court for the District of Minnesota. Chief Judge Fineday is a member of the White Earth Band of Ojibwe.

Judge Frank Pommersheim received a bachelor of arts degree from Colgate University in 1965, a juris doctor degree from Columbia University in 1968, and a master of public affairs degree from Harvard University in 1998. He is admitted to the Bar of the State of South Dakota and the State of Oregon, and to the Bar of the United States District Court for the District of South Dakota. Judge Pommersheim also serves as a Judge on the Rosebud Sioux Tribe Supreme Court, the Cheyenne River Sioux Tribe Court of Appeals, the Flandreau Santee Tribal Court of Appeals, the Saginaw Chippewa Tribal Court of Appeals, and the Mississippi Band of Choctaw Supreme Court. Judge Pommersheim is a Professor of Law at South Dakota University Law School, and published a nationally noted work of history and law, "Braid of Feathers", in 1994.

Judge Christopher Anderson received a bachelor of arts degree from Macalaster College in 1988, and a juris doctor degree from the University of Wisconsin Law School in 1991. He is admitted to the Bars of the States of Minnesota and Wisconsin, and is a member of the Bois Forte Band of Chippewa.

Judge Mary Al Balber received a juris doctor degree from Hamline University School of Law in 1990. Judge Balber is admitted to the Bar of the State of Minnesota, and to the Bars of the United States District Court for the District of Minnesota, the United States District Court for the Western District of Wisconsin, and the Prairie Island Mdewakanton Dakota Community Tribal Court. Judge Balber is a member of the Red Cliff Band of Chippewa Indians.

LEECH LAKE BAND OF OJIBWE TRIBAL COURT

Court Administrator, Carol White
6530 Highway 2 NW
Cass Lake, Minnesota, 56633
Telephone: (218) 335-3682
Facsimile: (218) 335-3685

6. The Leech Lake Band of Ojibwe Tribal Court recently expanded its jurisdiction from conservation matters to general civil jurisdiction, including certain traffic matters arising on the Leech Lake Reservation and child welfare matters. The Leech Lake Code permits the appointment of up to three judges. Matters before the Leech Lake Band of Ojibwe Tribal Court are heard at Cass Lake, Minnesota. Appeals from the trial court are taken to the Leech Lake Band of Ojibwe Court of Appeals, which is comprised of a three-judge panel of district judges not sitting at the trial court level and, in the event of disqualification or recusal, the panel may be completed by the appointment of deputy justices.

JUDGES

Chief Judge Margaret Treuer received a juris doctor degree from Catholic University in 1977, and is admitted to practice before the Bar of the State of Minnesota. From 1983 through 1989, Judge Treuer served as a United States Magistrate (part-time) for the United States District Court for the District of Minnesota. She was the Chief Judge of the Red Lake Nation Tribal Court from 1989 to 1990, and has been the Chief Judge of the Bois Forte Tribal Court from 1990 to the present, and has served as the Chief Judge of the Leech Lake Band of Ojibwe Tribal Court from 1998 to the present. She has served as an adjunct professor at Hamline University School of Law, and is a member of the White Earth Band of Ojibwe.

Judge Anita Fineday received a juris doctor degree from the University of Colorado in 1988, and a master of public affairs degree from Harvard University in 1997, when she was a Bush Foundation Leadership Fellow. She is admitted to the Bars of the State of Minnesota and the United States District Court for the District of Minnesota. Judge Fineday is a member of the White Earth Band of Ojibwe.

LOWER SIOUX COMMUNITY IN MINNESOTA TRIBAL COURT

Court Administrator, Carrie Blesener
5001 West 80th Street, Suite 500
Bloomington, Minnesota, 55437
Telephone: (952) 838-2294
Facsimile: (952) 893-0650

The Lower Sioux Community in Minnesota Tribal Court was created in 1993. It has civil jurisdiction over contract, tort, and worker's compensation issues. The Lower Sioux Community Code also provides that final judgments for money damages from state and federal courts will be granted full faith and credit. Matters before the Lower Sioux Community in Minnesota Tribal Court are heard at the Lower Sioux Community Hall near Morton, Minnesota. Appeals from the trial court are taken to the Lower Sioux Community in Minnesota Court of Appeals, which is comprised of a three-judge panel of trial court judges who where not assigned to the trial court case.

JUDGES

Chief Judge Kurt V. BlueDog has been practicing law for nearly 25 years, specializing in the area of Indian law. After he graduated from the University of South Dakota he served as a Commissioned Officer in the Army paratroopers. Judge BlueDog graduated from the University of Minnesota School of Law in 1977 and was named one of its distinguished alumni in the fall of 2001. He is a member of the State Bars of Minnesota and Wisconsin, several Tribal Courts, the United States Supreme Court and numerous Federal District and Appellate Courts. He has served as a Tribal Court Judge since 1994. Additionally, he has served as an adjunct professor at William Mitchell College of Law and the Hamline University School of Law in St. Paul, Minnesota. Judge BlueDog was born and raised on the Sisseton-Wahpeton Sioux Indian Reservation in South Dakota.

Judge Steven F. Olson graduated *cum laude* from the William Mitchell College of Law in 1992, and was admitted to practice in the State of Minnesota in October 1992. Judge Olson has been admitted to practice before three tribal jurisdictions and the United States District Court for Minnesota, United States District Court for Wisconsin, the United States District Court for South Dakota, and the United States District Court for Iowa, as well as the United States Eighth Circuit Court of Appeals, and the United States Supreme Court. Judge Olson serves as an Associate Judge for the Lower Sioux Community in Minnesota Tribal Court and the Prairie Island Mdewakanton Dakota Tribal Court.

Judge Andrew M. Small received his juris doctor degree from the University of Montana in 1981. Judge Small has served since 1994 as an Associate Judge for the Prairie Island Mdewakanton Dakota Community and for the Lower Sioux Community in Minnesota. He previously served as special Judge for the Crow Tribe and Northern Cheyenne Court of Appeals. He is admitted to practice in the United States Supreme Court and has been admitted to practice in ten Tribal jurisdictions throughout Indian country.

COURT OF THE LOWER SIOUX INDIAN COMMUNITY

JUDGES, Cont.

Judge Susan L. Allen graduated from the University of New Mexico School of Law in 1995, where she received an Indian Law Certificate, the West Award for Excellence in Indian Law, Honors in Clinical Law, and served as president of the Native American Law Students Association. In December 1999, she received her L.L.M. in Taxation from William Mitchell College of Law. Judge Allen is a member of the Minnesota State Bar Association, a Board Member of the Minnesota American Indian Bar Association, and is currently the Chairwoman of the Board of Directors of the Indian Child Welfare Law Center. Judge Allen serves as an Associate Judge for the Prairie Island Mdewakanton Dakota Community and for the Lower Sioux Community in Minnesota. She is an enrolled member of the Rosebud Sioux Tribe in South Dakota.

MILLE LACS BAND OF OJIBWE COURT OF CENTRAL JURISDICTION

Court Administrator, Matt Chapel
HCR 67, Box 194
Onamia, Minnesota, 56359
Telephone: (320) 532-7400
Facsimile: (320) 532-3153

7. The Mille Lacs Band of Ojibwe Court of Central Jurisdiction began functioning in 1983, and now has criminal jurisdiction over Indians, and broad civil jurisdiction. The Mille Lacs Band of Ojibwe Court of Central Jurisdiction has a criminal caseload of approximately 700 cases annually, and a relatively light civil caseload. The Code adopted by the Mille Lacs Band provides for full faith and credit to state court judgments if there is reciprocity for Band Court judgments from the state courts. The Mille Lacs Band of Ojibwe Court of Central Jurisdiction rides a circuit. Appeals from that Court are taken to the Mille Lacs Band of Ojibwe Court of Appeals and are heard by a three-judge panel.

JUDGES

COURT OF CENTRAL JURISDICTION

Judge Paul Day received a bachelor of arts degree from St. Cloud State University in 1970, and a juris doctor degree from the University of Minnesota Law School in 1978. He is a member of the Bar of the State of Minnesota, and the Bars of the Supreme Court of the United States, the United States Court of Appeals for the Eighth Circuit, and the United States District Court for the District of Minnesota. He has served as District Court Judge for the Mille Lacs Band of Ojibwe Central Court of Jurisdiction since April, 2001. Judge Day is a member of the Leech Lake Band of Ojibwe.

COURT OF APPEALS.

The Court of Appeals is made up of a three-member panel including **Chief Judge Dorothy Sam, Appellate Court Judge Rosalie Noonday, and Appellate Court Judge Alvina Aubele**.

PRAIRIE ISLAND MDEWAKANTON DAKOTA TRIBAL COURT

Court Administrator, Carrie Blesener
5001 West 80th Street
Bloomington, Minnesota, 55437
Telephone: (952) 838-2294
Facsimile: (952) 893-0650

8. The Prairie Island Mdewakanton Dakota Tribal Court was created in 1994, and has broad civil jurisdiction. It has a heavy children's court docket, and a relatively light civil litigation docket. Matters before the Prairie Island Mdewakanton Dakota Tribal Court are heard at the Community Courtroom in Welch, Minnesota. Appeals from the trial court are taken to the Prairie Island Mdewakanton Dakota Tribal Court of Appeals and are heard by a three-judge panel of trial court judges who were not assigned to the trial court case. The Prairie Island Court Code has a full faith and credit provision. The Prairie Island Mdewakanton Dakota Tribal Court has received cases which have been transferred from the district court systems and in certain cases has enforced wage garnishments which have come from district court.

JUDGES

Chief Judge Kurt V. BlueDog has been practicing law for nearly 25 years, specializing in the area of Indian law. After he graduated from the University of South Dakota he served as a Commissioned Officer in the Army paratroopers. Judge BlueDog graduated from the University of Minnesota School of Law in 1977 and was named one of its distinguished alumni in the fall of 2001. He is a member of the State Bars of Minnesota and Wisconsin, several Tribal Courts, the United States Supreme Court and numerous Federal District and Appellate Courts. He has served as a Tribal Court Judge since 1994. Additionally, he has served as an adjunct professor at William Mitchell College of Law and the Hamline University School of Law in St. Paul, Minnesota. Judge BlueDog was born and raised on the Sisseton-Wahpeton Sioux Indian Reservation in South Dakota.

Judge Steven F. Olson graduated *cum laude* from the William Mitchell College of Law in 1992, and was admitted to practice in the State of Minnesota in October 1992. Judge Olson has been admitted to practice before three tribal jurisdictions and the United States District Court for Minnesota, United States District Court for Wisconsin, the United States District Court for South Dakota, and the United States District Court for Iowa, as well as the United States Eighth Circuit Court of Appeals, and the United States Supreme Court. Judge Olson serves as an Associate Judge for the Lower Sioux Community in Minnesota Tribal Court and the Prairie Island Mdewakanton Dakota Tribal Court.

Judge Andrew M. Small received his juris doctor degree from the University of Montana in 1981. Judge Small has served since 1994 as an Associate Judge for the Prairie Island Mdewakanton Dakota Community and for the Lower Sioux Community in Minnesota. He previously served as special Judge for the Crow Tribe and Northern Cheyenne Court of Appeals. He is admitted to practice in the United States Supreme Court and has been admitted to practice in ten Tribal jurisdictions throughout Indian country.

Judge Susan L. Allen graduated from the University of New Mexico School of Law in 1995, where she received an Indian Law Certificate, the West Award for Excellence in Indian Law, Honors in Clinical Law, and served as president of the Native American Law Students Association. In December 1999, she received her L.L.M. in Taxation from William Mitchell College of Law. Judge Allen is a member of the Minnesota State Bar Association, a Board Member of the Minnesota American Indian Bar Association, and is currently the Chairwoman of the Board of Directors of the Indian Child Welfare Law Center. Judge Allen serves as an Associate Judge for the Prairie Island Mdewakanton Dakota Community and for the Lower Sioux Community in Minnesota. She is an enrolled member of the Rosebud Sioux Tribe in South Dakota.

RED LAKE NATION TRIBAL COURT

Court Administrator, Pam Needham
P.O. Box 572
Red Lake, Minnesota, 56671
Telephone: (218) 679-3303
Facsimile: (218) 679-2683

9. The Red Lake Nation Tribal Court was established in 1884. It exercises jurisdiction over all civil matters, and misdemeanor criminal matters that involve Indian people. It also exercises jurisdiction over Indian child welfare matters.

Matters before the Red Lake Nation Tribal Court are heard in Red Lake, Minnesota. Wanda Lyons was appointed Chief Judge by the Tribal Council in 1984. Like Chief Judge Lyons, Judge Charnoski was also appointed by the Tribal Council to sit as a judge for the Red Lake Nation Tribal Court in 1996. Phillip Smith is the newest judge at Red Lake, hired in 2000.

Appeals from the trial court are taken to the Red Lake Nation Court of Appeals, which is comprised of four judges who alternate to form a three-judge appellate panel. The following judges hear cases for the Court of Appeals: Loretta Hurd, Verna Graves, Aloysius Thunder, and Catherine VanWert.

TRIBAL COURT OF THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

Court Administrator, Jeanne Krieger
1855 University Avenue West, Suite 246
Saint Paul, Minnesota, 55104
Telephone: (651) 644-4710
Facsimile: (651) 644-5904

10. The Tribal Court of the Shakopee Mdewakanton Sioux (Dakota) Community was established in 1988. It now has broad civil jurisdiction, including jurisdiction to review administrative decisions as provided by Community ordinance. Matters before the Shakopee Court are heard at the Community Courtroom near Prior Lake, Minnesota. Appeals from the trial court are heard by the Court of Appeals of the Shakopee Mdewakanton Sioux (Dakota) Community, which is comprised of a two-judge panel of trial court judges who were not assigned to the trial court proceeding.

JUDGES

Judge Henry M. Buffalo, Jr. received a Bachelor of Science Degree from the University of Wisconsin-Milwaukee, in 1978, and a Juris Doctor Degree from the University of Wisconsin Law School in 1981. He has practiced law since 1981, and is admitted to the Bars of the State of Minnesota, the State of Wisconsin, the Bars of the United States Supreme Court, the United States Courts of Appeals for the District of Columbia Circuit, the Eighth Circuit, the Seventh Circuit, and the Sixth Circuit, and the Bars of the United States District Courts for the District of Minnesota, the Western and Eastern District of Wisconsin, the Eastern District of Michigan, and the District of North Dakota. In addition, Judge Buffalo is admitted to practice before the tribal courts of the Ho-Chunk Nation of Wisconsin, the Lower Sioux Indian Community in Minnesota, the Saginaw Chippewa Indian Tribe of Michigan, the Red Cliff Tribe of Chippewa, and the Three Affiliated Tribes of the Fort Berthold Reservation. He has served as a Judge for the Tribal Court of Shakopee Mdewakanton Sioux (Dakota) Community since the Court was created in 1988. Judge Buffalo is a member of the Red Cliff Band of Chippewa Indians.

Judge Robert GreyEagle received a bachelor of arts degree from Idaho State University in 1976, and a juris doctor degree from the University of New Mexico Law School in 1982. Judge GreyEagle is admitted to the Bar of the State of South Dakota, and has served as a tribal court judge for the Standing Rock Sioux Tribe, the Sisseton-Wahpeton Sioux Tribe, the Oglala Sioux Tribe, the Rosebud Sioux Tribe, the Cheyenne River Sioux Tribe, the Fort Thompson Sioux Tribe, the Upper Sioux Community in Minnesota and the Lower Sioux Community in Minnesota. He has served as a Judge for the Tribal Court of the Shakopee Mdewakanton Sioux (Dakota) Community since 1994. Judge GreyEagle is a member of the Oglala Sioux Tribe of the Pine Ridge Reservation of South Dakota.

COURT OF THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

JUDGES, Cont.

Judge John E. Jacobson received a bachelor of arts degree from Carleton College in 1968 and a juris doctor degree from the University of Chicago Law School in 1973. He has practiced law since that time, and is admitted to the Bar of the State of Minnesota, the Supreme Court of the United States, the United States Court of Appeals for the Eighth Circuit, and the United States District Courts for the District of Minnesota, the Western District of Wisconsin, and the Western District of Michigan. In addition Judge Jacobson is admitted to practice before the tribal courts of the Lower Sioux Indian Community in Minnesota, the Lac Courte Oreilles Band of Ojibwe, the Bad River Band of Chippewa, the Saginaw Chippewa Tribe of Michigan, and the Tulalip Tribe of Washington. Judge Jacobson has been an adjunct professor at the William Mitchell College of Law, and has served as a Judge for the Tribal Court of the Shakopee Mdewakanton Sioux (Dakota) Community since the Court was created in 1988.

UPPER SIOUX COMMUNITY TRIBAL COURT

Court Administrator, Laura Van Acker
P.O. Box 147
Granite Falls, Minnesota, 56241
Telephone: (320) 564-4955
Facsimile: (320) 564-4915

11. The Upper Sioux Community Tribal Court was created in 1994. It exercises general civil jurisdiction. The Upper Sioux Court Code contemplates granting full faith and credit to state court orders, if there is reciprocity from those Courts. Matters before the Upper Sioux Court are heard at Granite Falls, Minnesota. Appeals from the trial court are taken to the Upper Sioux Court of Appeals, which is composed one judge, unless a three judge panel is requested within thirty days of the final order of the trial court.

JUDGE

Chief Judge Lenor Sheffler received a bachelor of arts degree from St. Olaf College in 1979, and a juris doctor degree from William Mitchell College of Law in 1988. Judge Sheffler is a member of the Bar of the State of Minnesota, the Bar of the United States District Court for the District of Minnesota, and the Bars of the Prairie Island Mdewakanton Dakota Community Tribal Court, the Lower Sioux Community in Minnesota Tribal Court, and the Tribal Court of the Shakopee Mdewakanton Sioux (Dakota) Community. Judge Sheffler has served as the Judge of the Upper Sioux Community Tribal Court since 2001. She has served as an adjunct professor at William Mitchell College of Law, and is a member of the Lower Sioux Indian Community in Minnesota.

White Earth Band of Chippewa Tribal Court

Court Administrator, Kathy Goodwin
P.O. Box 418
White Earth, Minnesota, 56591
Telephone: (218) 983-3285
Facsimile: (218) 983-4013

The White Earth Band of Chippewa Tribal Court was established in 1978. The Court exercises general civil jurisdiction including jurisdiction over the Band's motor vehicle code. It is anticipated that the Court will shortly possess jurisdiction to hear child welfare and housing issues. The White Earth Band also intends to seek retrocession of criminal jurisdiction over misdemeanor offenses. The White Earth Band Code provides for the appointment of two additional associate judges. Appeals from the trial court are taken to the White Earth Band of Chippewa Court of Appeals and are heard by a two-judge panel of trial judges who were not assigned to the trial court case.

JUDGES

Chief Judge Anita Fineday received a juris doctor degree from the University of Colorado in 1988, and a master of public affairs degree from Harvard University in 1997, when she was a Bush Foundation Leadership Fellow. She is admitted to the Bars of the State of Minnesota and the United States District Court for the District of Minnesota. Chief Judge Fineday is a member of the White Earth Band of Ojibwe.

State of Minnesota in Supreme Court
CX-89-1863
October 29, 2002 Hearing to Consider Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments

Frederick Grittner, Clerk of the Appelate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Request to be Heard

I request that I be given full opportunity for my testimony to be heard by the Rules Committee in the matter of the Minnesota Tribal State Court Forum's "Petition for Adoption of Rule of Procedure for the Recognition of Tribal Court Orders and Judgments."

Thank you.

Dated: october 15, 2002

Maxine V. Eidsvig

State of Minnesota in Supreme Court
CX-89-1863
October 29, 2002 Hearing to Consider Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments

Affidavit of Maxine V. Eidsvig

I am a 75 year old woman who was raised on the Lower Sioux Reservation in Morton, Minnesota. I am listed on the Indian Census rolls of April 1, 1934 as an enrolled Mdewakaton Sioux on the Lower Sioux Reservation.

On September 26, 2002, the Lower Sioux Community in Minnesota Tribal Court moved to dismiss my lawsuit in that court. The Court noted in their judgment that they, the Court, did not hold any hearings or oral argument, as the Community urged that no hearing or argument was necessary and that I had not requested any hearing or oral argument. To that I respond, due process was never an option for me from the very beginning.

To provide background to my lawsuit I must start with my early years. I attended the reservation day school from the 1st through the 4th grades. My years in the 5th and the 6th grades were spent at an Indian boarding school at Pipestone, Minnesota, and I returned to the reservation day school for the 7th and 8th grades. In 1941, I went to another Indian boarding school, this time the high school at Flandreau, South Dakota, for the 9th and 10th grades. After two years at Flandreau, I realized I was not getting the education I expected. I decided to transfer to the public school in the town of Morton, a mile or so from the Indian community. This was not a decision I made without some trepidation. Most of the kids, once they had completed the 8th grade, either decided to go Flandreau or the Haskell Institute in Lawrence, Kansas, because they did not want to deal with the discrimination at the public school. If someone did not want to leave home, then they just dropped out of school. As it happened I was the only Indian student in my class for both the 11th and 12th grades and for the most part was not accepted by the white students. I graduated in May, 1945, third in my class. I graduated from high school without having taken any classes in algebra. Flandreau did not offer algebra in the 9th and 10th grades. When I transferred to the public school in Morton, my classmates had already taken the class. Missing algebra was to come back to haunt me later.

World War II was just ending and the country was entering the hard times of post war. College was not something that was in the future for me. Not too many young women, white or Indian, went to college in those days. I married and raised a family and I also worked. The first full time job I got in Minneapolis was as a power machine operator in a garment factory. There were still quite a few garment factories in the late 1940's and early 1950's. There was one other Indian woman and one woman of Chinese descent employed in this factory. There were no other women of color.

After the garment factories moved south, I took a short business course at Minneapolis Business College and began a career as a white-collar worker. I eventually got a job at the Minneapolis Postal Data Center, where I worked myself up the ladder from a key-punch operator to a payroll supervisor, the position I retired from on December 1, 1989 at the age of 62.

In 1990, I decided to move back to the Lower Sioux Community to take advantage of the per capita payments that were being made to enrolled members. Those of us who moved back at this time, were dismayed to learn that we were not welcomed back. We were told since we had left the reservation and had been gone for over two years, we could not share in the profits of the casino. It did not seem to matter that most of the people who were already receiving per capita had left the reservation at one time or another.

A lawsuit was filed in District Court because there was not a tribal court in place at that time. In 1993, after the community had established a distribution plan and created a tribal court we were required to provide proof to the community that we had resided within the prescribed 10-mile area for two years. We were then allowed to become "qualified members," the term used to identify members who were receiving per capita payments.

After spending the summers of 1993 and 1994 working as an interpreter at the Lower Sioux History Center, I decided I wanted to write. I had read many published works which I felt did not accurately depict Indian people. I wanted to write about the people I remembered growing up on this small reservation, many of whom were no longer living. These were ordinary people who possessed extraordinary resilience. Life was never easy for them but they took care of one another.

Taking advantage of the community's education program, I applied for admission to

the University of Minnesota and was accepted. At the age of 68, fifty years after graduating from high school, I entered the University in pursuit of a degree. Needless to say, I was always the oldest student in my class. I never had a professor or instructor who was as old or older than me. I had no idea if I could do it or not but I had to try.

On of the stipulations in the Community Gaming Ordinance is that one could be gone from the 10-mile residency area for more than two years and still retain their per capita payments, if they were attending an accredited educational institution as a full time student or if they were in the military.

The community did fund my education for four years. Since I had not taken the required algebra in high school I had to take the basic math courses to bring me up to the requirements of the University. These were non-credit courses and did not count towards the degree. After four years I was told by the community that I had to return to the community or lose my privileges (per capita). I had not earned the required credits for graduation so I asked that I be allowed to complete my degree. Since I was not violating the gaming ordinance I was allowed to complete my degree, but I had to pay for the remainder of my education.

I received my Bachelors of Arts degree on May 12, 2001 at the age of 73. Another of the stipulations of the Ordinance is that when one is discharged from the military or graduates from college they must return within 60 days. I was well aware of this stipulation and realized that I would be watched very closely to see that I complied with this rule.

I began looking for an apartment in Redwood Falls where i had lived before starting at the University. When it appeared that finding a suitable place to live was going to be difficult, a friend offered me the use of one of her bedrooms until I could find a place. I accepted her offer gratefully, but told her that I would have to pay her rent. She provided me with rent receipts. On August 3, 2001, the community filed a preliminary resolution which stated that I had not returned within 60 days and I had 30 days to respond. I provided copies of the rent receipts for July and August from my friend, in addition to rent receipts for September and October for the the apartment I took in Redwood Falls. The apartment was not something I would have chosen given more time, but felt it was in my best interest to try and please the community council.

All my efforts were to no avail. On October 29, 2001, a final resolution was filed taking away my per capita. Not only did they take away my per capita but the council also took away my right to vote in community elections.

I considered the action the community took against me as arbitrary and capricious. I believe the action was taken because of my outspoken criticism of their policies. I argued against the change of the residency requirements from two years to five years, which was based solely on the greed of the council and some of the members. I argued that what they were doing to the youth of the community was criminal. When I decided to pursue a degree it was not with the idea of becoming a role model. However, role models are what the community sorely needs. Giving 18 year old members thousands of dollars each month will not instill in the young people the value of an education. Crime and drugs have become a huge problem in the little community and no actions have been taken to curb the problem . One council member wrote, "the young people now had the money to purchase luxuries and not be envious of others." Clearly, the council was only concerned about material wealth.

Once I began looking for an attorney to represent me in tribal court, I realized I had an uphill battle on my hands. However, I did not realize the magnitude of that battle.

One of my complaints was that the community had violated the Membership Privilege and Gaming Ordinance Revenue Allocation Ordinance by appropriating more than the 70% of gaming revenues for individual per capita payments to members. The tribal court responded in their decision that even if the community had violated the provisions of the Ordinance, I, the plaintiff, had not suffered any personal or individual injury. The Ordinance dated March 2001 clearly states "that not more than 70% of the community's net gaming business revenues may be paid to qualified members," yet one of their own financial reports lists per capita payments at 75%. Neither the community lawyers nor the Tribal Court have addressed who authorized the increase from 70% to 75%. Only through discovery can it be proven that the community far exceeded the 70% or even the questionable 75%. Only through discovery can the illegal activities of the tribal government be exposed. As it stands today, the tribal courts will block any motions for discovery to go

forward.

The community has also violated the Ordinance by not making proper Federal Tax deductions from per capita payments. In April, 2002, $4,000 checks were issued to help pay taxes for tax year 2001, with a note attached stating that taxes were not taken out of the check but the amount would be on their 1099 and would be their responsibility. The Ordinance does state that appropriate Federal Taxes shall be withheld. It is apparent that council members are thinking only of themselves and not the people who are already in arrears to IRS.

In one of the community's reply in support of motion to dismiss, the attorney makes the statement that I, the plaintiff, "made it abundantly clear that she disagrees with various actions and policies of the community government." I consider that a compliment. Clearly, there is a need for people to speak out on various issues without the threat of retribution.

Corruption is corruption and greed is greed, no matter if it is the corporate corruption and greed of companies such as Enron, Worldcom, Tyco, or the greed and corruption of a tribal government. As individuals are being indicted for securities fraud in those large corporations, there has been criticism directed at the Securities & Exchange Commission, the U.S. government agency in charge of supervising the exchange of securities to protect investors against malpractice, for their lack of proper supervision. American Indians sympathize with the victims of corporate greed and corruption. We feel their pain, their frustration, and their anger. We have experienced pain, frustration and anger with another government agency, the Bureau of Indian Affairs, who are charged with administering Indian policy, and who have been just as negligent in their responsibilities. Self-government sounds good but has proven to be just an excuse to pass the buck.

Dealing with the BIA has always been difficult. There has always been favoritism, nepotism, and inefficiency with which tribal members have had to deal. Tribal courts have not only reinforced those standards but have introduced a few of their own, to the detriment of the rank and file tribal members. I vehemently oppose full faith and credit for tribal courts. They should not be given more power than they already have but should have their wings clipped. They are clearly out of control.

I submit this petition not only in my name, but also in the name of Leona Bluestone,

Paul Crooks and Marion Ross. Leona and Paul are enrolled members of Lower Sioux and Marion has been fighting to be enrolled.

Leona, age 83, was committed at the age of 15 years to a mental institution in Cambridge because she suffered from epilepsy. That is what they did to people with that disorder in the 1930's. When the mental hospitals were deinstitutionalized, patients were placed in other facilities that would provide a better environment. Leona has been a resident since June 1996 at the Franklin Nursing Home just a few miles from the Lower Sioux community but within the prescribed 10-mile radius. The council has not given a reason why Leona should not receive per capita payments. They will only say they are looking into it. They have been looking into her case since 1998.

Paul is a 65 year old man who has been declared mentally incompetent. He was receiving per capita payments. In October of 2001, Paul and I were removed as a "qualified members." To remove me for my out-spoken views is one thing but why would they remove a man who is not capable of defending himself. Paul had been in a group home outside the ten mile radius for over two years. Surely, there had to have been a better way to handle his situation. He is now a resident in the same nursing home as Leona in Franklin. While money is being squandered left and right, the care of two people who could be paying their own way is left up to the county and state. What is disturbing is that other community members have been or are residents of this same nursing home and continue to receive their payments. While lawsuits have not been filed on behalf of Leona and Paul, the tribal lawyers do have case files on both of them.

Marion Ross, age 82, was born and raised on the Lower Sioux reservation but for some reason ended up on the rolls in Flandreau, possibly because she was attending the Indian boarding in Flandeau when the census rolls were taken in 1934. Her efforts to straighten out her enrollment throughout the years have been unsuccessful. Her recent appeal to the Department of the Interior, Office of Hearings and Appeals was denied. Marion is the only granddaughter of Jeanette Crooks Campbell, who was one of the renowned lace makers at the Lower Sioux Agency at the turn of the 19th to the 20th centuries. Marion's brothers, children, and grandchildren are all enrolled at Lower Sioux, but the tribal council continues to deny her enrollment while allowing their own family members

in. She is a classic case of the many enrollment irregularities that have occurred because of inept and many times corrupt enrollment practices by the Indian communities, rubbered-stamped by the BIA and upheld by tribal courts.

Finally, I file this petition in the name of my great-grandfather, Andrew Goodthunder, who was taken to Crow Creek in the spring of 1863 after the Dakota War of 1862. When the people were allowed to leave Crow Creek, many families, including Andrew Goodthunder's, were relocated to the Santee Reservation in Niobrara, Nebraska. From Niobrara, he made his way to Flandreau, South Dakota, where he was able to buy some land for farming. It has been documented that in July, 1883, Goodthunder appeared near the site of the old Redwood agency, one of the first to return to the area. He had sold his land in Flandreau for $400 and a team of horses. He bought 80 acres of land for $694. The sale was recorded in the Redwood County Register of Deeds. According the Roy Meyer's *History of the Santee Sioux*, Goodthunder was making satisfactory progress in paying for his farm and raising enough food for his own needs in 1885, but the influx of newcomers was "eating him up," as Special Agent Benjamin W. Thompson wrote at end of the year. Such was the character of this man, he could not order the newcomers from his land but did what he could to help them. This is the true spirit of the early Dakota people. It is a spirit that does not exist today. largely because of corrupt tribal councils, backed by equally corrupt tribal courts.

Based on all the above, I respectfully request that the Court reject the Petition by the Tribal Courts for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments.

Respectfully Submitted,

Maxine V. Eidsvig

Maxine V. Eidsvig

Dated: October 15, 2002

State of Minnesota in Supreme Court
CX-89-1863
October 29, 2002 Hearing to Consider Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments

Frederick Grittner, Clerk of the Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

We, enrolled members of the Lower Sioux Indian Community, respectfully submit the attached petition with 41 signatures to oppose adoption of a rule procedure for the recognition of tribal court orders and judgments under the tribal court system now in place. We object because the same small group of lawyers who represent the tribes sit as judges in each other's courts. We find it incomphrensible that tribal courts need more power than they already have. Many feel it is futile to have a case heard in tribal court. The feeling is that there is not any hope for justice so why spend the money to hire a lawyer.

Dated: October 15, 2002

Respectfully submitted,

See attached.

PETITION

We the undersigned Lower Sioux Community members are opposed to existing practice of the attorneys representing our community also serve as Tribal Court Judges at other communities and visa-versa the Tribal Court judges serving our community also provide legal representation for those same communities. We believe this to be a Conflict of Interest.

1. Tom Leith
2. Juanita J. Horn
3. [illegible] Leith
4. Renee Renville
5. C. A. Leith
6. Otto Bucholz Jr 10/9/02
7. Lillian Wilson 10/9/02
8. [illegible] Leith 10-9-02
9. [illegible] 10-10-02
10. Amber Leith
11. [illegible] Columbus
12. [illegible]
13. Sheldon P. Wolfchild
14. Francine Unruh
15. [illegible]
16. [illegible] Columbus
17. Arlene (Peters) Sam
18. Kimberly Berry
19. Roland Columbus
20. Cheryl Leith
21. Dan Grey Eagle
22. [illegible]
23. Ruby Minkel (Leith) 10-9-02
24. ALBERT LUCIO
25. Michael J. Lucio
26. Rita Daniels 10/13/02
27. Candice Berry
28. Dawn Pendleton
29. Ron Pendleton
30. [illegible] Roberts
31. Timothy Roberts
32. [illegible] Pendleton
33. [illegible]
34. Lenore Grey Eagle
35. Leon Columbus
36. Michael Prescott
37. [illegible] Leith
38. Forrest Leith 10-14-02
39. Gay L. Prescott
40. Maxine [illegible]
41. Naomi K. Leith
42.
43.
44.

STATE OF MINNESOTA

IN SUPREME COURT

CX 89 1863

In Re:

Proposed Amendments to the General Rules of Practice.

Request for time for oral presentation
at hearing now set on for
3:00 p.m. Tuesday, October 29, 2002.

I request five minutes (or less) time for an oral presentation briefly relating background to the resolution of the Minnesota State Bar Association Committee on Court Rules and Administration with respect to the proposal of the Minnesota Tribal Court State Court Forum for a new rule of court.

An original and fourteen copies of materials outlining the committee's position are attached.

Dated : 10/14/02

Mark H. Gardner # 228801
MARK GARDNER FAMILY LAW
328 Bremer Bank Building
8800 West Highway 7
St. Louis Park MN 55426
952 935 2002
Fax 952 945 9567

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Mark H. Gardner
Attorney at Law
952 935 2002
FAX 952 945 9567

October 14, 2002

Minnesota Supreme Court

Recognition of tribal court orders and judgments.

Dear Minnesota Supreme Court :

Below is a report of a resolution of the Minnesota State Bar Association Committee on Court Rules and Administration with respect to the proposal of the Minnesota Tribal Court State Court Forum. Attached also is a request for five minutes to make an oral presentation.

Judge Bruce Douglas and I are currently co-chairs of the Minnesota State Bar Association Court Rules and Administration Committee. In that capacity, I now report to you that after a presentation on May 15, 2002, by representatives of the Minnesota Tribal Court State Court Forum in support of the petition for a rule on recognition of tribal court orders and judgments now before you, a majority of our committee resolved that the best recommended course would be,

> Rather than create a new, essentially free-standing rule, to integrate salient terms of the proposed rule into an existing rule, if appropriate, or else into existing statutes.
>
> For example, the existing Rule of Civil Procedure 9.05 concerns the form of formal pleading, Minnesota Statutes § 548.26 concerns procedures for securing recognition of foreign judgments now entitled to full faith and credit or comity under existing law including the US Const. Art. IV, Sec. 1, etc.

(Copies of that rule and Minnesota subsection are attached.)

The minority favored simply supporting more active continued discussion of the issue.

If I may interpret the debate as a whole, everyone recognized that the scope of tribal courts' activity has increased substantially in recent years, that tribal courts are competent and professional and merit comity by some appropriate means, and that a problem now exists in Minnesota a from uneven practices regarding recognition of tribal court orders and judgments. Again, the individuals present each favored steps toward

I welcome any inquiry.

Very truly yours,

Mark H. Gardner
Attorney at Law

Attachments

Letter of October 14, 2002, Attachments.

Minnesota Rules of Civil Procedure (2002).

9.04 Official Document or Act
In pleading an official document or official act, it is sufficient to aver that the document was issued or the act was done in compliance with law; and in pleading any ordinance of a city, village, or borough or any special or local statute or any right derived from either, it is sufficient to refer to the ordinance or statute by its title and the date of its approval.

9.05 Judgment
In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

9.06 Time and Place
For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

Minnesota Statutes (2002).

==548.26 548.26 Definition. "Foreign judgment" means any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this state. HIST: 1977 c 51 s 1

==548.27 548.27 Filing and status of foreign judgments. A certified copy of any foreign judgment may be filed in the office of the court administrator of any district court of this state. The court administrator shall treat the foreign judgment in the same manner as a judgment of any district court or the supreme court of this state, and upon the filing of a certified copy of a foreign judgment in the office of the court administrator of district court of a county, it may not be filed in another district court in the state. A judgment so filed has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of a district court or the supreme court of this state, and may be enforced or satisfied in like manner. HIST: 1977 c 51 s 2; 1Sp1986 c 3 art 1 s 82; 1987 c 273 s 1

==548.28 548.28 Notice of filing.

Subdivision 1. At the time of the filing of the foreign judgment, the judgment creditor or the creditor's lawyer shall make and file with the court administrator an affidavit setting forth the name and last known post office address of the judgment debtor, and the judgment creditor.

Subd. 2. Promptly upon the filing of the foreign judgment and the affidavit, the court administrator shall mail notice of the filing of the foreign judgment to the judgment debtor at the address given and shall make a note of the mailing in the docket. The notice shall include the name and post office address of the judgment creditor and the judgment creditor's lawyer, if any, in this state. In addition, the judgment creditor may mail a notice of the filing of the judgment to the judgment debtor and may file proof of mailing with the court administrator. Failure of the court administrator to mail notice of filing shall not affect the enforcement proceedings if proof of mailing by the judgment creditor has been filed.

Subd. 3. No execution or other process for enforcement of a foreign judgment filed hereunder shall issue until 20 days after the date the judgment is filed. HIST: 1977 c 51 s 3; 1986 c 444; 1Sp1986 c 3 art 1 s 82

==548.29 548.29 Stay.

Subdivision 1. If the judgment debtor shows the district court that an appeal from the foreign judgment is pending or will be taken, or that a stay of execution has been granted, the court shall, upon proof that the judgment debtor has furnished the security for the satisfaction of the judgment required by the state in which it was rendered, stay enforcement of the foreign judgment until the appeal is concluded, the time for appeal expires, or the stay of execution expires or is vacated.

Subd. 2. Stay of enforcement. If the judgment debtor at any time shows the district court any ground upon which enforcement of a judgment of any district court or the court of appeals or supreme court of this state would be stayed, the court shall stay enforcement of the foreign judgment for an appropriate period, upon requiring the same security for satisfaction of the judgment which is required in this state. HIST: 1977 c 51 s 4; 1983 c 247 s 189

==548.30 548.30 Fees. Any person filing a foreign judgment shall pay to the court administrator the same fee as provided for filing a civil action in district court, except that if the amount of the judgment is not greater than the jurisdictional limit of the conciliation court, the fee shall be in the amount of the filing fee for an action in conciliation court. Fees for docketing, transcription or other enforcement proceedings shall be as provided for judgments of any district court of this state. HIST: 1977 c 51 s 5; 1Sp1986 c 3 art 1 s 82; 1987 c 273 s 2; 1993 c 192 s 102

==548.31 548.31 Optional procedure. The right of a judgment creditor to bring an action to enforce a judgment instead of proceeding under sections 548.26 to 548.30 remains unimpaired. HIST: 1977 c 51 s 6; 1986 c 444

==548.32 548.32 Uniformity of application and construction. Sections 548.26 to 548.33 shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of sections 548.26 to 548.33 among those states which enact it. HIST: 1977 c 51 s 7

==548.33 548.33 Citation. Sections 548.26 to 548.33 may be cited as the Uniform Enforcement of Foreign Judgments Act. HIST: 1977 c 51 s 8

==548.35 548.35 Uniform Foreign Country Money-Judgments Recognition Act.

Subdivision 1. Definitions. As used in this section: (1) "foreign state" means any governmental unit other than the United States or any state, district, commonwealth, territory, or insular possession of the United States; (2) "foreign judgment" means any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for (a) taxes, or (b) a fine or other penalty, or (c) in matrimonial or family matters.

Subd. 2. Applicability. This section applies to any foreign judgment that is final and conclusive and enforceable where rendered even though an appeal is pending or it is subject to appeal.

Subd. 3. Recognition and enforcement. Except as provided in subdivision 4, a foreign judgment meeting the requirements of subdivision 2 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. The foreign judgment is enforceable in the same manner as the judgment of another state which is entitled to full faith and credit.

Subd. 4. Grounds for nonrecognition. (a) A foreign judgment is not conclusive if: (1) the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law; (2) the foreign court did not have personal jurisdiction over the defendant; or (3) the foreign court did not have jurisdiction over the subject matter. (b) A foreign judgment need not be recognized if: (1) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to prepare a defense; (2) the judgment was obtained by fraud; (3) the claim for relief on which the judgment is based is repugnant to the public policy of this state; (4) the judgment conflicts with another final and conclusive judgment; (5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled

otherwise than by proceedings in that court; or (6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

Subd. 5. Personal jurisdiction. (a) The foreign judgment shall not be refused recognition for lack of personal jurisdiction if: (1) the defendant was served personally in the foreign state; (2) the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over the defendant; (3) the defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved; (4) the defendant was domiciled in the foreign state when the proceedings were instituted, or, being a body corporate had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state; (5) the defendant had a business office in the foreign state and the proceedings in the foreign court involved a claim for relief arising out of business done by the defendant through that office in the foreign state; or (6) the defendant operated a motor vehicle or airplane in the foreign state and the proceedings involved a claim for relief arising out of the operation. (b) The courts of this state may recognize additional bases of jurisdiction.

Subd. 6. Stay in case of appeal. If the defendant satisfies the court either that an appeal is pending or that the defendant is entitled and intends to appeal from the foreign judgment, the court may stay the proceedings, with or without bond at the court's discretion, until the appeal has been determined or until the expiration of a period of time sufficient to enable the defendant to prosecute the appeal.

Subd. 7. Saving clause. This section does not prevent the recognition of a foreign judgment in situations not covered by this act.

Subd. 8. Short title. This section may be cited as the Uniform Foreign Country Money-Judgments Recognition Act. HIST: 1985 c 218 s 1

October 14, 2002

State of Minnesota in Supreme Court, CX-89-1863, October 29, 2002 Hearing to Consider Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Order and Judgement

TO: Frederick Grittner, Clerk of the Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155

I, Sheldon Peters Wolfchild, am the producer of a newly-completed documentary entitled The "New Buffalo" which I am submitting to be reviewed by the Supreme Court Justices.

The elders in this documentary, as well as I, ask that the Supreme Court deny the Petition for Full Faith and Credit until the Tribal Courts are reformed with independent federal Indian judges dedicated to impartial justice.

Also, I am requesting to be heard on this matter for five minutes on October 29, 2002.

Sincerely, Sheldon Peters Wolfchild

Sheldon Wolfchild
Producer and Spokesman for the "New Buffalo" Elders

IN THE SUPREME COURT, STATE OF MINNESOTA

In re: Hearing to Consider Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments

CX-89-1863

REQUEST TO MAKE AN ORAL PRESENTATION

I, the undersigned, respectfully request the opportunity to make an oral presentation at the Supreme Court's hearing to consider the petition for adoption of a rule of procedure for the recognition of tribal courts orders and judgments, scheduled on October 29, 2002.

The testimony that I wish to present is outlined generally in the "WRITTEN STATEMENT BY LAW PROFESSORS URGING ADOPTION OF A RULE OF PROCEDURE FOR THE RECOGNITION OF TRIBAL COURT ORDERS AND JUDGMENTS IN STATE COURTS" filed herewith.

Respectfully submitted this 15th day of October, 2002.

Kevin K. Washburn
Associate Professor
University of Minnesota Law School
229 19th Avenue South
N226 Walter Mondale Hall
Minneapolis, MN 55455
(612) 624-3869

WRITTEN STATEMENT BY LAW PROFESSORS URGING ADOPTION OF A RULE OF PROCEDURE FOR THE RECOGNITION OF TRIBAL COURT ORDERS AND JUDGMENTS IN STATE COURTS

We, the undersigned law professors, seek to comment on the petition by state and tribal judges in Minnesota for adoption of procedures for the recognition of tribal court orders and judgments in state courts. For the following reasons, we respectfully urge the Supreme Court to grant the petition and adopt the rule set forth therein as it has been proposed.

To understand the limited nature of the proposed rule, it is important to recognize that tribal court jurisdiction and procedure has been carefully circumscribed by federal statutory and common law. Tribal court jurisdiction over non-Indians, for example, is especially limited.[1] As a result, tribal court jurisdiction is much narrower than the jurisdiction of state general jurisdiction courts. Despite these limitations, many of the substantive procedural rules that Congress has required of tribal courts would be understood by anyone familiar with state or federal courts. Most importantly, Congress by statute requires tribal courts to provide due process of law and equal protection under law to any person under tribal court jurisdiction.[2] Judgments issued by tribal courts are valid, of course, only if consistent with applicable federal laws. In light of the limitations on tribal court jurisdiction, procedures for the recognition of tribal court judgments would primarily affect only a limited number of tribal members within the State of Minnesota.[3]

Though the rule would affect only a modest number and type of case, the need for such a rule is great. For a variety of reasons, including increasing economic activity on Indian reservations and corresponding increases in tribal capacities to provide governmental services to members, tribal courts have been sought out more and more in recent years. Although tribal court jurisdiction has not expanded, tribal court dockets have grown. Tribal courts are hearing more and more cases within the areas of tribal court competence. As Justice Sandra Day O'Connor has noted, "tribal courts, while relatively young, are developing in leaps and bounds."[4]

In addition to the internal pressures causing expansion of tribal court dockets, tribal courts have been the benefactors of a great deal of external support. Although federal law has sharply limited tribal jurisdiction, the United States has shown strong support and respect for tribal courts acting within the limits of their jurisdiction. While the Minnesota Supreme Court must make its own decision as to whether to adopt rules for the

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[1]Montana v. United States, 450 U.S. 544 (1981) (explaining the general rule that tribes lack civil authority over non-members); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (tribes lack criminal authority over non-members).

[2]Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8) (2002).

[3]Aside from tribal members, the rule would also provide an avenue for non-Indians and non-members who have engaged tribal court processes to obtain recognition of judgments. In addition, the rule would have the less direct, but equally important effect of allowing and requiring certain tribal courts, through reciprocity requirements in tribal laws, to grant recognition to state court orders and judgments.

[4]Hon. Sandra Day O'Connor, Lessons from the Third Sovereign: Indian Tribal Courts, 9 Tribal Ct. Rec. 12 (1996).

recognition of tribal court orders and judgment, the Court may look for guidance from the United States Supreme Court. After all, it is partially because of the actions of the United States Supreme Court that the Minnesota courts are faced with the question of how to treat tribal court judgments and orders.

Although tribal justice systems have existed in one form or another for centuries and indeed predate the formation of the United States of America,[5] tribal justice systems are in the midst of a dramatic renaissance.[6] In recent years, tribal justice systems have begun to model state and federal courts.[7] Indeed, many tribal codes require tribal judges to use state law for guidance or for the rule of decision when tribal law fails to address the conflict at issue.

The renaissance in tribal courts is attributable in no small measure to the work of the United States Supreme Court. In a 1985 decision, National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985), the Supreme Court repeated its oft-noted observation that "Congress is committed to a policy of supporting tribal self-government and self-determination." The Supreme Court ruled that, as a matter of federal common law, the policies in favor of tribal self-government should extend to tribal courts. Accordingly, the Supreme Court adopted a rule requiring exhaustion of tribal court review of federal questions involving the scope of tribal court jurisdiction. What is perhaps most noteworthy is the fact that this action was taken by the Supreme Court as a matter of federal common law without any express legislative direction by Congress.[8]

In the wake of National Farmers Union, federal circuit courts have embraced the rapidly developing tribal courts in several ways, including the application of this common law rule in civil cases,[9] treatment of tribal court convictions as a favorable basis for upward departure in federal sentencing in criminal cases,[10] and making extraordinary efforts to

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[5]See, e.g., Worcester v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (tribes possessed powers of self-government at the time of European contact that were not surrendered in treaties with the United States).

[6]The number of tribal courts has increased dramatically, from 117 in 1976, see Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 n. 21 (1978), to more than 275 this year. See National Tribal Justice Resource Center website: http://www.tribalresourcecenter.org/pages/justice.htm.

[7]See Nell Jessup Newton, Tribal Court Praxis, a Year in the Life of Twenty Indian Tribal Courts, 22 Am. Ind. L. Rev. 285, 287, 294, 311 (1998) (noting that some tribal courts "operate as nearly exact replicas of state courts" and that the Oneida tribal court in New York hired two recently retired members of New York's highest court to serve as tribal judges); see also Tom Tso, The Process of Decision Making in Tribal Courts, 31 Ariz. L. Rev. 225, 227 (1989) (containing a careful description of the Navajo Nation court system).

[8]The Court reaffirmed this principle two years later in Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 14-15 (1987).

[9]See, e.g., Kerr-McGee Corp. v. Farley, 115 F. 3d 1498 (10th Cir. 1997) (affirming stay of federal district court proceedings to allow tribal court to determine its own jurisdiction).

[10]See United States v. Waugh, 207 F.3d 1098, 1102 (8th Cir. 2000) (affirming upward departure in federal defendant's criminal history score under the federal sentencing guidelines on the basis of numerous tribal

integrate tribal courts into the larger national court community through efforts at joint cooperation. Indeed, the United States Courts of Appeal for the Eighth, Ninth and Tenth Circuits, and even many state courts, have made several efforts to reach out to tribal courts for joint consultation and training.[11]

Although the United States Supreme Court led the federal efforts at support for tribal courts, the United States Congress later followed the Supreme Court's leadership. In 1993, Congress enacted the Indian Tribal Justice Act, which established an Office of Tribal Justice Support within the Bureau of Indian Affairs and authorized an annual appropriation of up to $50 million for assistance to tribal courts.[12] Among other findings, Congress determined that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments[.]"[13] In 2000, Congress took further action, enacting the Indian Tribal Justice Technical and Legal Assistance Act,[14] which provided additional funding mechanisms for tribal courts. Congress explicitly expressed its intention to "strengthen and improve the capacity of tribal court systems that address civil and criminal causes of action under the jurisdiction of Indian tribes."[15]

Congress's actions, it should be noted, have primarily involved fiscal support and appropriation, rather than substantive legislation, and have thus left undisturbed the Supreme Court efforts at formulating rules as to the integration of tribal courts within federal law.

Like the Congress and the Supreme Court, the Executive Branch has made considerable investments in tribal courts. For example, in conjunction with the Federal Judicial Center, the Department of Justice developed a joint training program for tribal and federal judges on the adjudication of child sexual abuse cases in Indian country. In the 1990s, the Department of Justice designated approximately 45 tribal governments for "Tribal Court-DOJ Partnership Projects," under which local United States Attorneys' offices assisted in training tribal court personnel.[16]

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court convictions); United States v. Drapeau, 110 F.3d 618 (8th Cir. 1997) (same); United States v. Claymore, 978 F.2d 421 (8th Cir. 1992) (same).

[11]See Hon. J. Clifford Wallace, A New Era of Federal Tribal Court Cooperation, 79 Judicature 150 (1995)(then-Chief Judge of the U.S. Court of Appeals for the Ninth Circuit describing efforts of the Ninth and Tenth Circuits); Final Report, Task Force on Tribal Courts of the Judicial Council of the Ninth Circuit (August 20, 1997).

[12]See Pub. L. No. 103-176, 107 Stat. 2004 (1993), codified at 25 U.S.C. §§ 3601-14, 3621(b) (2002).

[13]25 U.S.C. § 3601(5) (2002).

[14]Pub. L. 106-559, 114 Stat. 2778 (2000), 25 U.S.C. § 3651 (2002).

[15]25 U.S.C. § 3652(2) (2002).

[16]Janet Reno, A Federal Commitment to Tribal Justice Systems, 79 Judicature 113, 114 (1995) (symposium on tribal courts).

With all this support, and in light of the steady increase in the number of cases on tribal court dockets, tribal courts have developed substantial judicial experience. Moreover, the professional qualifications of tribal judges and advocates appearing in such courts have improved dramatically.[17] With tribal courts beginning to meet high standards of competence, tribal court judges adopted the same type of behavior employed by state courts to insure judicial competence. For several years now, for example, tribal judges have trained side-by-side with state court judges at the National Judicial College in Reno, Nevada.

In light of the growth of tribal court activity, it is inevitable that state courts throughout Minnesota will increasingly be presented with questions of how to handle tribal court judgments and orders.[18] Adoption of a procedure for recognition of tribal court judgments would provide clear guidance to state trial courts on such matters.

Based on our knowledge and experience with the tribal justice systems around the United States and within Minnesota, we believe that the quality of justice coming from tribal courts is high and shows unwavering respect for the rule of law. We respectfully urge the Supreme Court to adopt the rule outlined in the petition.

Dated: October 15, 2002

Mary Jo Brooks Hunter
Associate Clinical Professor
Hamline University
School of Law

Eric Janus
Professor of Law
William Mitchell College of Law

Scott A. Taylor by Kevin Washburn with permission
Scott A. Taylor
Professor of Law
University of St. Thomas
School of Law

Kevin K. Washburn
Associate Professor of Law
University of Minnesota
Law School

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[17] See Testimony of Hon. William Canby, Chair of the Ninth Circuit Judicial Task Force on Tribal Courts, Tribal Justice Act: Hearing Before the Senate Comm. on Indian Affairs, 104th Cong., 1st Sess. 58 (1995) ("Tribal courts today are infinitely more competent and better staffed than they were thirty or even fifteen years ago.").

[18] The need for such a rule is becoming increasingly urgent in jurisdictions with active tribal courts. In May of 2000, for example, Arizona adopted a rule to address the handling of civil tribal court judgments in state courts. See Rules or Procedure for the Recognition of Tribal Court Civil Judgments Rules 1-7 (2002).

THE MINNESOTA

COUNTY ATTORNEYS

ASSOCIATION

October 15, 2002

Frederick Grittner
Clerk of the Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155

RE: Proposed Full Faith and Credit Rule

Dear Mr. Grittner:

The Minnesota County Attorneys Association desires to make an oral presentation at the hearing on October 29, 2002 to consider the petition for adoption of a rule of procedure for the recognition of tribal court orders and judgments. Earl Maus, Cass County Attorney, will address the Court on behalf of the Association. His comments will expand on the issues identified in the enclosed letter provided to the Advisory Committee on the General Rules of Practice.

If you have any questions, please feel free to contact me. Thank you.

Sincerely,

John P. Kingrey
Executive Director

100 Empire Drive, Suite 200 • St. Paul, MN 55103 • 651/641-1600 • Fax: 651/641-1666
www.mcaa-mn.org

THE MINNESOTA
COUNTY ATTORNEYS
ASSOCIATION

August 6, 2002

The Honorable Edward C. Stringer, Chair
General Rules of Practice Committee
Minnesota Supreme Court
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155-6102

RE: Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments

Dear Justice Stringer:

The Minnesota County Attorneys Association (MCAA) has reviewed the Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments. The MCAA Board of Directors met on June 28, 2002, at which time a number of concerns were addressed and the matter was referred to the Indian Law Committee. The Indian Law Committee met on July 11, 2002 with various proponents of the rule and further discussed the matter. The consensus of the Committee is that the proposed rule is overbroad as written and goes well beyond the enforcement of federally recognized laws by the state court system. MCAA recognizes the need for better education in the state and tribal court systems as to which tribal orders are to be enforced in the state court system as a result of state and federal laws. For example, tribal orders for protection and certain emergency orders should already be recognized in the state court system. It is MCAA's position that efforts should be made to educate the general public and, in particular, individuals affected within the court system.

The following is a list of concerns raised by individual members of the MCAA:

- State and local law enforcement agencies would be required to enforce tribal court orders well beyond the intent of the federally recognized instances. For example, bench warrants could be ordered by tribal court judges to enforce the Minnesota Supreme Court's recognized "civil regulatory" exceptions to criminal law enforcement in the State of Minnesota.
- Any expansion of subject matter requiring full faith and credit in the state court system should come through the legislative process with statewide input. The proposed rule expands the subject matter of required enforcement without proper public input and appropriate cost analysis.
- The proposed rule does not address immunity from lawsuits for any state or local official enforcing a tribal court order.
- Costs associated with the enforcement by state and local units of government have not been taken into consideration. By recognizing apprehension orders, the costs associated with the arrest, transportation, juvenile housing and jail housing of detained individuals are of great concern to local units of government. The court rule does not provide for any funding.

100 Empire Drive, Suite 200 • St. Paul, MN 55103 • 651/641-1600 • Fax: 651/641-1666
www.mcaa-mn.org

- Social service agencies could potentially be required to comply with tribal court orders beyond those currently recognized by federal law; again, without any additional funding being provided by the state legislature and/or tribal government.
- The costs associated with the enforcement of money judgments filed for full faith and credit under this rule is tremendous. An objecting party would have to overcome a presumption in the state court system that:

  1. The tribal court lacked personal or subject matter jurisdiction; or
  2. The order or judgment was obtained by fraud, duress, or coercion; or
  3. The order or judgment was not obtained through a process that afforded fair notice in a hearing; or
  4. The order or judgment is not final under the laws and procedures of the rendering court, unless the order is a non-criminal order for the protection or apprehension of an adult, juvenile or child, or another type of temporary, emergency order.

  The rule goes beyond full faith and credit given even to other states' orders enforced in Minnesota.

- Tribal court orders may be inconsistent with state law and state courts are without authority to exceed state law.
- Tribal courts are not bound to provide state and federal constitutional protections, including those of equal protection and due process, but orders rendered there would be enforceable in Minnesota state courts.
- The expanded list of tribal orders given full faith and credit in the state court system would greatly increase the workload of an already overburdened state court system. The proposed rule creates more grey areas than it fixes. The cost associated with future litigation has not been considered.

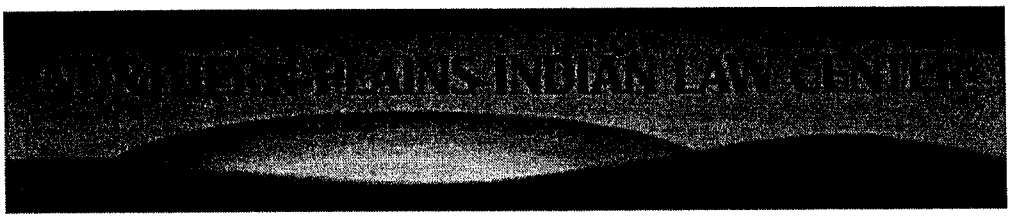
It is MCAA's position that any whole scale changes of subject matter required to be enforced in the state court system should be done through the legislative process. MCAA encourages and would assist in education regarding existing areas of federally recognized tribal court judgments within the court system and would not oppose a court rule dealing solely with those federally recognized statutes. MCAA would respectfully request that any rule be limited solely to existing statutes.

Respectfully submitted,

Doug Johnson
President MCAA

Earl E. Maus, Co-Chair
Indian Law Committee MCAA

Janelle Kendall, Co-Chair
Indian Law Committee MCAA



TO: MINNESOTA SUPREME COURT

RE: Comments regarding the Proposed Full Faith and Credit rule for Tribal Court Judgments in Minnesota

Dear Sirs/Madams:

My name is B.J. Jones and I direct the Northern Plains Tribal Judicial Institute, a training center for Tribal Courts in Minnesota, North Dakota and South Dakota and a component of the Northern Plains Indian Law Center at the University of North Dakota School of Law. Our Institute was started in 1993 with a grant from the Bush Foundation and has grown into a nationally recognized technical support center for tribal justice systems nationwide. Presently, we serve as the primary technical assistance provider for the Department of Justice, Bureau of Justice Assistance, and its tribal court assistance project. I also serve as a Tribal Judge for several different Indian tribes in South Dakota, North Dakota, and on occasion for the Mille Lacs Band of Ojibwe in Minnesota. I submit this letter in support of the proposed Supreme Court rule for the recognition of tribal court judgments by Minnesota state courts.

I have followed with interest the development of a proposed Supreme Court rule for the recognition of tribal court judgments in Minnesota. I have been involved with the North Dakota Supreme Court Committee on Tribal and State Court relations for about 7 years and have worked extensively with North Dakota Supreme Court Rule 7.2 regarding the recognition of tribal court judgments. I have also written a law review article about tribal court development in Minnesota at 24 Wm. Mitchell L. Rev. 457 called Welcoming Tribal Courts Into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Relations.

As the Court may be aware, tribal court development in Minnesota is a fairly recent trend, except on the Red Lake reservation, which is not subject to the strictures of Public Law 280. Although there are federal laws that presently require states and tribes to honor each other's judgments and orders in the areas of child welfare, child support and domestic violence protection orders, these laws only govern a small number of the proceedings that tribal courts in Minnesota routinely handle.

In a state such as Minnesota where state and tribal courts share concurrent criminal and civil jurisdiction over certain disputes, except those arising on the Red Lake Indian reservation, and the Bois Forte reservation where there has been some retrocession of exclusive jurisdiction to the Tribe, the absence of a state statute or rule governing the

recognition of tribal court judgments is inevitably going to create a situation where litigants are allowed to relitigate disputes that were previously resolved in tribal forums. For example, if a tribal member brings a breach of contract action against a non-member in a tribal court and loses that case, he may bring the very same action in a state court and the tribal court's disposition of the very same case is not preclusive of the state court action. The same may be true if the identities of the litigants were reversed and the tribal member prevailed in the tribal court. This system of allowing litigants two bites at the same apple retards the growth of tribal justice systems and it also clogs up the state courts with cases that have been fairly resolved in the tribal court.[1] As this Court held years ago, "Where two actions between the same parties, on the same subject, and to test the same rights, are brought in different courts having concurrent jurisdiction, the court which first acquires jurisdiction, its power being adequate to the administration of complete justice, retains its jurisdiction and may dispose of the whole controversy, and no court of coordinate power is at liberty to interfere with its action. State ex rel Minnesota Nat'l Bank v. District Court, 195 Minn. 169, 173, 262 N.W. 155, 157 (1935). This Court went on to hold: "This rule rests upon comity and the necessity of avoiding conflict in the execution of judgments by independent courts, and is a necessary one because any other rule would unavoidably lead to perpetual collision and be productive of the most calamitous results." Id.The absence of a full faith and credit requirement seems to violate the spirit of this holding.

The absence of a statute or rule regarding full faith and credit for tribal court judgments also undermines the doctrine of abstention that the Minnesota Supreme Court has recognized as appropriate in cases where the exercise of state jurisdiction would undermine the authority of tribal courts over reservation affairs or infringe upon the rights of Indians to govern their own affairs. See Gavle v. Little Six, 555 N.W.2d 284 (Minn. 1996); see also See Matsch v. Prairie Island Indian Community, 567 N.W.2d 276, 278, rev denied. Abstention unaccompanied by an affirmative duty of the state courts to recognize the order of the tribal court abstained to is a hollow proposition because the state court can ignore the ruling of a tribal court and allow a matter to be relitigated if a litigant is forced to utilize a state forum to enforce an order entered by a tribal court. I was involved in a case several years ago where a tribal court entered a judgment against a tribal housing authority whose assets (bank account) were located off reservation. When I sought to execute against the off-reservation assets the state court in North Dakota recognized the judgment under North Dakota Supreme Court Rule 7.2 and permitted the execution. Had this happened in Minnesota, apparently, the Minnesota courts would not be under any duty to recognize the judgment and enforce it despite the Minnesota Supreme Court's ruling in Gavle that the underlying dispute should be resolved exclusively in the tribal forum because it involved an intramural matter.

It should be pointed out that this absence of a full faith and credit rule is going to harm non-Indian litigants who do business with tribal entities just as much as tribal entities and individuals because those non-Indian entities may be called upon to enforce

[1] This problem may very well be an argument for tribes to adopt full faith and credit rules also.

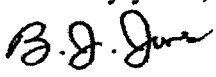
tribal court judgments against off-reservation assets in state courts and will apparently not be able to avail themselves of that option.

I am also concerned that in those cases where Tribes need the assistance of county or state law enforcement to enforce tribal court orders that assistance would not be forthcoming. For example, if a tribal court entered an order prohibiting a non-Indian from entering a tribal housing area because of some action the non-Indian took there (harassing certain tenants for example) and the non-Indian continued to enter the area, state or county law enforcement would not be permitted to intervene to enforce the tribal court order because the order is not entitled to full faith and credit by the state or county. The state court would also not prosecute that as a trespass, assuming the State could under Public Law 280, because the underlying legal premise for the trespass is a tribal court order that carries no legal effect in state court. In addition, if a tribal member is prosecuted by the Tribal Court and convicted, apparently that person can merely stay in state jurisdiction and avoid arrest because the State will not be under a duty to recognize that tribal court warrant and conviction.

I am aware that Minnesota state courts do enforce tribal court orders in certain cases under the doctrine of comity. A Stearns County District Court Judge recently enforced an order from the Sisseton-Wahpeton Sioux Tribal Court in a child custody dispute. However, comity is such an inexact and discretionary doctrine that a situation is going to develop in Minnesota where certain District courts will honor tribal court judgments and others will not. This kind of variation in treatment of tribal court judgments is intolerable and may lead to equal protection arguments being made because of the divergent treatment individual litigants receive in the state courts when they seek to enforce their tribal court judgments. Mille Lacs County, for example, may refuse to recognize a tribal court custody decree, but if it is filed in Stearns County it will be recognized. Does this make sense? I think not. Nothing would prevent a party from forum-shopping for a Judge who honors or dishonors tribal court judgments, depending upon their individual propensities. State courts must assure litigants equal treatment in the separate courts in Minnesota. The best way to do this is to take a position on full faith and credit instead of demurring on the issue.

I do hope that the Court considers all the issues concerning the proposed rule and adopts the rule.

Sincerely yours,



B.J. Jones
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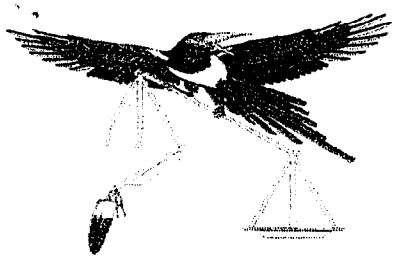

Minnesota American Indian Bar Association
1113 East Franklin Avenue, Suite 600 Minneapolis, MN 55404
www.maiba.org

October 14, 2002

Fred Grittener
Clerk of the Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155

Re: Comment on the Tribal Court/State Court Forum Petition

Dear Mr. Grittner:

Enclosed is a submission from the Minnesota American Indian Bar Association ("MAIBA"), an organization formed to promote public understanding of the unique legal status of Indian tribes and to improve access to justice for all Indian people. MAIBA has carefully tracked the Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments since it was filed with the Minnesota Supreme Court on April 11, 2002. MAIBA has also had the opportunity to meet with members of the Minnesota Tribal Court/State Court Forum to discuss the issues that prompted the Petition in the first place. Furthermore, many MAIBA members have practiced the kind of law in which enforcement issues between states and tribes typically arise.

The proposed rule provides a uniform mechanism for the enforcement of tribal court orders and judgments. The need for such a mechanism is founded on the widespread understanding that state courts have not consistently or effectively enforced orders issued by tribal courts. MAIBA believes that all persons ought to be entitled to the protections afforded by the original state or tribal order throughout the State of Minnesota and Indian country without having to repeat the process. Moreover, if the enforcing state or tribal court affords greater substantive protections than the issuing court, litigants will be entitled to those as well. The adoption of a Rule of Procedure for recognition of tribal court judgments will result in greater public respect for both tribal and state court authority.

Although Congress has enacted legislation which either authorizes or mandates cooperation between Indian tribes, the federal government, and state

governments, adoption of the proposed rule is necessary to address potential conflicts between tribal and state courts. Good working relationships have developed between some tribal and state courts and agencies over time but are always subject to change with each change in personnel, and arrangements that work for most cases often do not hold when a difficult case arises. Lack of formality also leads to wide regional variations, uncertain lines of authority, and at times a diminished role for the tribal court or council. A Rule of Procedure would clarify the roles and expectations of the parties and substantially improve the working relations between tribal and state judicial systems.

Central to tribal sovereignty is proper respect for tribal courts and other tribal institutions. Congress recognized in the Indian Tribal Justice Act, 25 U.S.C. 3601 et seq., that "tribal justice systems are an essential part of tribal governments." 25 U.S.C. 3601(5). Tribes possess "inherent authority to establish their own form of government, including tribal justice systems," which are "important forums for ensuring public health and safety and the political integrity of tribal governments" and are "the appropriate forums for the adjudication of disputes affecting personal and property rights." 25 U.S.C. 3601(4)-(6). The Senate Report accompanying that Act explained that "tribal courts are permanent institutions charged with resolving the rights and interests of both Indian and non-Indian individuals." S. Rep. No. 88, 103d Cong., 1st Sess. 8 (1993). Ignoring tribal court decisions undermines the authority and legitimacy of tribal courts.

Enclosed please find a copy of the MAIBA's letter to the Board of Governors of the Minnesota State Bar Association in support the Board's formal consideration of the Petition, which examines specific difficulties encountered in inter-jurisdictional enforcement of orders and judgments. It demonstrates that the procedural clarification provided by a rule will benefit participants at all levels in all jurisdictions. MAIBA urges the Supreme Court to grant the Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments.

Sincerely,

Eileen J. Strejc, President

Enclosure

Minnesota American Indian Bar Association
1113 East Franklin Avenue, Suite 600 Minneapolis, MN 55404
www.maiba.org

September 7, 2002

Jon Duckstad, President
Minnesota State Bar Association
46 East Fourth Street
Suite 1310
St. Paul, Minnesota 55101

Re: Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments

Dear President Duckstad:

The Minnesota American Indian Bar Association ("MAIBA") has carefully tracked the Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments since it was filed with the Minnesota Supreme Court on April 11, 2002. MAIBA has also had the opportunity to meet with members of the Minnesota Tribal Court/State Court Forum to discuss the issues that prompted the Petition in the first place. Furthermore, many MAIBA members have practiced the kind of law in which enforcement issues between states and tribes typically arise. We believe we are a part of the Minnesota State Bar Association which is very much aware of the issues that the Petition addresses. We are also fully informed as to the deliberations of the General Rules of Practice Committee and the submissions that it has considered.

There is currently no uniformity in the enforcement of tribal court orders and judgments in the courts of the State of Minnesota. That is the first and best reason for the relief that the Petition requests of the Supreme Court. Even with the clear mandates of the Indian Child Welfare Act (25 U.S.C. § 1901-1963), the Violence Against Women Act (18 U.S.C. § 2265), and the Full Faith and Credit for Child Support Orders (28 U.S.C. § 1738B), tribal court orders triggering those acts do not receive uniform treatment in the state courts. And even with the guidelines that have been prepared for district courts and social services workers, compliance with the Indian Child Welfare Act varies from judicial district to judicial district.

The treatment of emergency orders, both those covered by the federal mandates and those arising from original tribal jurisdiction, have the most acute

need for what the Petition offers. For example, M.S.A. 260C.175 allows a peace officer to take a child into custody when the child has run from "a parent, guardian or custodian " or when the peace officer "reasonably believes" the child has run from a parent, guardian or custodian or when a peace officer "reasonably believes" that a child's surroundings will endanger the child's health or welfare. Notwithstanding that delegation of authority by state law, often when a state peace officer is presented with findings and an order from a tribal court establishing those requirements noted above, there is a reluctance and sometimes an outright refusal to honor the tribal court order.

MAIBA believes even with the statutory direction currently available, a rule, such as that proposed by the Petition, would greatly enhance the understanding and ability of those confronted with these questions to act properly. We understand that objections have been made to the Proposed Rule based on the fact that state and federal mandates are already in place. However, that overlooks the reality of enforcement. The reality creates a danger for families which is wholly avoidable and can be greatly diminished by having a rule in place.

We would be happy to provide any assistance that we can in the deliberations of the Board of Governors of the Minnesota State Bar Association and fully support the Board's formal consideration of the Petition.

Sincerely,

Eileen J. Strejc

Eileen J. Strejc, President

MINNESOTA SHERIFFS' ASSOCIATION

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October 14, 2002

Minnesota Supreme Court
Rules Advisory Committee
135 Judicial Center
25 Constitution Avenue
St. Paul, MN. 55155

Re: Proposed Rules Amendment on Tribal Court Orders

Dear Advisory Committee:

On October 11, 2002 the Board of Directors of the Minnesota Sheriff's Association (MSA) met and once again discussed the proposal to amend the Minnesota Rules of Court to give full faith and credit to the civil judgments of the tribal courts. MSA Legal Counsel, Richard Hodsdon, who extensively researched this matter, again made a presentation to the Board on this issue. After further discussion the Board voted unanimously to recommend rejection of the proposed rule amendment.

I would refer you to the attached letter from our Association dated August 11, 2002. In this letter the Board recommends the legislative process be used to address any changes to Minnesota Rules of Court.

We urge you to reject the proposed rule change and refer the issue to the legislature of the State of Minnesota.

Sincerely,

Larry Podany
Executive Director

cc: MSA President & Freeborn County Sheriff, Don Nolander
MSA Legal Counsel, Richard Hodsdon
MSA Legislative Chairperson & Olmsted County Sheriff, Steve Borchardt
MSA Lobbyist Eric Hyland
Minnesota County Attorneys' Association -- Executive Director John Kingrey

MINNESOTA SHERIFFS' ASSOCIATION

1210 South Concord St., South St. Paul, MN 55075
Telephone: 651/451-7216 Fax: 651/451-8087*2
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August 5, 2002

Minnesota Supreme Court
Rules Advisory Committee
135 Judicial Center
25 Constitution Avenue
St. Paul, MN. 55155

Re: Proposed Rules Amendment on Tribal Court Orders

Dear Advisory Committee:

On August 2, 2002 the Board of Directors of the Minnesota Sheriff's Association had a lengthy discussion concerning the proposal to amend the Minnesota Rules of Court to give full faith and credit to the civil judgments of the tribal courts. MSA legal counsel has spent many hours researching this matter and reviewing a wide range of legal and popular materials. Many of the sheriffs have had extensive experience with tribal governments and tribal courts. Our Association has been involved at the legislature over several years concerning the relationships between tribal governments, local law enforcement and county government.

Based upon all the above, the Board unanimously voted to ask that the Supreme Court reject the proposed rule amendment. Our state has historically addressed these issues through the legislative process. By legislation, orders for protection from tribal courts have been given legal effect. By statute, the State has given recognition to tribal police departments under circumstances established in the statute.

By having these important issues addressed through the legislative process, the opportunity for democratic debate and full public discussion is preserved. Adoption of this important policy change by a quiet amendment to the rules of procedure is contrary to historical precedent and the spirit of our democratic traditions. Such matters should be decided by accountable, elected public officials after extensive public hearings and discussion. We urge you to reject the proposed rule change and refer the issue to the legislature of the State of Minnesota.

Sincerely,

Larry Podany
Executive Director

cc: MSA President & Freeborn County Sheriff, Don Nolander
MSA Legal Counsel, Rick Hodson
MSA Legislative Chairperson & Olmsted County Sheriff, Steve Borchardt

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Mark H. Gardner
Attorney at Law
952 935 2002
FAX 952 945 9567

October 15, 2002

TO: CLERK OF APPELLATE COURTS
THIRD FLOOR
25 CONSTITUTION AVENUE
ST. PAUL MN 55155

BY MESSENGER

THE PACKET OF MATERIALS ATTACHED IS A REVISED VERSION INTENDED TO REPLACE AND SUPERCEDE A VERY SIMILAR (SLIGHTLY DEFECTIVE) PACKET I DROPPED OFF THIS MORNING.

PLEASE USE THESE AND THROW THE FIRST ONES IN THE TRASH.

THANK YOU FOR YOUR EXTRA ATTENTION !

Very truly yours:

Mark H. Gardner
Attorney at Law

Attachments

STATE OF MINNESOTA

IN SUPREME COURT

CX 89 1863

In Re:

Proposed Amendments to the General Rules of Practice.

Request for time for oral presentation
at hearing now set on for
3:00 p.m. Tuesday, October 29, 2002.

I request five minutes (or less) time for an oral presentation briefly relating background to the resolution of the Minnesota State Bar Association Committee on Court Rules and Administration with respect to the proposal of the Minnesota Tribal Court State Court Forum for a new rule of court.

An original and fourteen copies of materials outlining the committee's position are attached.

Dated : 10/15/02

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October 14, 2002

Minnesota Supreme Court

Recognition of tribal court orders and judgments.

Dear Minnesota Supreme Court :

Below is a report of a resolution of the Minnesota State Bar Association Committee on Court Rules and Administration with respect to the proposal of the Minnesota Tribal Court State Court Forum. Attached also is a request for five minutes to make an oral presentation.

Judge Bruce Douglas and I are currently co-chairs of the Minnesota State Bar Association Court Rules and Administration Committee. In that capacity, I now report to you that after a presentation on May 15, 2002, by representatives of the Minnesota Tribal Court State Court Forum in support of the petition for a rule on recognition of tribal court orders and judgments now before you, a majority of our committee resolved that the best recommended course would be,

> Rather than create a new, essentially free-standing rule, to integrate salient terms of the proposed rule into an existing rule, if appropriate, or else into existing statutes.
>
> For example, the existing Rule of Civil Procedure 9.05 concerns the form of formal pleading, Minnesota Statutes § 548.26 concerns procedures for securing recognition of foreign judgments now entitled to full faith and credit or comity under existing law including the US Const. Art. IV, Sec. 1, etc.

(Copies of that rule and Minnesota subsection are attached.)

The minority favored simply supporting more active continued discussion of the issue.

If I may interpret the debate as a whole, everyone recognized that the scope of tribal courts' activity has increased substantially in recent years, that tribal courts are competent and professional and merit comity by some appropriate means, and that a problem now exists in Minnesota a from uneven practices regarding recognition of tribal court orders and judgments. Again, the individuals present each favored steps toward

requiring uniform recognition of tribal court orders and judgments by some means. Our debate focused solely on the appropriateness of the potential means.

I welcome any inquiry.

Very truly yours:

Mark H. Gardner
Attorney at Law

Attachments

Letter of October 14, 2002, Attachments.

Minnesota Rules of Civil Procedure (2002).

9.04 Official Document or Act
In pleading an official document or official act, it is sufficient to aver that the document was issued or the act was done in compliance with law; and in pleading any ordinance of a city, village, or borough or any special or local statute or any right derived from either, it is sufficient to refer to the ordinance or statute by its title and the date of its approval.

9.05 Judgment
In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

9.06 Time and Place
For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

Minnesota Statutes (2002).

==548.26 548.26 Definition. "Foreign judgment" means any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this state. HIST: 1977 c 51 s 1

==548.27 548.27 Filing and status of foreign judgments. A certified copy of any foreign judgment may be filed in the office of the court administrator of any district court of this state. The court administrator shall treat the foreign judgment in the same manner as a judgment of any district court or the supreme court of this state, and upon the filing of a certified copy of a foreign judgment in the office of the court administrator of district court of a county, it may not be filed in another district court in the state. A judgment so filed has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of a district court or the supreme court of this state, and may be enforced or satisfied in like manner. HIST: 1977 c 51 s 2; 1Sp1986 c 3 art 1 s 82; 1987 c 273 s 1

==548.28 548.28 Notice of filing.

Subdivision 1. At the time of the filing of the foreign judgment, the judgment creditor or the creditor's lawyer shall make and file with the court administrator an affidavit setting forth the name and last known post office address of the judgment debtor, and the judgment creditor.

Subd. 2. Promptly upon the filing of the foreign judgment and the affidavit, the court administrator shall mail notice of the filing of the foreign judgment to the judgment debtor at the address given and shall make a note of the mailing in the docket. The notice shall include the name and post office address of the judgment creditor and the judgment creditor's lawyer, if any, in this state. In addition, the judgment creditor may mail a notice of the filing of the judgment to the judgment debtor and may file proof of mailing with the court administrator. Failure of the court administrator to mail notice of filing shall not affect the enforcement proceedings if proof of mailing by the judgment creditor has been filed.

Subd. 3. No execution or other process for enforcement of a foreign judgment filed hereunder shall issue until 20 days after the date the judgment is filed. HIST: 1977 c 51 s 3; 1986 c 444; 1Sp1986 c 3 art 1 s 82

==548.29 548.29 Stay.

Subdivision 1. If the judgment debtor shows the district court that an appeal from the foreign judgment is pending or will be taken, or that a stay of execution has been granted, the court shall, upon proof that the judgment debtor has furnished the security for the satisfaction of the judgment required by the state in which it was rendered, stay enforcement of the foreign judgment until the appeal is concluded, the time for appeal expires, or the stay of execution expires or is vacated.

Subd. 2. Stay of enforcement. If the judgment debtor at any time shows the district court any ground upon which enforcement of a judgment of any district court or the court of appeals or supreme court of this state would be stayed, the court shall stay enforcement of the foreign judgment for an appropriate period, upon requiring the same security for satisfaction of the judgment which is required in this state. HIST: 1977 c 51 s 4; 1983 c 247 s 189

==548.30 548.30 Fees. Any person filing a foreign judgment shall pay to the court administrator the same fee as provided for filing a civil action in district court, except that if the amount of the judgment is not greater than the jurisdictional limit of the conciliation court, the fee shall be in the amount of the filing fee for an action in conciliation court. Fees for docketing, transcription or other enforcement proceedings shall be as provided for judgments of any district court of this state. HIST: 1977 c 51 s 5; 1Sp1986 c 3 art 1 s 82; 1987 c 273 s 2; 1993 c 192 s 102

==548.31 548.31 Optional procedure. The right of a judgment creditor to bring an action to enforce a judgment instead of proceeding under sections 548.26 to 548.30 remains unimpaired. HIST: 1977 c 51 s 6; 1986 c 444

==548.32 548.32 Uniformity of application and construction. Sections 548.26 to 548.33 shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of sections 548.26 to 548.33 among those states which enact it. HIST: 1977 c 51 s 7

==548.33 548.33 Citation. Sections 548.26 to 548.33 may be cited as the Uniform Enforcement of Foreign Judgments Act. HIST: 1977 c 51 s 8

==548.35 548.35 Uniform Foreign Country Money-Judgments Recognition Act.

Subdivision 1. Definitions. As used in this section: (1) "foreign state" means any governmental unit other than the United States or any state, district, commonwealth, territory, or insular possession of the United States; (2) "foreign judgment" means any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for (a) taxes, or (b) a fine or other penalty, or (c) in matrimonial or family matters.

Subd. 2. Applicability. This section applies to any foreign judgment that is final and conclusive and enforceable where rendered even though an appeal is pending or it is subject to appeal.

Subd. 3. Recognition and enforcement. Except as provided in subdivision 4, a foreign judgment meeting the requirements of subdivision 2 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. The foreign judgment is enforceable in the same manner as the judgment of another state which is entitled to full faith and credit.

Subd. 4. Grounds for nonrecognition. (a) A foreign judgment is not conclusive if: (1) the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law; (2) the foreign court did not have personal jurisdiction over the defendant; or (3) the foreign court did not have jurisdiction over the subject matter. (b) A foreign judgment need not be recognized if: (1) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to prepare a defense; (2) the judgment was obtained by fraud; (3) the claim for relief on which the judgment is based is repugnant to the public policy of this state; (4) the judgment conflicts with another final and conclusive judgment; (5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled

otherwise than by proceedings in that court; or (6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

Subd. 5. Personal jurisdiction. (a) The foreign judgment shall not be refused recognition for lack of personal jurisdiction if: (1) the defendant was served personally in the foreign state; (2) the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over the defendant; (3) the defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved; (4) the defendant was domiciled in the foreign state when the proceedings were instituted, or, being a body corporate had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state; (5) the defendant had a business office in the foreign state and the proceedings in the foreign court involved a claim for relief arising out of business done by the defendant through that office in the foreign state; or (6) the defendant operated a motor vehicle or airplane in the foreign state and the proceedings involved a claim for relief arising out of the operation. (b) The courts of this state may recognize additional bases of jurisdiction.

Subd. 6. Stay in case of appeal. If the defendant satisfies the court either that an appeal is pending or that the defendant is entitled and intends to appeal from the foreign judgment, the court may stay the proceedings, with or without bond at the court's discretion, until the appeal has been determined or until the expiration of a period of time sufficient to enable the defendant to prosecute the appeal.

Subd. 7. Saving clause. This section does not prevent the recognition of a foreign judgment in situations not covered by this act.

Subd. 8. Short title. This section may be cited as the Uniform Foreign Country Money-Judgments Recognition Act. HIST: 1985 c 218 s 1

MINNESOTA TRIBAL COURT/STATE COURT FORUM

October 15, 2002

OFFICE OF
APPELLATE COURTS

OCT 15 2002

FILED

VIA MESSENGER

Frederick Grittner
Clerk of Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155

Re: Request to Make an Oral Presentation and Written Statement

Dear Mr. Grittner:

I am submitting this request on behalf of the Minnesota Tribal Court/State Court Forum. The following individuals request to make oral presentations at the Public Hearing on the Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments on October 29, 2002, at 2:00 p.m.:

Norman Deschampe, President
Minnesota Chippewa Tribe
P.O. Box 217
Cass Lake, Minnesota 56633

Jackie CrowShoe, Child Welfare Officer
Family and Children Services
Shakopee Mdewakanton Sioux (Dakota) Community
2330 Sioux Trail
Prior Lake, Minnesota 55372

The testimony of these persons will speak to the recognition of the need for a Rule by tribal governments located within the geographical confines of the State of Minnesota and of the difficulties encountered by tribal social services in the absence of a rule, respectively.

As noted in the recommendations in the Final Report of the Minnesota Supreme Court Advisory Committee on General Rules of

Practice ("Committee") dated August 19, 2002, two opportunities were provided for public input to the committee regarding the Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments ("Petition"). Additionally, the Committee received written materials from the public throughout the time of its consideration.

The Minnesota Tribal Court/State Court Forum ("Forum") actively participated in that process in an attempt to provide the Committee with as much history, legal analysis and context for the Proposed Rule as possible. While each member of the Forum respects that difficulty encountered by the members of the Committee in attempting to reach a recommendation for this Court, Forum members were quite dismayed that the written recommendation to the Court failed to address the full basis for the proposal, as well as failing to provide a clear explanation for its recommendation to reject the proposal.

The recommendation concluded that:

> ". . .it would create a presumption that any judgment or order rendered by a tribal court of a tribe recognized by federal statute is valid and enforceable in state court as though it had been rendered by a court of a sister state. Second, it contains specific and limited criteria under which the tribal court order would not be given effect. Third, it creates an expedited process for implementing tribal court orders on an "emergency" basis. Fourth, it includes a specific provision carving out judgments or orders where existing federal law provides for full faith and credit; in those circumstances, the procedures of the federal law would govern."

Committee Recommendation, Page 3.

The Committee's concern that the proposal creates a presumption as to the validity of a tribal court order cannot stand on its own: it must be paired with the second concern noted above and then placed in a proper context. The dynamic set up of the Proposed Rule is no different from any other exercise of comity by a state court in any other jurisdiction, including Minnesota. What the Committee describes as "specific and limited criteria" which a court could apply to determine the recognition of a tribal court order are nearly identical to those criteria contained in the Uniform Foreign Country Money-Judgments Recognition Act, M.S.A.§ 548.35, Subd.4 (1-6). The Committee's recommendation contains an implicit suggestion that tribal court orders must be held to a higher standard than those of other jurisdictions. Without analyzing those criteria, the Committee intimates that they are insufficient. The recommendation overlooks that the Proposed Rule gives the receiving court the opportunity to determine if the sending court has given the defendant the rights protected by the Indian Civil Rights Act, 25 U.S.C. 1301, et seq.

The most critical need for the Proposed Rule and the most direct benefit to come from the Proposed Rule is Section B(2) regarding emergency orders issued by tribal courts. The testimony before the Committee was replete with instances of orders, as was the Petition, Page 5, designed to protect children or families that were not enforced simply because they were tribal court orders. Whether or not one agrees with the propriety of the exercise of a tribe's sovereign powers, the fact of the matter is that the only limitations on that exercise is the Indian Civil Rights Act, and just as importantly, tribal law limitations. Minnesota law already allows a police officer to take an action to protect a child about whom the officer has formed a reasonable belief is in danger. M.S.A. § 260.175. Even children residing on, but temporarily off their own reservation, are addressed in that statute. Yet, a certified order from a tribal court with full findings and conclusions demonstrating that the child is in need of protection is typically not enforced. As the Petition noted, as well as the testimony before the Committee, tribal children are immediately endangered by such refusals. The imbalance in this equation should be obvious. A rule from the Supreme Court making a simple filing or registration requirement with the clerk of court of the receiving county should be sufficient for all purposes when the lives and safety of tribal children may be in the balance.

Last, the Committee seemed to misunderstand Section C(1) of the Proposed Rule that would require that ". . . federal law and not this Rule shall govern the manner in which full faith and credit is given . . ." Petition, Appendix A, Page A-2. The Committee recommendation suggested that in those circumstances ". . . the *procedures* of the federal law would govern." Committee Recommendation, emphasis added. The Forum is not clear on why it would be of any concern were it in the manner of the Proposed Rule or as described by the Committee Recommendation. However, most of the federal statutes requiring full faith and credit do not contain explicit procedures to carry out the mandate of the federal statute. *Cf* Indian Child Welfare Act and Full Faith and Credit for Child Support Orders. *See also*, 18 U.S.C. § 2265 (The Violence Against Women Act (VAWA)); 25 U.S.C. §1725(g) (The Maine Indian Claims Settlement Act); 25 U.S.C. § 2207 (The Indian Land Consolidation Act; 25 U.S.C. § 3106 (The National Indian Forest Resources Managment Act); and 25 U.S.C. § 3713 (American Indian Agricultural Resources Management Act). Why a rule from this Court reminding the courts of this state of those federal statutes mandating full faith and credit should cause some discomfort or offend sensibilities is perplexing.[1]

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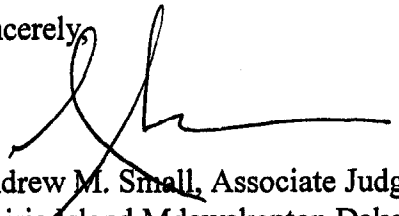
[1]As noted in the Petition and in extensive testimony before the Committee, even the simple directives of ICWA or VAWA are frequently not followed relative to the enforcement of tribal court orders. The intended beneficiaries of those orders are thus left to languish without protection.

We note that the Committee acknowledged a need for some action by the State to address the severe inadequacies that now exist. We fully appreciate the difficulty of the task before the Committee, but we do not believe the Court should rely on the mere generalities of the Recommendation. We again petition this Court to adopt this rule of procedure for the recognition of tribal court orders and judgments.

Sincerely,



Andrew M. Small, Associate Judge
Prairie Island Mdewakanton Dakota Community Tribal Court
Lower Sioux Community in Minnesota Tribal Court

Request to Be Heard

TO: Frederick Grittner, Clerk of the Appellate Courts

RE: State of Minnesota in Supreme Court, CX-89-1863, October 29, 2002 Hearing to Consider Peition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments

The following persons, members of the Citizens for Lawful Government, request time to be heard, on their individual behalf and as members of the Citizens for Lawful Government:

1. **Laura Guthrie, resident (non-enrolled) of the White Earth Reservation**
2. **Leonard Roy, resident of White Earth, enrolled member**
3. **Ken Pearson, non-enrolled, resident on the White Earth Reservation; President of the Citizens for Lawful Government**
4. **Ed Peterson, human rights worker and Minnesota lawyer, Detroit Lakes on Minnesota Constitution, statutes; tribal constitution, equal protection and human rights issues, and a member of Citizens for Lawful Goverment**
5. **Clarence Roy, enrolled member of White Earth from Moorhead, and member of the Citizens for Lawful Government**
6. **Marvin Manypenny, resident and enrolled member of White Earth, member of Citizens for Lawful Government**

Please reserve our time and 14 copies of materials submitted for consideration are enclosed.

Sincerely,

Laura Guthrie

Ed Peterson

For and on behalf of the listed members of Citizens for Lawful Government

Ed Peterson

P.O. Box 282
Detroit Lakes, MN 56502
Oct. 14, 2002

To: Frederick Grittner, Clerk of the Appellate Court
Re: State of Minnesota in the Supreme Court CX-89-1863, October 29, 2002, Hearing to Consider Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments

I would like to speak three to five minutes on equal protection and human rights issues under the Minnesota Constitution, U.S. Constitution and tribal constitution in regard to issues researched pertinent to the above forum, and speak on Jacobson v. United States, the 1905 U.S. Supreme Court case, Robertson v. Baldwin, 165 U.S. 275 (1897) and Article XIII of the Revised Constitution and By-laws of the Minnesota Chippewa Tribe as they relate to these issues.

Thank you.

Sincerely,

Ed Peterson
Mn. Atty. Reg. 130370

REVISED CONSTITUTION AND BYLAWS OF THE MINNESOTA CHIPPEWA TRIBE, MINNESOTA

PREAMBLE

We, the Minnesota Chippewa Tribe, consisting of the Chippewa Indians of the White Earth, Leech Lake, Fond du Lac, Bois Forte (Nett Lake), and Grand Portage Reservations and the Nonremoval Mille Lac Band of Chippewa Indians, in order to form a representative Chippewa tribal organization, maintain and establish justice for our Tribe, and to conserve and develop our tribal resources and common property; to promote the general welfare of ourselves and descendants, do establish and adopt this constitution for the Chippewa Indians of Minnesota in accordance with such privilege granted the Indians by the United States under existing law.

ARTICLE I - ORGANIZATION AND PURPOSE

Section 1. The Minnesota Chippewa Tribe is hereby organized under Section 16 of the Act of June 18, 1934 (48 Stat. 984), as amended.

Sec. 2. The name of this tribal organization shall be the "Minnesota Chippewa Tribe."

Sec. 3. The purpose and function of this organization shall be to conserve and develop tribal resources and to promote the conservation and development of individual Indian trust property; to promote the general welfare of the members of the Tribe; to preserve and maintain justice for its members and otherwise exercise all powers granted and provided the Indians, and take advantage of the privileges afforded by the Act of June 18, 1934 (48 Stat. 984) and acts amendatory thereof or supplemental thereto, and all the purposes expressed in the preamble hereof.

Sec. 4. The Tribe shall cooperate with the United States in its program of economic and social development of the Tribe or in any matters tending to promote the welfare of the Minnesota Chippewa Tribe of Indians.

ARTICLE II - MEMBERSHIP

Section 1. The membership of the Minnesota Chippewa Tribe shall consist of the following:

(a) Basic Membership Roll. All persons of Minnesota Chippewa Indian blood whose names appear on the annuity roll of April 14, 1941, prepared pursuant to the Treaty with said Indians as enacted by Congress in the Act of January 14, 1889 (25 Stat. 642) and Acts amendatory thereof, and as corrected by the Tribal Executive Committee and ratified by the Tribal Delegates, which roll shall be known as the basic membership roll of the Tribe.

(b) All children of Minnesota Chippewa Indian blood born between April 14, 1941, the date of the annuity roll, and July 3, 1961, the date of approval of the membership ordinance by the Area Director, to a parent or parents, either or both of whose names appear on the basic membership role, provided an application for enrollment was filed with the Secretary of the Tribal Delegates by July 4, 1962, one year after the date of approval of the ordinance by the Area Director.

(c) All children of at least one quarter (1/4) degree Minnesota Chippewa Indian blood born after July 3, 1961, to a member, provided that an application for enrollment was or is filed with the Secretary of the Tribal Delegates or the Tribal Executive Committee within one year after the date of birth of such children.

Sec. 2. No person born after July 3, 1961, shall be eligible for enrollment if enrolled as a member of another tribe, or if not an American citizen.

Sec. 3 Any person of Minnesota Chippewa Indian blood who meets the membership requirements of the Tribe, but who because of an error has not been enrolled, may be admitted to membership in the Minnesota Chippewa Tribe by adoption, if such adoption is approved by the Tribal Executive Committee, and shall have full membership privileges from the date the adoption is approved.

Sec. 4. Any person who has been rejected for enrollment as a member of the Minnesota Chippewa Tribe shall have the right of appeal within sixty days from the date of written notice of rejection to the Secretary of the Interior from the decision of the Tribal Executive Committee and the decision of the Secretary of Interior shall be final.

Sec. 5. Nothing contained in this article shall be construed to deprive any descendant of a Minnesota Chippewa Indian of the right to participate in any benefits derived from claims against the U.S. Government when awards are made for and on behalf and for the benefit of descendants of members of said tribe.

ARTICLE III - GOVERNING BODY

The governing bodies of the Minnesota Chippewa Tribe shall be the Tribal Executive Committee and the Reservation Business Committees of the White Earth, Leech Lake, Fond du Lac, Bois Forte (Nett Lake), and Grand Portage Reservations, and the Nonremoval Mille Lac Band of Chippewa Indians, hereinafter referred to as the six (6) Reservations.

Section 1. Tribal Executive Committee. The Tribal Executive Committee shall be composed of the Chairman and Secretary-Treasurer of each of the six (6) Reservation Business Committees elected in accordance with Article IV. The Tribal Executive Committee shall, at its first meeting, select from within the group a President, a Vice-President, a Secretary, and a Treasurer who shall continue in office for the period of two (2) years or until their successors are elected and seated.

Sec. 2. Reservation Business Committee. Each of the six (6) Reservations shall elect a Reservation Business Committee composed of not more than five (5) members nor less than three (3) members. The Reservation Business Committee shall be composed of a Chairman, Secretary-Treasurer, and one (1), two (2), or three (3) Committeemen. The candidates shall file for their respective offices and shall hold their office during the term for which they were elected or until their successors are elected and seated.

ARTICLE IV - TRIBAL ELECTIONS

Section 1. Right to Vote. All elections held on the six (6) Reservations shall be held in accordance with a uniform election ordinance to be adopted by the Tribal Executive Committee which shall provide that:

(a) All members of the tribe, eighteen (18) years of age or over, shall have the right to vote at all elections held within the reservation of their enrollment. 1/

(b) All elections shall provide for absentee ballots and secret ballot voting.

(c) Each Reservation Business Committee shall be the sole judge of the qualifications of its voters.

(d) The precincts, polling places, election boards, time for opening and closing the polls, canvassing the vote and all pertinent details shall be clearly described in the ordinance.

Sec. 2. Candidates. A candidate for Chairman, Secretary-Treasurer and Committeeman must be an enrolled member of the Tribe and reside on the reservation of his enrollment. No member of the Tribe shall be eligible to hold office, either as a Committeeman or Officer, until he or she has reached his or her twenty-first (21) birthday on or before the date of election. 2/

Sec. 3 Term of Office.

(a) The first election of the Reservation Business Committee for the six (6) Reservations shall be called and held within ninety (90) days after the date on which these amendments became effective in accordance with Section 1, of this Article.

(b) For the purpose of the first election, the Chairman and one (1) Committeeman shall be elected for a four-year term. The Secretary-Treasurer and any remaining Committeemen shall be elected for a two-year term. Thereafter, the term of office for officers and committeemen shall be four (4) years. For the purpose of the first election, the Committeeman receiving the greatest number of votes shall be elected for a four-year term.

ARTICLE V - AUTHORITIES OF THE TRIBAL EXECUTIVE COMMITTEE

Section 1. The Tribal Executive Committee shall, in accordance with applicable laws or regulations of the Department of the Interior, have the following powers:

(a) To employ legal counsel for the protection and advancement of the rights of the Minnesota Chippewa Tribe; the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior, or his authorized representative.

(b) To prevent any sale, disposition, lease or encumbrance of tribal lands, interest in lands, or other assets including minerals, gas and oil.

(c) To advise with the Secretary of the Interior with regard to all appropriation estimates or Federal projects for the benefit of the Minnesota Chippewa Tribe, except where such appropriation estimates or projects are for the benefit of individual Reservations.

1/ As amended per Amendment I, approved by Secretary of Interior 11/6/72.

2/ As amended per Amendment II, approved by Secretary of Interior 11/6/72.

(d) To administer any funds within the control of the Tribe; to make expenditures from tribal funds for salaries, expenses of tribal officials, employment or other tribal purposes. The Tribal Executive Committee shall apportion all funds within its control to the various Reservations excepting funds necessary to support the authorized costs of the Tribal Executive Committee. All expenditures of tribal funds, under the control of the Tribal Executive Committee, shall be in accordance with a budget, duly approved by resolution in legal session, and the amounts so expended shall be a matter of public record at all reasonable times. The Tribal Executive Committee shall prepare annual budgets, requesting advancements to the control of the Tribe of any money deposited to the credit of the Tribe in the United States Treasury, subject to the approval of the Secretary of the Interior or his authorized representative.

(e) To consult, negotiate, contract and conclude agreements on behalf of the Minnesota Chippewa Tribe with Federal, State and local governments or private persons or organizations on all matters within the powers of the Tribal Executive Committee, except as provided in the powers of the Reservation Business Committee.

(f) Except for those powers hereinafter granted to the Reservation Business Committees, the Tribal Executive Committee shall be authorized to manage, lease, permit, or otherwise deal with tribal lands, interests in lands or other tribal assets; to engage in any business that will further the economic well being of members of the Tribe; to borrow money from the Federal Government or other sources and to direct the use of such funds for productive purposes, or to loan the money thus borrowed to Business Committees of the Reservations and to pledge or assign chattel or income, due or to become due, subject only to the approval of the Secretary of the Interior or his authorized representative, when required by Federal law or regulations.

(g) The Tribal Executive Committee may by ordinance, subject to the review of the Secretary of the Interior, levy licenses or fees on non-members or non-tribal organizations doing business on two or more Reservations.

(h) To recognize any community organizations, associations or committees open to members of the several Reservations and to approve such organizations, subject to the provision that no such organizations, associations, or committees may assume any authority granted to the Tribal Executive Committee or to the Reservation Business Committees.

(i) To delegate to committees, officers, employees or cooperative associations any of the foregoing authorities, reserving the right to review any action taken by virtue of such delegated authorities.

ARTICLE VI -AUTHORITIES OF THE RESERVATION BUSINESS COMMITTEES

Section 1. Each of the Reservation Business Committees shall, in accordance with applicable laws or regulations of the Department of the Interior, have the following powers:

(a) To advise with the Secretary of the Interior with regard to all appropriation estimates on Federal projects for the benefit of its Reservation.

(b) To administer any funds within the control of the Reservation; to make expenditures from Reservation funds for salaries, expenses of Reservation officials, employment or other Reservation purposes. All expenditures of Reservation funds under the control of the Reservation Business Committees shall be accordance with a budget, duly approved by resolution in legal session, and the amounts so expended shall be a matter of public record at all reasonable times. The Business Committees shall prepare annual budgets requesting advancements to the control of the Reservation of tribal funds under the control of the Tribal Executive Committee.

(c) To consult, negotiate and contract and conclude agreements on behalf of its respective Reservation with Federal, State and local governments or private persons or organizations on all matters within the power of the Reservation Business Committee, provided that no such agreements or contracts shall directly affect any other Reservation or the Tribal Executive Committee without their consent. The Business Committees shall be authorized to manage, lease, permit or otherwise deal with tribal lands, interests in lands or other tribal assets, when authorized to do so by the Tribal Executive Committee but no such authorization shall be necessary in the case of lands or assets owned exclusively by the Reservation. To engage in any business that will further the economic well being of members of the Reservation; to borrow money from the Federal Government or other sources and to direct the use of such funds for productive purposes or to loan the money thus borrowed to members of the Reservation and to pledge or assign Reservation chattel or income due or to become due, subject only to the approval of the Secretary of the Interior or his authorized representative when required by Federal law and regulations. The Reservation Business Committee may also, with the consent of the Tribal Executive Committee, pledge or assign tribal chattel or income.

(d) The Reservation Business Committee may by ordinance, subject to the review of the Secretary of the Interior, levy licenses or fees on non-members or non-tribal organizations doing business solely within their respective Reservations. A Reservation Business Committee may recognize any community organization, association or committee open to members of the Reservation or located within the Reservation and approve such organization, subject to the provision that no such organization, association or committee may assume any authority granted to the Reservation Business Committee or to the Tribal Executive Committee.

(e) To delegate to committees, officers, employees or cooperative associations any of the foregoing authorities, reserving the right to review any action taken by virtue of such delegated authorities.

(f) The powers hereforeto granted to the bands by the charters issued by the Tribal Executive Committee are hereby superceded by this Article and said charters will no longer be recognized for any purposes.

ARTICLE VII - DURATION OF TRIBAL CONSTITUTION

Section 1. The period of duration of this tribal constitution shall be perpetual or until revoked by lawful means as provided in the Act of June 18, 1934 (48 Stat. 984), as amended.

ARTICLE VIII - MAJORITY VOTE

Section 1. At all elections held under this constitution, the majority of eligible votes cast shall rule, unless otherwise provided by an Act of Congress.

ARTICLE IX - BONDING OF TRIBAL OFFICIALS

Section 1. The Tribal Executive Committee and the Reservation Business Committees, respectively, shall require all persons, charged by the Tribe or Reservation with responsibility for the custody of any of its funds or property, to give bond for the faithful performance of his official duties. Such bond shall be furnished by a responsible bonding company and shall be acceptable to the beneficiary thereof and the Secretary of the Interior or his authorized representative, and the cost thereof shall be paid by the beneficiary.

ARTICLE X - VACANCIES AND REMOVAL

Section 1. Any vacancy in the Tribal Executive Committee shall be filled by the Indians from the Reservation on which the vacancy occurs by election under rules prescribed by the Tribal Executive Committee. During the interim, the Reservation Business Committee shall be empowered to select a temporary Tribal Executive Committee member to represent the Reservation until such time as the election herein provided for has been held and the successful candidate elected and seated.

Sec. 2. The Reservation Business Committee by a two-thirds (2/3) vote of its members shall remove any officer or member of the Committee for the following causes:

(a) Malfeasance in the handling of tribal affairs.

(b) Dereliction or neglect of duty.

(c) Unexcused failure to attend two regular meetings in succession.

(d) Conviction of a felony in any county, State or Federal court while serving on the Reservation Business Committee.

(e) Refusal to comply with any provisions of the Constitution and Bylaws of the Tribe.

The removal shall be in accordance with the procedures set forth in Section 3 of this Article.

Sec. 3. Any member of the Reservation from which the Reservation Business Committee member is elected may prefer charges by written notice supported by the signatures of no less than 20 percent of the resident eligible voters of said Reservation, stating any of the causes for removal set forth in Section 2 of this Article, against any member or members of the respective Reservation Business Committee. The notice must be submitted to the Business Committee. The Reservation Business Committee shall consider such notice and take the following action:

(a) The Reservation Business Committee within fifteen (15) days after receipt of the notice or charges shall in writing notify the accused of the charges brought against him and set a date for a hearing. If the Reservation Business Committee deems the accused has failed to answer charges to its satisfaction or fails to appear at the appointed time, the Reservation Business Committee may remove as provided in Section 2 or it may schedule a recall election which shall be held within thirty (30) days after the date set for the hearing. In either event, the action of the Reservation Business Committee or the outcome of the recall election shall be final.

(b) All such hearings of the Reservation Business Committee shall be held in accordance with the provisions of this Article and shall be open to the members of the Reservation. Notices of such hearings shall be duly posted at least five (5) days prior to the hearing.

(c) The accused shall be given opportunity to call witnesses and present evidence in his behalf.

Sec. 4. When the Tribal Executive Committee finds any of its members guilty of any of the causes for removal from office as listed in Section 2 of this Article, it shall in writing censor the Tribal Executive Committee member. The Tribal Executive Committee shall present its written censure to the Reservation Business Committee from which the Tribal Executive Committee member is elected. The Reservation Business Committee shall thereupon consider such censure in the manner prescribed in Section 3 of this Article.

Sec. 5. In the event the Reservation Business Committee fails to act as provided in Sections 3 and 4 of this Article, the Reservation membership may, by petition supported by the signatures of no less than 20 percent of the eligible resident voters, appeal to the Secretary of the Interior. If the Secretary deems the charges substantial, he shall call an election for the purpose of placing the matter before the Reservation electorate for their final decision.

ARTICLE XI - RATIFICATION

Section 1. This constitution and the bylaws shall not become operative until ratified at a special election by a majority vote of the adult members of the Minnesota Chippewa Tribe, voting at a special election called by the Secretary of the Interior, provided that at least 30 percent of those entitled to vote shall vote, and until it has been approved by the Secretary of the Interior.

ARTICLE XII - AMENDMENT

Section 1. This constitution may be revoked by Act of Congress or amended or revoked by a majority vote of the qualified voters of the Tribe voting at an election called for that purpose by the Secretary of the Interior if at least 30 percent of those entitled to vote shall vote. No amendment shall be effective until approved by the Secretary of the Interior. It shall be the duty of the Secretary to call an election when requested by two-thirds of the Tribal Executive Committee.

ARTICLE XIII - RIGHTS OF MEMBERS

All members of the Minnesota Chippewa Tribe shall be accorded by the governing body equal rights, equal protection, and equal opportunities to participate in the economic resources and activities of the Tribe, and no member shall be denied any of the constitutional rights or guarantees enjoyed by other citizens of the United States, including but not limited to freedom of religion and conscience, freedom of speech, the right to orderly association or assembly, the right to petition for action or the redress of grievances, and due process of law.

ARTICLE XIV - REFERENDUM

Section 1. The Tribal Executive Committee, upon receipt of a petition signed by 20 percent of the resident voters of the Minnesota Chippewa Tribe, or by an affirmative vote of eight (8) members of the Tribal Executive Committee, shall submit any enacted or proposed resolution or ordinance of the Tribal Executive Committee to a referendum of the eligible voters of the Minnesota Chippewa Tribe. The majority of the votes cast in such referendum shall be conclusive and binding on the Tribal Executive Committee. The Tribal Executive Committee shall call such referendum and prescribe the manner of conducting the vote.

Sec. 2. The Reservation Business Committee, upon receipt of a petition signed by 20 percent of the resident voters of the Reservation, or by an affirmative vote of a majority of the members of the Reservation Business Committee, shall submit any enacted or proposed resolution or ordinance of the Reservation Business Committee to a referendum of the eligible voters of the Reservation. The majority of the votes cast in such referendum shall be conclusive and binding on the Reservation Business Committee. The Reservation Business Committee shall call such referendum and prescribe the manner of conducting the vote.

ARTICLE XV - MANNER OF REVIEW

Section 1. Any resolution or ordinance enacted by the Tribal Executive Committee, which by the terms of this Constitution and Bylaws is subject to review by the Secretary of the Interior, or his authorized representative, shall be presented to the Superintendent or officer in charge of the Reservation who shall within ten (10) days after its receipt by him approve or disapprove the resolution or ordinance.

If the Superintendent or officer in charge shall approve any ordinance or resolution it shall thereupon become effective, but the Superintendent or officer in charge shall transmit a copy of the same, bearing his endorsement, to the Secretary of the Interior, who may within ninety (90) days from the date of approval, rescind the ordinance or resolution for any cause by notifying the Tribal Executive Committee.

If the Superintendent or officer in charge shall refuse to approve any resolution or ordinance subject to review within ten (10) days after its receipt by him he shall advise the Tribal Executive Committee of his reasons therefor in writing. If these reasons are deemed by the Tribal Executive Committee to be insufficient, it may, by a majority vote, refer the ordinance or resolution to the Secretary of the Interior, who may, within ninety (90) days from the date of its referral, approve or reject the same in writing, whereupon the said ordinance or resolution shall be in effect or rejected accordingly.

Sec. 2. Any resolution or ordinance enacted by the Reservation Business Committee, which by the terms of this Constitution and Bylaws is subjected to review by the Secretary of the Interior or his authorized representative, shall be governed by the procedures set forth in Section 1 of this Article.

Sec. 3. Any resolution or ordinance enacted by the Reservation Business Committee, which by the terms of this Constitution and Bylaws is subject to approval by the Tribal Executive Committee, shall within ten (10) days of its enactment be presented to the Tribal Executive Committee. The Tribal Executive Committee shall at its next regular or special meeting, approve or disapprove such resolution or ordinance.

Upon approval or disapproval by the Tribal Executive Committee of any resolution or ordinance submitted by a Reservation Business Committee, it shall advise the Reservation Business Committee within ten (10) days, in writing, of the action taken. In the event of disapproval the Tribal Executive Committee shall advise the Reservation Business Committee, at that time, of its reasons therefor.

BYLAWS

ARTICLE I - DUTIES OF THE OFFICERS OF THE TRIBAL EXECUTIVE COMMITTEE

Section 1. The President of the Tribal Executive Committee shall:

(a) Preside at all regular and special meetings of the Tribal Executive Committee and at any meeting of the Minnesota Chippewa Tribe in general council.

(b) Assume responsibility for the implementation of and resolutions and ordinances of the Tribal Executive Committee.

(c) Sign, with the Secretary of the Tribal Executive Committee, on behalf of the Tribe all official papers when authorized to do so.

(d) Assume general supervision of all officers, employees and committees of the Tribal Executive Committee and, as delegated, take direct responsibility for the satisfactory performance of such officers, employees and committees.

(e) Prepare a report of negotiations, important communications and other activities of the Tribal Executive Committee and shall make this report at each regular meeting of the Tribal Executive Committee. He shall include in this report all matters of importance to the Tribe, and in no way shall he act for the Tribe unless specifically authorized to do so.

(f) Have general management of the business activities of the Tribal Executive Committee. He shall not act on matters binding the Tribe until the Tribal Executive Committee has deliberated and enacted appropriate resolution, or unless written delegation of authority has been granted.

(g) Not vote in meetings of the Tribal Executive Committee except in the case of a tie.

Sec. 2. In the absence or disability of the President, the Vice-President shall preside. When so presiding, he shall have all rights, privileges and duties as set forth under duties of the President, as well as the responsibility of the President.

Sec. 3. The Secretary of the Tribal Executive Committee shall:

(a) Keep a complete record of the meetings of the Tribal Executive Committee and shall maintain such records at the headquarters of the Tribe.

(b) Sign, with the President of the Tribal Executive Committee, all official papers as provided in Section 1 (c) of this Article.

(c) Be the custodian of all property of the Tribe.

(d) Keep a complete record of all business of the Tribal Executive Committee. Make and submit a complete and detailed report of the current year's business and shall submit such other reports as shall be required by the Tribal Executive Committee.

(e) Serve all notices required for meetings and elections.

(f) Perform such other duties as may be required of him by the Tribal Executive Committee.

Sec. 4. The Treasurer of the Tribal Executive Committee shall:

(a) Receive all funds of the Tribe entrusted to it, deposit same in a depository selected by the Tribal Executive Committee, and disburse such tribal funds only on vouchers signed by the President and Secretary.

(b) Keep and maintain, open to inspection by members of the Tribe or representatives of the Secretary of the Interior, at all reasonable times, adequate and correct accounts of the properties and business transactions of the Tribe.

(c) Make a monthly report and account for all transactions involving the disbursement, collection or obligation of tribal funds. He shall present such financial reports to the Tribal Executive Committee at each of its regular meetings.

Sec. 5. Duties and functions of all appointive committees, officers, and employees of the Tribal Executive Committee shall be clearly defined by resolution of the Tribal Executive Committee.

ARTICLE II - TRIBAL EXECUTIVE COMMITTEE MEETINGS

Section 1. Regular meetings of the Tribal Executive Committee shall be held once in every 3 months beginning on the second Monday in July of each year and on such other days of any month as may be designated for that purpose.

Sec. 2. Notice shall be given by the Secretary of the Tribal Executive Committee of the date and place of all meetings by mailing a notice thereof to the members of the Tribal Executive Committee not less than 15 days preceding the date of the meeting.

Sec. 3. The President shall call a special meeting of the Tribal Executive Committee upon a written request of at least one-third of the Tribal Executive Committee. The President shall also call a special meeting of the Tribal Executive Committee when matters of special importance pertaining to the Tribe arise for which he deems advisable the said Committee should meet.

Sec. 4. In case of special meetings designated for emergency matters pertaining to the Tribe, or those of special importance warranting immediate action of said Tribe, the President of the Tribal Executive Committee may waive the 15-day clause provided in Section 2 of this Article.

Sec. 5. Seven members of the Tribal Executive Committee shall constitute a quorum, and Roberts' Rule shall govern its meetings. Except as provided in said Rules, no business shall be transacted unless a quorum is present.

Sec. 6. The order of business at any meeting so far as possible shall be:

(a) Call to order by the presiding officer.

(b) Invocation.

(c) Roll call.

(d) Reading and disposal of the minutes of the last meeting.

(e) Reports of committees and officers.

(f) Unfinished business.

(g) New business.

(h) Adjournment.

ARTICLE III - INSTALLATION OF TRIBAL EXECUTIVE COMMITTEE MEMBERS

Section 1. New members of the Tribal Executive Committee who have been duly elected by the respective Reservations shall be installed at the first regular meeting of the Tribal Executive Committee following election of the committee members, upon subscribing to the following oath:

> "I, , do hereby solemnly swear (or affirm) that I shall preserve, support and protect the Constitution of the United States and the Constitution of the Minnesota Chippewa Tribe, and execute my duties as a member of the Tribal Executive Committee to the best of my ability, so help me God."

ARTICLE IV - AMENDMENTS

Section 1. These bylaws may be amended in the same manner as the Constitution.

ARTICLE V - MISCELLANEOUS

Section 1. The fiscal year of the Minnesota Chippewa Tribe shall begin on July 1 of each year.

Section 2. The books and records of the Minnesota Chippewa Tribe shall be audited at least once each year by a competent auditor employed by the Tribal Executive Committee, and at such times as the Tribal Executive Committee or the Secretary of the Interior or his authorized representative may direct. Copies of audit reports shall be furnished the Bureau of Indian Affairs.

ARTICLE VI - RESERVATION BUSINESS COMMITTEE BYLAWS

Section 1. The Reservation Business Committee shall by ordinance adopt bylaws to govern the duties of its officers and Committee members and its meetings.

Section 2. Duties and functions of all appointive committees, officers, and employees of the Reservation Business Committee shall be clearly defined by resolution of the Reservation Business Committee.

CERTIFICATION OF ADOPTION

Pursuant to an order approved September 12, 1963, by the Assistant Secretary of the Interior, the Revised Constitution and Bylaws of the Minnesota Chippewa Tribe was submitted for ratification to the qualified voters of the reservations, and was on November 23, 1963, duly adopted by a vote of 1,761 for, and 1,295 against, in an election in which at least 30 percent of those entitled to vote cast their ballots in accordance with Section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378).

(sgd) Allen Wilson, President
Tribal Executive Committee

(sgd) Peter DuFault, Secretary
Tribal Executive Committee

(sgd) H.P. Mittelholtz, Superintendent
Minnesota Agency

APPROVAL

I, John A. Carver, Jr., Assistant Secretary of the Interior of the United States of America, by virtue of the authority granted me by the Act of June 18, 1934 (48 Stat. 984), as amended, do hereby approve the attached Revised Constitution and Bylaws of the Minnesota Chippewa Tribe, Minnesota.

John A. Carver, Jr.,
Assistant Secretary of the Interior
Washington, D.C.
(SEAL) Date: March 3, 1964

OFFICE OF THE SOLICITOR
Office of the Field Solicitor
606 Federal Building, Fort Snelling
Twin Cities, Minnesota 55111

June 10, 1980

Memorandum

ATTACHMENT 6

To: Associate Solicitor, Indian Affairs
Attn: David Etheridge

From: Field Solicitor, Twin Cities, Minnesota

Subject: Petition for Reassumption of Jurisdiction under the Indian Child Welfare Act of 1978, P.L. 95-608--White Earth Band of Chippewa Indians

The White Earth Band of Chippewa Indians, one of the constituent bands of the Minnesota Chippewa Tribe, has submitted a petition to reassume exclusive child custody jurisdiction under §108 of the Indian Child Welfare Act of 1978, 25 U.S.C. §1918. You have asked that we review the petition for conformity to the requirements contained in 25 C.F.R. Part 13.

The petition shows careful preparation and contains all the information specified in 25 C.F.R. §13.11. However, we do not believe that the constitutional authority cited in the petition authorizes the White Earth Band to regulate child custody, nor does any provision in the present Minnesota Chippewa Tribe Constitution provide such authority.

As you know, the six constituent bands of the Minnesota Chippewa Tribe all operate under the same constitution. The constitution establishes as the tribal governing bodies a Tribal Executive Committee (hereinafter "TEC") and six Reservation Business Committees (hereinafter "RBCs"). White Earth, like the other constituent bands, has its own RBC. The constitution confers certain powers on the TEC (article V) and on the RBCs (Article VI).

The White Earth reassumption petition cites Article I, §3 of the constitution as authority for the exercise of child custody jurisdiction. That section reads:

> The purpose and function of this organization shall be to conserve and develop tribal resources and to promote the conservation and development of individual Indian trust property; to promote the general welfare of the members of the Tribe; to preserve and maintain justice for its members and otherwise exercise all powers granted and provided the Indians, and take advantage of the privileges afforded by the Act of June 18, 1934, (48 Stat. 984) and acts amendatory thereof or supplemental thereto, and all the purposes expressed in the preamble hereof.

The relevant portion of this section is apparently the language reading "to preserve and maintain justice for its members," since Resolution 42-80 (January 18, 1980), in which the White Earth RBC purports to create a Children's Court to exercise child custody jurisdiction under the Indian Child Welfare Act, cites this constitutional language as authority.

The basic problem is that the cited language is found in Article I of the constitution, which sets out the purposes of the Minnesota Chippewa Tribe, and not in either Article V, which delegates certain powers to the TEC, or in Article VI, which does the same for the RBCs. We believe that, to be effectively delegated, poweres inherent in the tribe as a whole must be enumerated in the constitutional article or articles setting out the powers of the governing body. Cf. Quechan Tribe of Indians v. Rowe, 531 F.2d 408 (9th Cir. 1976). A statement of purpose such as that found in the cited portion of Article I is not sufficient.

Moreover, even if the TEC and/or RBC were specifically empowered "to preserve and maintain justice for /the White Earth Band's/ members," we have serious doubts as to whether such general language would authorize exercise of child custody jurisdiction. Where governmental action has the potential to affect people's lives in an intimate and drastic way, as child custody jurisdiction does, the authority should be explicitly stated. + Montague

We conclude that the Minnesota Chippewa Tribe must amend its constitution before it may exercise child custody jurisdiction. The necessary amendment could take many forms, but should include authorization for the TEC and/or RBC to promulgate child custody ordinances and set up a court with child custody jurisdiction.

Our views do not have any implications for the jurisdiction of the White Earth Conservation Court. In an opinion dated November 3, 1977, we stated that a broad interpretation

of Minnesota Chippewa Tribe Constitution Article V, §1(f), authorizing the TEC to manage tribal assets, and of Article VI, §1(c), authorizing the RBC to manage tribal assets belonging exclusively to the particular reservation, was sufficient to support enactment of the White Earth Conservation Code. However, we also advised that a constitutional amendment providing more explicit authority was highly desirable.

Here, no power has been delegated to the TEC or the RBC which could even arguably support regulation of child custody. It will be necessary, in our opinion, for the Minnesota Chippewa Tribe to amend its constitution. We will gladly give the Tribe any assistance they wish in drafting amendments. Meanwhile, we do not believe that the petition for reassumption should be accepted.

Sincerely yours,

(Sgd) Mariana R. Shulstad

Mariana R. Shulstad
For the Field Solicitor

cc: MAO, BIA, Attn: Social Services
Regional Solicitor, Boston

AMS:vjc

United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

JUL 31 1986

ATTACHMENT 7

BIA.IA.0708

To: Assistant Secretary--Indian Affairs

From: Associate Solicitor, Division of Indian Affairs

Subject: Authority of the Tribal Executive Committee and the Reservation Business Committees of the Minnesota Chippewa Tribe to authorize tribal courts to adjudicate child custody cases

This responds to a letter that you received and referred to me dated March 25, 1986, from the Fond du Lac Reservation Business Committee urging the reversal of a Twin Cities Field Solicitor's opinion dated June 10, 1980. That opinion concluded that the Constitution of the Minnesota Chippewa Tribe does not delegate to tribal officials the power to authorize tribal courts to adjudicate child custody cases.

The Field Solicitor's opinion was in the form of a memorandum to this office asserting that a petition for reassumption of jurisdiction under the Indian Child Welfare Act, 25 U.S.C. §§ 1901 et seq., from the White Earth Band of Chippewa Indians was deficient because the constitution of the Minnesota Chippewa Tribe does not authorize tribal officials to regulate child custody. Both the White Earth Band and the Fond du Lac Band are constituent bands of the Minnesota Chippewa Tribe.

Although Article I, § 3, of the constitution states that one of the purposes of the tribe is "to preserve and maintain justic for its members", the Field Solicitor concluded that such language did not delegate any authority to adjudicate child custody disputes to tribal officials in the absence of any language providing such authority either in Article V, which delegates specific powers to the Tribal Executive Committee, or in Article VI, which enumerates the powers of the reservation business committees. The Field Solicitor took the position that the Tribe would need to amend its constitution in order to authorize tribal courts to adjudicate child custody matters.

This office reviewed the Field Solicitor's advice in 1980 and informed the BIA that we agreed with it. On that basis, the BIA informed the chairman of the White Earth Reservation Business Committee that the Band's petition would not be approved. At the request of the Deputy Assistant Secretary--Indian Affairs, this office again reviewed the issue and concluded, in the attached memorandum dated September 30, 1980, that our previous advice was correct. We concluded that the intent of the constitution was to grant powers through Articles V and VI rather than through Article I or the Preamble. We also concluded that, although the Department should give great weight to a tribe's interpretation of its own constitution, the Department must exercise its own judgment in deciding whether to approve a reassumption petition under 25 U.S.C. § 1918.

We have reviewed the arguments of the Fond du Lac Band contained in both its March 25, 1986 letter and its March 14, 1986 briefing memo and again conclude that the Constitution of the Minnesota Chippewa Tribe must be amended before the Tribal Executive Committee or any of the Tribe's reservation business committees may authorize a tribal court to adjudicate child custody matters. Each of the Band's arguments is discussed below.

The Band cites language in Article VI, § 1(b), which authorizes reservation business committees to "make expenditures from Reservation funds for...Reservation purposes" and language in Article I, § 3 stating that one of the purposes of the Minnesota Chippewa Tribe is "...to preserve and maintain justice for its members...." The Band argues that the cited language authorizes the Fond du Lac Reservation Business Committee to expend money for the operation of a court that it has authorized to adjudicate child custody matters because the operation of such a court would "preserve and maintain justice".

The issue, however, is not whether the court can be funded, but whether it can exercise the power, for example, to remove a child permanently from the custody of his or her parents. Article I also provides that the purpose of the tribe is "...to promote the general welfare of the members of the Tribe...." To conclude, as the Band does, that the cited language in Article VI authorizes it to do anything that would further any of the purposes stated in Article I would make unnecessary the detailed listing of specific authorities contained in the remainder of Article VI. It is simply unreasonable to conclude that the drafters of the constitution intended to give virtually unlimited authority to reservation business committees by authorizing them to make expenditures for reservation purposes, but then proceeded to provide several paragraphs detailing explicit authorities that would clearly be subsumed under the categories "promoting the general welfare" or "maintaining justice". Such a conclusion is especially untenable since the U.S. Supreme Court rejected such

Jacob

an approach with respect to the United States Constitution long before the Constitution of the Minnesota Chippewa Tribe was adopted. Jacobsen v. Massachusetts, 197 U.S. 11, 22 (1905).

The Band points out that the Tribal Executive Committee responded to the 1980 Field Solicitor's opinion by issuing "Constitutional Interpretation No. 1" holding that it, as the "supreme executive, legislative and judicial body" of the tribe, had exclusive authority to interpret its constitution and then issued "Constitutional Interpretation No. 2" holding that both it and the reservation business committees have authority to establish courts. The Band cites Committee to Save our Constitution v. United States, No. 83-3011 (D. S.D. Feb. 24, 1984) (11 ILR 3035) (CSOC), for the proposition that the Interior Department is required to accept without question these interpretations of the tribal constitution.

The court in CSOC overstated the law when it concluded that a tribal court decision on a question of tribal law must "be accepted at face value". Id. at 3035. It is true that the Supreme Court concluded in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), that Congress intended to rely on tribal forums for the resolution of many Indian civil rights disputes. It is also true that the Eighth Circuit in Goodface v. Grassrope, 708 F.2d 335 (8th Cir. 1983), concluded that the BIA should recognize as Lower Brule tribal officials those persons who are recognized as entitled to govern the Tribe pursuant to a judgment entered by a tribal court. It does not follow from those decisions, however, that the BIA must always accept without question the decision of tribal forums on such issues.

Just as considerations of tribal sovereignty dictate that great deference be given to decisions of tribal forums on tribal government matters, considerations of federalism require federal courts to give great weight to the views of state courts on questions of state law. See e.g., Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 100 (1938). The Supreme Court has noted, however, that courts are not absolutely bound by state court decisions on matters of state law. For example, a state court may not preclude the U.S. Supreme Court from determining whether the state has unconstitutionally impaired the right of contract simply by ruling as a matter of state law that a contract never existed in the first place. Ibid. Neither is the Supreme Court bound by a state court decision that a litigant abandoned a constitutional claim in state court. Wright v. Georgia, 373 U.S. 284, 289 (1963).

In CSOC the BIA had made an independent decision to recognize the elected tribal council despite allegations it had been illegally elected. The court in CSOC upheld that decision because it happened to coincide with the most recent tribal court decision on the issue. Since the Interior Department prevailed, there was no opportunity for Interior to appeal. The Department, however, continued to assert that it is not required to accept decisions

of tribal forums without question in a subsequent related dispute involving the same tribe. In that case the United States Court of Appeals for the Eighth Circuit required those persons challenging tribal government action to exhaust administrative remedies within the Interior Department before taking their case to federal court. Runs After v. United States, 766 F.2d 347 (8th Cir. 1985). It is unlikely that court would have required exhaustion of remedies within the Interior Department if the Department were required to accept the decision of tribal government officials "at face value".

It is true that 25 U.S.C. § 1911 of the Indian Child Welfare Act confers certain jurisdiction on tribes over Indian child custody proceedings. That provision, however, does not, as the tribe suggests, authorize tribal officials to adjudicate such matters if those officials have not been delegated such authority by the tribal membership in the tribal constitution. Nothing in that section could be construed as preempting the prerogative of the tribal membership to decide whether or not to authorize its officials to exercise the jurisdiction that the tribe has.

The Band also argues that the Department was not authorized to express a view on the powers or authorities of the Minnesota Chippewa Tribe because the tribal constitution does not confer such authority on the Department. Interior's authority in this matter, however, is derived not from the tribal constitution but from 25 U.S.C. § 1918, which permits a tribe to reassume jurisdiction under the Indian Child Welfare Act, 25 U.S.C. §§ 1901 et seq., if the Secretary approves a petition submitted by the tribe. The regulation implementing that statute provides that the Assistant Secretary is to approve the tribal petition only if the tribal constitution authorizes the tribal governing body or bodies to exercise jurisdiction over Indian child custody matters. 25 C.F.R. § 13.12(a)(2).

Additionally, the Band takes the position that the Department should have returned the petition without action on the ground that it was unnecessary because the Minnesota Chippewa Tribe has never lost its jurisdiction over Indian child custody matters. The Solicitor has concluded that tribes that are, like the Minnesota Chippewa Tribe, subject to Public Law 83-280 share concurrent jurisdiction with the state on their reservations. 85 I.D. 433 (1978). Despite that ruling, however, tribes may wish to reassume jurisdiction formally in order to establish exclusive jurisdiction and jurisdiction that will not be questioned by state officials who may not accept the Solicitor's view of the law. See 25 C.F.R. § 13.1(b).

We disagree with the Band's assertion that the Department is obligated to construe the tribal constitution as broadly as possible because such a construction will benefit the tribe. If, as we have concluded, the tribal members have not decided to empower the tribal government to decide who should have custody of their children, it is not in the interest of those members for

the Department to acquiesce in the decision of tribal officials to assert such power. The usual rule requiring laws passed for the benefit of Indians to be construed liberally and all doubts to be resolved in favor of the Indians has no application where there are Indian interests on both sides of the issue. Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 655 n.7 (1976). The Department's decision preserves for the tribal membership the right to decide whether it wishes to accord to its government broad power over their family relations.

The Band complains that neither the Minnesota Chippewa Tribe nor any of its other bands were given notice of the White Earth petition before the Department acted on it. In fact, notice of receipt of the petition was published in the Federal Register on April 21, 1980, at 45 Fed. Reg. 26827. That notice states that the petition was under review and could be examined at the Minnesota Agency Office. In any case, the Department's action on the petition had no effect on any other reservation. While the reasoning of that decision may have some effect as precedent on other bands and, indeed, on tribes throughout the nation, the principles of due process do not require a forum to seek out and involve everyone in the nation who might be affected if the rule announced in a specific case is applied to other situations. Were it otherwise, the United States Supreme Court would be compelled to send personal notices to virtually everyone in the nation before considering many of the cases it decides that involve broad constitutional issues.

Finally, the Band points out that the BIA is funding a complete criminal justice system on the Bois Forte Reservation, which is also part of the Minnesota Chippewa Tribe and has funded certain special purpose courts on other reservations of the Tribe. The court at Bois Forte is a CFR court operated by the BIA to administer justice for a band that lacks its own courts. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 64 n.17 (1978). That court is functioning, not pursuant to the Constitution of the Minnesota Chippewa Tribe but pursuant to Interior Department regulations adopted pursuant to 25 U.S.C. §§ 2 and 9, see United States v. Eberhardt, 789 F.2d 1354, 1359 (1986), and pursuant to the Department's annual appropriations act, see Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 196 n.7 (1978).

The Department encourages the establishment of tribal courts to provide due process with respect to any matter over which the tribe has jurisdiction. For that reason courts with jurisdiction over the exercise of tribal hunting and fishing rights, for example, have been funded because Article V, § 1(f) and Article VI, § 1(c) authorize the Tribal Executive Committee and the reservation business committees respectively to administer tribal assets. Similarly, regulation of business on the reservation is authorized by Article V, § 1(g) and Article VI, § 1(d). Funding for tribal courts to exercise jurisdiction over such matters is consistent with the conclusion in the Field Solicitor's opinion that such courts may not adjudicate child custody matters.

For these reason, we reaffirm our earlier conclusion that the constitution must be amended before the tribal government may exercise jurisdiction over child custody disputes.

Tim Vollmann

Wefald & Baer

Attorneys at Law

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331 Sixth Street
Hawley, Minnesota 56549

MAGNUS WEFALD, (1900-1991)
ZENAS BAER
RANDALL KNUTSON

"QUALITY LEGAL SERVICES SINCE 1929"

(218) 483-3372

Legal Assistant
Judy Aarsvold

Fax (218) 483-4989

M E M O R A N D U M

To: Senator Paul Wellstone

From: Zenas Baer

Subject: Memo in Opposition to S.521 "To Assist the Development of Tribal Judicial Systems and for Other Purposes"

Date: July 7, 1993

I. INTRODUCTION

S.521 a/k/a "Indian Tribal Justice Act" sets out a method of establishing a tribal justice system for the several Indian tribes in the United States. The bill makes certain findings which include a recognition that Congress, through statutes, treaties and administrative authorities, has recognized the self-determination, self-reliance, and "inherent sovereignty of Indian tribes." (S.521 Sec. 102(2) The bill goes on to recognize that tribes possess the "inherent authority to establish their own form of government, including tribal justice systems".

S.521 is designed to further develop a judicial system within the tribes with the statutory blessing of Congress.

This memorandum will address several points which should assist Congress in determining the wisdom of the enactment of S.521 without also amending the Indian Civil Rights Act codified at 25 U.S.C. §1301 through §1303 to include a separate waiver of

sovereign immunity for enforcement of the Indian Civil Rights Act (hereinafter ICRA).

Presently, Native Americans who are oppressed by a corrupt government which repeatedly violates the constitutional rights guaranteed by 25 U.S.C. §1302 are powerless. The Supreme Court of the United States has ruled that no waiver of sovereign immunity can be implied by the passage of the ICRA, and in the absence of an express waiver, the Supreme Court will not imply such waiver to enforce the provisions of the clear statutory intent. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 L. Ed. 2d 106, 98 S. Ct. 1670 (1978).

Unless Congress, in conjunction with passage of S.521 amends the ICRA to include a specific waiver of sovereign immunity for the enforcement of the ICRA, Congress is merely perpetuating an already unjust system. Without amendment of the ICRA to provide for waiver of sovereign immunity for the enforcement, the government of the several Indian tribes could be tyrannies, dictatorships, or autocratic. The proposed bill, S.521, recognizes that "Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems;" S.521 Sec. 102(3). A literal reading of this finding would suggest that Indian tribes have the inherent authority to establish a dictatorship or some other nondemocratic form of government, including a tribal justice system to perpetuate the nondemocratic

form of government. Unless an amendment to S.521 or the ICRA accompanies the grant of authority for the establishment of the tribal justice system, the United States Government is participating in the oppressing of peoples who dare to disagree with the tribal leadership.

With specific reference to the White Earth Reservation in Minnesota, the bill would be extremely detrimental to the silent majority. The White Earth Tribe is governed by the Revised Constitution and Bylaws of the Minnesota Chippewa Tribe as amended September 12, 1963.

Although the Revised Constitution and Bylaws of the Minnesota Chippewa Tribe provides for significant constitutional protections for members of the tribe, there is no forum to enforce those rights. The leadership arbitrarily violates the rights guaranteed to the members of the White Earth Band. There are repeated allegations of voting fraud, which go uninvestigated and unchallenged because there is no forum wherein such voting irregularities can be challenged. The election board of appeals is completely controlled by the tribal leadership. It has no independent authority, and if a tribal judge rules against the wishes of the tribal leadership, tribal leadership simply dismisses the judge and appoints another judge to obtain a favorable decision. No appeal can be taken from the actions of the tribal leaders.

The Chippewa Tribal Constitution grants the right of any member of the tribe to inspect the books and records of the tribe. Bylaws, Art. 1, Sec. 4. Although the constitutional right exists, members of the White Earth Band are repeatedly denied access to an inspection of the accounts, properties and business transactions of the tribe. Since there is no forum wherein to register these complaints, it becomes a right without a remedy.

I would urge the Senate to oppose the passage of S.521 unless it amends it or the Indian Civil Rights Act to contain a specific waiver of sovereign immunity for enforcement of the constitutional rights by Native Americans.

Respectfully submitted,

WEFALD & BAER

By _____
Zenas Baer

Exhibit 4

The Minnesota Chippewa Tribe

P.O. BOX 217 — CASS LAKE, MINNESOTA 56633-0217

Administration 218-335-8581
Home Loan 218-335-8582
Economic Development 218-335-8583
Education 218-335-8584
Human Services 218-335-8585
Water Quality 218-335-6300

TELEFAX 218-335-6562

May 31, 1994

tribal membership did not consent

was speaking for himself

The Honorable Ada Deer
Assistant Secretary, Indian Affairs
U.S. Department of the Interior
1849 C Street Northwest
MS 4140 MIB
Washington D.C. 20240

re: MCT Determination that the Opinions, Memorandums, or missives from the Department of the Interior regarding MCT Tribal Courts and which are dated June 10, 1980, and; September 30, 1980, and; July 31, 1988, and; December 21, 1990 and; August 11, 1993, have no force or effect.

Dear Assistant Secretary Deer:

We, the Membership of the Minnesota Chippewa Tribe, are writing to advise you that as of today, various past Departmental determinations which would diminish the scope of tribal authorities of the Minnesota Chippewa Tribe (MCT) and its Constituent Bands officially have no force or effect.

As you may recall, you received a letter from the MCT dated March 16, 1994 requesting your immediate assistance in reversing various positions by the Solicitor beginning in 1980 which claimed that the MCT Constitution was not explicit enough to authorize reassumption of Indian Child Welfare Act (ICWA) jurisdiction as is provided by the ICWA. As you know, we took issue with these opinions because our Constitution contains an explicit provision authorizing the Tribe and Bands to "preserve and maintain justice" over tribal members. Despite this clear constitutional and inherent sovereign authority, the Department refused to acknowledge our governmental right to exercise Indian Child Welfare authorities and advised us to amend our Constitution. We have steadfastly refused to do so as it is unnecessary. The TEC opposed the opinion citing it as being an unauthorized interpretation of our Constitution, and further asserted that the Bands have always maintained the sovereign authority to establish and operate tribal court systems as an inherent sovereign authority, rather than one delegated by the federal government.

When we received notice that your office had carried this encroachment several steps further by refusing to recognize a Tribal Court currently under the MCT Constitution, we requested that you agree to meet with all tribal chairs of the MCT immediately to discuss this critical issue. The following Members of Congress requested the same:

The Honorable Bill Richardson, March 11, 1994
The Honorable Craig Thomas, March 15, 1994
The Honorable John McCain, March 3, 1994
The Honorable Paul Wellstone, March 16, 1994
The Honroable Jim Oberstar, March 9, 1994

However, we received no response from your office regarding our meeting request until late April, when we were verbally notified that you could not meet with us in the near future. We were further informed that the Associate Solicitor was once again conducting a review of our Constitution.

This review is no longer necessary, as a result of congressional passage of S.1654 which amends the Indian Reorganization Act of June 18, 1934, (25 U.S.C. 461 et seq., 48 Stat. 984). President Clinton has now signed S.1654 into law. The law states:

"Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on the date of enactment of this Act and that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes has no force or effect."

Your decision refusing to recognize tribal courts established pursuant to the Constitution of the Minnesota Chippewa Tribe was without question an administrative diminishment of the privileges of the Bands relative to other federally recognized tribes. As Senator McCain said in remarks accompanying S.1654:

"Indian tribes exercise powers of self-governance by reason of their inherent sovereignty and not by virtue of a delegation of authority from the federal government."

Senator Inouye agreed with his remark, saying:

> "Our amendment makes it clear that it is and has always been federal law and policy that Indian tribes recognized by the federal government stand on an equal footing to each other and to the federal government. That is, each federally recognized Indian tribe has the same governmental status as Indian tribes with a government-to-government relationship with the United States. Each federally recognized Indian tribe is entitled to the same privileges and immunities as do other federally recognized tribes and have the right to exercise the same inherent and delegated authorities.

We applaud both Senators Inouye and McCain for their remarks and agree completely. In addition, we applaud Representatives Bill Richardson and Craig Thomas for their concurrence and swift action in this regard. We have been advised by both House and Senate staff that S.1654 applies in our instance and effectively makes null and void the Department's intrusive determinations about the scope of our court authorities.

Accordingly, we further advise the Department that the MCT and individual Bands shall continue to exercise all such court authorities as are determined by the TEC to be authorized by the Constitution of the Minnesota Chippewa Tribe, or a matter of the inherent, sovereign governing rights of each Band. We shall not abide by any past unauthorized Departmental interpretations of our Constitution. Nor, in fact, did we ever abide by the Department's position and cease exercising our inherent sovereign rights including the active exercise of Indian Child Welfare jurisdiction. We also expect that the Department will now fund 638 contracts for the delivery of judicial services through tribal or band courts.

In summary, the Opinions, Memorandums, or missives from the Department and which are dated June 10, 1980, and; September 30, 1980, and; July 31, 1988, and; December 21, 1990, and; August 11, 1993, have no force or effect.

If you should wish to affirm the above, we would be pleased to accept such correspondence. Otherwise, we are in no further need of assistance from your office with regard to this issue.

Sincerely,

THE MINNESOTA CHIPPEWA TRIBE

Darrell Wadena, President

cc:
The Honorable Daniel K. Inouye
The Honorable John McCain
The Honorable Bill Richardson
The Honorable Craig Thomas
The Honorable Paul Wellstone
The Honorable Jim Oberstar
The Honorable Bruce Babbitt
Mr. John Duffy
Mr. John Lesche
Mr. Michael Anderson
Ms. Penny Coleman
Mr. Walt Mills
Ms. Faith Roessel

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

TAKE PRIDE IN AMERICA

Rec from Judy Mo 9/28/94

SEP 20 1994

Honorable Norman Deschampe
President, Minnesota Chippewa Tribe
P.O. Box 217
Cass Lake, Minnesota 56633-0217

Dear President Deschampe:

This is in response to Mr. Darrell Wadena's letter of May 31, 1994, regarding the effect of the amendments to the Indian Reorganization Act contained in P. L. 103-263 on our review of the Minnesota Chippewa constitution. We apologize for the delay in responding to your request.

We are pleased to inform you that the Associate Solicitor - Indian Affairs, Department of the Interior (Department), has reviewed the prior opinions of the Office of the Solicitor and that of the Field Solicitor and concluded a constitutional amendment is not necessary to the establishment of tribal courts. Citing general principles of law, the Associate Solicitor - Indian Affairs indicated the Department should give deference to a Tribe's interpretation of its own constitution. Even greater weight will be given to a Tribe's interpretation that is the result of or subject to tribal constitutional safeguards and checks and balances.

Having found such safeguards in the Minnesota Chippewa constitution, the Tribe's interpretation has been given decisive weight. In light of this determination, a correction deleting Bois Forte from 25 CFR §11.100, Listing of Courts of Indian Offenses, has been prepared and will be published in the FEDERAL REGISTER in the near future. Bois Forte Band has been contracting the administration of the court and will continue to do so.

We look forward to working with the Minnesota Chippewa courts.

Sincerely,

Ada E. Deer

Ada E. Deer
Assistant Secretary - Indian Affairs

cc: Director, Minneapolis Area Office

Jacobson, Buffalo, Schoessler & Magnuson, Ltd.

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*Also admitted in Wisconsin

September 28, 1994

Gary S. Frazer
Executive Director
The Minnesota Chippewa Tribe
P.O. Box 217
Cass Lake, Minnesota 56633-0217

Re: Ada Deer Letter About Tribal Court Jurisdiction

Dear Gary:

The Department of the Interior finally sent to the Tribe the long-awaited letter about tribal court jurisdiction. The letter is attached.

The letter accomplishes what we want. It overturns the old Solicitor's letters which had said that no courts could be set up without a change in the tribal constitution. The letter is short--as we had asked--so there won't be lots of legal analysis to debate. It makes some excellent statements about the Department giving deference to the Tribes' interpretation of its own constitution. By recognizing the Bois Forte Band court (and removing it from the list of Courts of Indian Offenses), the letter acknowledges the validity of Band courts.

The letter focusses on the Tribe, because that is what the old opinions focussed on. It supports, however, the Tribe's view on Band courts since it supports the Tribe's interpretation of its own constitution. The acknowledgment of the Bois Forte court illustrates this.

This is a major victory for the Tribe and Bands. To minimize the possibility of any future confusion or debate, however, I would still recommend that the TEC pass a resolution acknowledging the validity of Band courts so that no one can claim that somehow those courts violate tribal law.

Very truly yours,

James M. Schoessler

E3050.055

Exhibit 4

Darrell Wadena,
Chairman

Jerry Rawley,
Secretary/Treasurer

WHITE EARTH

RESERVATION
TRIBAL
COUNCIL

P.O. Box 418
(218) 983-3285

WHITE EARTH, MINNESOTA 56591

July 28, 1995

U.S. Department of Justice
COPS Universal Hiring Program
633 Indiana Avenue, NW, 3rd Floor
Washington D.C. 20531

ATTN: COPS Universal Hiring Program

Enclosed is the White Earth Reservation Tribal Council's COPS Universal Hiring application in which the tribe is requesting dollars to hire one police officer who will be dedicated to providing community policing on tribal trust land. The White Earth Reservation is 1300 square miles and encompasses three counties in the State of Minnesota. The reservation includes portions of Becker and Clearwater counties and all of Mahnomen county.

Jurisdiction for the Community Policing officer would be upon 116 square miles of tribal trust land. This land includes 6 Indian communities scattered throughout the reservation (Map attached). Native American population is 4,497 according to the 1993 BIA Labor Force Report. The tribe does not have a law enforcement executive officer or law enforcement department. The monies available for a police officer position will allow the tribe to initiate a police department and potential cross-jurisdiction agreements.

The White Earth Reservation is currently subject to the State of Minnesota's jurisdiction. Tribal members in Becker county are within the 7th Judicial District, while Mahnomen and Clearwater county residents are within the 9th Judicial District. The State of Minnesota was one of several states in which Public Law 280 was enacted in 1953. Under this law states were mandated to assume jurisdiction over crime in "Indian Country". States were displeased with the law because they were not given additional money; tribes were displeased because they saw no benefit, loss of rights and inequitable treatment. Today, the three counties which encompass the reservation do not have adequate dollars to provide law and order to Indian communities and the tribe has no mechanism to enforce laws on the White Earth Reservation.

In 1968 Congress amended P.L. 280 to allow states to give jurisdiction back to the federal government. This process is known as "retrocession". Tribes and/or states can request the

retrocession of jurisdiction to the federal government. Before this can be accomplished the tribe must prepare to assume jurisdiction through a lengthy and complex process. The White Earth Band of Chippewa Indians are currently preparing for the assumption of civil and criminal jurisdiction and/or concurrent jurisdiction with the State of Minnesota on the White Earth Reservation.

The COPS Universal Hiring program will allow the tribe to initiate a police department by hiring a police officer to provide community policing on tribal trust land. When "Retrocession" occurs and the tribe is allowed to establish a judicial system, this police officer will become the Law Enforcement Executive officer. The tribe anticipates the establishment of our tribal court and law enforcement department in 1997.

The White Earth Reservation Tribal Council is committed to the establishment of a law enforcement department to serve tribal members on the White Earth Reservation. Upon expenditure of COPS Universal Hiring grant funds, the White Earth Reservation Tribal Council will fund the Community Policing police officer position full time and at the established salary rate.

Thank you for your consideration of this application and I look forward to your reply. If your department has questions or needs further information, please contact the Planning Department at (218)983-3285 ext. 235.

Sincerely,

Darrell Wadena

Darrell Wadena
Chairman

cc: file

attachments

This is the case a challange do to "ada Deer" letter and state statute could be made under

U.S. Supreme Court

JACOBSON v. COM. OF MASSACHUSETTS, 197 U.S. 11 (1905)

197 U.S. 11

HENNING JACOBSON, Plff. in Err.,
v.
COMMONWEALTH OF MASSACHUSETTS.
No. 70.

Argued December 6, 1904.
Decided February 20, 1905.

[197 U.S. 11, 12] This case involves the validity, under the Constitution of the United States, of certain provisions in the statutes of Massachusetts relating to vaccination.

The Revised Laws of that commonwealth, chap. 75, 137, provide that 'the board of health of a city or town, if, in its opinion, it is necessary for the public health or safety, shall require and enforce the vaccination and revaccination of all the inhabitants thereof, and shall provide them with the means of free vaccination. Whoever, being over twenty-one years of age and not under guardianship, refuses or neglects to comply with such requirement shall forfeit $5.'

An exception is made in favor of 'children who present a certificate, signed by a registered physician, that they are unfit subjects for vaccination.' 139.

Proceeding under the above statutes, the board of health of the city of Cambridge, Massachusetts, on the 27th day of February, 1902, adopted the following regulation: 'Whereas, smallpox has been prevalent to some extent in the city of Cambridge, and still continues to increase; and whereas, it is necessary for the speedy extermination of the disease that all persons not protected by vaccination should be vaccinated; and whereas, in the opinion of the board, the public health and safety require the vaccination or revaccination of all the inhabitants of Cambridge; be it ordered, that [197 U.S. 11, 13] all the inhabitants habitants of the city who have not been successfully vaccinated since March 1st, 1897,

be vaccinated or revaccinated.'

Subsequently, the board adopted an additional regulation empowering a named physician to enforce the vaccination of persons as directed by the board at its special meeting of February 27th.

The above regulations being in force, the plaintiff in error, Jacobson, was proceeded against by a criminal complaint in one of the inferior courts of Massachusetts. The complaint charged that on the 17th day of July, 1902, the board of health of Cambridge, being of the opinion that it was necessary for the public health and safety, required the vaccination and revaccination of all the inhabitants thereof who had not been successfully vaccinated since the 1st day of March, 1897, and provided them with the means of free vaccination; and that the defendant, being over twenty-one years of age and not under guardianship, refused and neglected to comply with such requirement.

The defendant, having been arraigned, pleaded not guilty. The government put in evidence the above regulations adopted by the board of health, and made proof tending to show that its chairman informed the defendant that, by refusing to be vaccinated, he would incur the penalty provided by the statute, and would be prosecuted therefor; that he offered to vaccinate the defendant without expense to him; and that the offer was declined, and defendant refused to be vaccinated.

The prosecution having introduced no other evidence, the defendant made numerous offers of proof. But the trial court ruled that each and all of the facts offered to be proved by the defendant were immaterial, and excluded all proof of them.

The defendant, standing upon his offers of proof, and introducing no evidence, asked numerous instructions to the jury, among which were the following:

That 137 of chapter 75 of the Revised Laws of Massachusetts was in derogation of the rights secured to the defendant by the preamble to the Constitution of the United [197 U.S. 11, 14] States, and tended to subvert and defeat the purposes of the Constitution as declared in its preamble;

That the section referred to was in derogation of the rights secured to the defendant by the 14th Amendment of the Constitution of the United States, and especially of the clauses of that amendment providing that no state shall make or enforce any law abridging the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; and

That said section was opposed to the spirit of the Constitution.

Each of defendant's prayers for instructions was rejected, and he duly excepted. The defendant requested the court, but the court refused, to instruct the jury to return a verdict of not guilty. And the court instructed structed the jury, in substance, that, if they believed the evidence introduced by the commonwealth, and were satisfied beyond a reasonable doubt that the defendant was guilty of the offense charged in the complaint, they would be warranted in finding a verdict of guilty. A verdict of guilty was thereupon returned.

The case was then continued for the opinion of the supreme judicial court of Massachusetts. Santa F e Pacific Railroad Company, the exceptions, sustained the action of the trial court, and thereafter, pursuant to the verdict of the jury, he was sentenced by the court to pay a fine of $5. And the court ordered that he stand committed until the fine was paid.

Messrs. George Fred Williams and James A. Halloran for plaintiff in error.

[197 U.S. 11, 18] Messrs. Frederick H. Nash and Herbert Parker for defendant in error.

[197 U.S. 11, 22]

Mr. Justice Harlan delivered the opinion of the court:

We pass without extended discussion the suggestion that the particular section of the statute of Massachusetts now in question (137, chap. 75) is in derogation of rights secured by the preamble of the Constitution of the United States. Although that preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the government of the United States, or on any of its departments. Such powers embrace only those expressly granted in the body of the Constitution, and such as may be implied from those so granted. Although, therefore, one of the declared objects of the Constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States, unless, apart from the preamble, it be found in some express delegation of power, or in some power to be properly implied therefrom. 1 Story, Const. 462.

We also pass without discussion the suggestion that the above section of the statute is opposed to the spirit of the Constitution. Undoubtedly, as observed by Chief Justice Marshall, speaking for the court in Sturges v. Crowninshield, 4 Wheat. 122, 202, 4 L. ed. 529, 550, 'the spirit of an instrument, especially of a constitution, is to be respected not less than its letter; yet the spirit is to be collected chiefly from its words.' We have no need in this case to go beyond the plain, obvious meaning of the words in those provisions of the Constitution which, it is contended, must control our decision.

What, according to the judgment of the state court, are the [197 U.S. 11, 23] scope and effect of the statute? What results were intended to be accomplished by it? These questions must be answered.

The supreme judicial court of Massachusetts said in the present case: 'Let us consider the offer of evidence which was made by the defendant Jacobson. The ninth of the propositions which he offered to prove, as to what vaccination consists of, is nothing more than a fact of common knowledge, upon which the statute is founded, and proof of it was unnecessary and immaterial. The thirteenth and fourteenth involved matters depending upon his personal opinion, which could not be taken as correct, or given effect, merely because he made it a ground of refusal to comply with the requirement. Moreover, his views could not affect the validity of the statute, nor entitle him to be excepted from its provisions. Com. v. Connolly, 163 Mass. 539, 40 N. E. 862; Com. v. Has, 122 Mass. 40; Reynolds v. United States, 98 U.S. 145 , 25 L. ed. 244; Reg. v. Downes, 13 Cox, C. C. 111. The other eleven propositions all relate to alleged injurious or dangerous effects of vaccination. The defendant 'offered to prove and show be competent evidence' these socalled facts. Each of them, in its nature, is such that it cannot be stated as a truth, otherwise than as a matter of opinion. The only 'competent evidence' that could be presented to the court to prove these propositions was the testimony of experts, giving their opinions. It would not have been competent to introduce the medical history of individual cases. Assuming that medical experts could have been found who would have testified in support of these propositions, and that it had become the duty of the judge, in accordance with the law as stated in Com. v. Anthes, 5 Gray, 185, to instruct the jury as to whether or not the statute is constitutional, he would have been obliged to consider the evidence in connection with facts of common knowledge, which the court will always regard in passing upon the constitutionality of a statute. He would have considered this testimony of experts in connection with the facts that for nearly a century most of the members of the medical profession [197 U.S. 11, 24] have regarded vaccination, repeated after intervals, as a preventive of smallpox; that, while they have recognized the possibility of injury to an individual from carelessness in the performance of it, or even in a conceivable case without carelessness, they generally have considered the risk of such an injury too small to be seriously weighed as against the benefits coming from the discreet and proper use of the preventive; and that not only the medical profession and the people generally have for a long time entertained these opinions, but legislatures and courts have acted upon them with general unanimity. If the defendant had been permitted to introduce such expert testimony as he had in support of these several propositions, it could not have changed the result. It would not have justified the court in holding that the legislature had transcended

its power in enacting this statute on their judgment of what the welfare of the people demands.' Com. v. Jacobson, 183 Mass. 242, 66 N. E. 719.

While the mere rejection of defendant's offers of proof does not strictly present a Federal question, we may properly regard the exclusion of evidence upon the ground of its incompetency or immateriality under the statute as showing what, in the opinion of the state court, are the scope and meaning of the statute. Taking the above observations of the state court as indicating the scope of the statute,-and such is our duty. Leffingwell v. Warren, 2 Black, 599, 603, 17 L. ed. 261. 262; Morley v. Lake Shore & M. S. R. Co. 146 U.S. 162, 167 , 36 S. L. ed. 925, 928, 13 Sup. Ct. Rep. 54; Tullis v. Lake Erie & W. R. Co. 175 U.S. 348 , 44 L. ed. 192, 20 Sup. Ct. Rep. 136; W. W. Cargill Co. v. Minnesota, 180 U.S. 452, 466 , 45 S. L. ed. 619, 625, 21 Sup. Ct. Rep. 423,-we assume, for the purposes of the present inquiry, that its provisions require, at least as a general rule, that adults not under the guardianship and remaining within the limits of the city of Cambridge must submit to the regulation adopted by the board of health. Is the statute, so construed, therefore, inconsistent with the liberty which the Constitution of the United States secures to every person against deprivation by the state?

The authority of the state to enact this statute is to be [197 U.S. 11, 25] referred to what is commonly called the police power,-a power which the state did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained frained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a state to enact quarantine laws and 'health laws of every description;' indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other states. According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety. Gibbons v. Ogden, 9 Wheat. 1, 203, 6 L. ed. 23, 71; Hannibal & St. J. R. Co. v. Husen, 95 U.S. 465, 470 , 24 S. L. ed. 527, 530; Boston Beer Co. v. Massachusetts, 97 U.S. 25 , 24 L. ed. 989;New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U.S. 650, 661 , 29 S. L. ed. 516, 520, 6 Sup. Ct. Rep. 252; Lawson v. Stecle, 152 U.S. 133 , 38 L. ed. 385, 14 Sup. Ct. Rep. 499. It is equally true that the state may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health and the public safety. The mode or manner in which those results are to be accomplished is within the discretion of the state, subject, of course, so far as Federal power is concerned, only to the condition that no rule prescribed by a state, nor any regulation adopted by a local governmental agency acting under the sanction of state legislation, shall contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument. A local enactment or regulation, even if based on the acknowledged police powers of a state, must always yield in case of conflict with the exercise by the general government of any power it possesses under the Constitution, or with any right which that instrument gives or secures. Gibbons v. Ogden, 9 Wheat. 1, 210, 6 L. ed. 23, 73; Sinnot v. Davenport, 22 How. 227, 243, 16 L. ed. 243, 247; Missouri, K. & T. R. Co. v. Haber, 169 U.S. 613, 626 , 42 S. L. ed. 878, 882, 18 Sup. Ct. Rep. 488.

We come, then, to inquire whether any right given or secured by the Constitution is invaded by the statute as [197 U.S. 11, 26] interpreted by the state court. The defendant insists that his liberty is invaded when the state subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory vaccination law is unreasonable, arbitrary, and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person. But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that 'persons

and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned.' Hannibal & St. J. R. Co. v. Husen, 95 U.S. 465, 471 , 24 S. L. ed. 527, 530; Missouri, K. & T. R. Co. v. Haber, 169 U.S. 613, 628 , 629 S., 42 L. ed. 878- 883, 18 Sup. Ct. Rep. 488; Thorpe v. Rutland & B. R. Co. 27 Vt. 148, 62 Am. Dec. 625. In Crowley v. Christensen, 137 U.S. 86, 89 , 34 S. L. ed. 620, 621, 11 Sup. Ct. Rep. 13, we said: 'The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty [197 U.S. 11, 27] itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law.' In the Constitution of Massachusetts adopted in 1780 it was laid down as a fundamental principle of the social compact that the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for 'the common good,' and that government is instituted 'for the common good, for the protection, safety, prosperity, and happiness of the people, and not for the profit, honor, or private interests of any one man, family, or class of men.' The good and welfare of the commonwealth, of which the legislature is primarily the judge, is the basis on which the police power rests in Massachusetts. Com. v. Alger, 7 Cush. 84.

Applying these principles to the present case, it is to be observed that the legislature of Massachusetts required the inhabitants of a city or town to be vaccinated only when, in the opinion of the board of health, that was necessary for the public health or the public safety. The authority to determine for all what ought to be done in such an emergency must have been lodged somewhere or in some body; and surely it was appropriate for the legislature to refer that question, in the first instance, to a board of health composed of persons residing in the locality affected, and appointed, presumably, because of their fitness to determine such questions. To invest such a body with authority over such matters was not an unusual, nor an unreasonable or arbitrary, requirement. Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members. It is to be observed that when the regulation in question was adopted smallpox, according to the recitals in the regulation adopted by the board of health, was prevalent to some extent in the city of Cambridge, and the disease was increasing. If such was [197 U.S. 11, 28] the situation,-and nothing is asserted or appears in the record to the contrary,-if we are to attach, any value whatever to the knowledge which, it is safe to affirm, in common to all civilized peoples touching smallpox and the methods most usually employed to eradicate that disease, it cannot be adjudged that the present regulation of the board of health was not necessary in order to protect the public health and secure the public safety. Smallpox being prevalent and increasing at Cambridge, the court would usurp the functions of another branch of government if it adjudged, as matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary, and not justified by the necessities of the case. We say necessities of the case, because it might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons. Wisconsin, M. & P. R. Co. v. Jacobson, 179 U.S. 287, 301 , 45 S. L. ed. 194, 201, 21 Sup. Ct. Rep. 115; 1 Dill. Mun. Corp. 4th ed. 319-325, and authorities in notes; Freurid, Police Power, 63 et seq. In Hannibal & St. J. R. Co. v. Husen, 95 U.S. 465 , 471-473, 24 L. ed. 527, 530, 531, this court recognized the right of a state to pass sanitary laws, laws for the protection of life, liberty, health, or property within its limits, laws to prevent persons and animals suffering under contagious or infectious diseases, or convicts, from coming within its borders. But, as the laws there involved went beyond the necessity of the case, and, under the guise of exerting a police power, invaded the domain of Federal authority, and violated rights secured by the Constitution, this court deemed it to be its duty to hold such laws invalid. If the mode adopted by the commonwealth of Massachusetts for the protection of its local communities against smallpox proved to be distressing, inconvenient, or objectionable to some,-if nothing more could be reasonably [197 U.S. 11, 29] affirmed of the statute in question,-the answer is that it was the duty of the constituted authorities primarily to keep in view the welfare,

comfort, and safety of the many, and not permit the interests of the many to be subordinated to the wishes or convenience of the few. There is, of course, a sphere within which the individual may assert the supremacy of his own will, and rightfully dispute the authority of any human government,- especially of any free government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand. An American citizen arriving at an American port on a vessel in which, during the voyage, there had been cases of yellow fever or Asiatic cholera, he, although apparently free from disease himself, may yet, in some circumstances, be held in quarantine against his will on board of such vessel or in a quarantine station, until it be ascertained by inspection, conducted with due diligence, that the danger of the spread of the disease among the community at large has disappeared. The liberty secured by the 14th Amendment, this court has said, consists, in part, in the right of a person 'to live and work where he will' (Allgeyer v. Louisiana, 165 U.S. 578 , 41 L. ed. 832, 17 Sup. Ct. Rep. 427); and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense. It is not, therefore, true that the power of the public to guard itself against imminent danger depends in every case involving the control of one's body upon his willingness to submit to reasonable regulations established by the constituted authorities, under the [197 U.S. 11, 30] sanction of the state, for the purpose of protecting the public collectively against such danger.

It is said, however, that the statute, as interpreted by the state court, although making an exception in favor of children certified by a registered physician to be unfit subjects for vaccination, makes no exception in case of adults in like condition. But this cannot be deemed a denial of the equal protection of the laws to adults; for the statute is applicable equally to all in like condition, and there are obviously reasons why regulations may be appropriate for adults which could not be safely applied to persons of tender years.

Looking at the propositions embodied in the defendant's rejected offers of proof, it is clear that they are more formidable by their number than by their inherent value. Those offers in the main seem to have had no purpose except to state the general theory of those of the medical profession who attach little or no value to vaccination as a means of preventing the spread of smallpox, or who think that vaccination causes other diseases of the body. What everybody knows the court must know, and therefore the state court judicially knew, as this court knows, that an opposite theory accords with the common belief, and is maintained by high medical authority. We must assume that, when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them. It was not compelled to commit a matter involving the public health and safety to the final decision of a court or jury. It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain. It could not properly abdicate its function to guard the public health and safety. The state legislature proceeded upon the theory which recognized vaccination as at least an effective, if not the best-known, way in which to meet and suppress the [197 U.S. 11, 31] evils of a smallpox epidemic that imperiled an entire population. Upon what sound principles as to the relations existing between the different departments of government can the court review this action of the legislature? If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution. Mugler v. Kansas, 123 U.S. 623, 661 , 31 S. L. ed. 205, 210, 8 Sup. Ct. Rep. 273; Minnesota v. Barber, 136 U.S. 313, 320 , 34 S. L. ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Atkin v. Kansas, 191 U.S. 207, 223 , 48 S. L. ed. 148, 158, 24 Sup. Ct. Rep. 124.

Whatever may be thought of the expediency of this statute, it cannot be affirmed to be, beyond question, in palpable conflict with the Constitution. Nor, in view of the methods employed to stamp out the disease of smallpox, can anyone confidently assert that the means prescribed by the state to that end has no real or substantial relation to the protection of the public health and the public safety. Such an assertion would not be consistent with the experience of this and other countries whose authorities have dealt with the disease of smallpox. And the principle of vaccination as a means to [197 U.S. 11, 32] prevent the spread of smallpox has been enforced in many states by statutes making the vaccination of children a condition of their right to enter or remain in public schools. Blue v. Beach, 155 Ind. 121, 50 L. R. A. 64, 80 Am. St. Rep. 195, 56 N. E. 89; Morris v. Columbus, 102 [197 U.S. 11, 33] Ga. 792, 42 L. R. A. 175, 66 Am. St. Rep. 243, 30 S. E. 850; State v. Hay, 126 N. C. 999, 49 L. R. A. 588, 78 Am. St. Rep. 691, 35 S. E. 459; Abeel v. Clark, 84 Cal. 226, 24 Pac. 383; Bissell v. Davison, 65 Conn. 183, 29 L. R. A. 251, 32 Atl. 348; Hazen v. Strong, 2 Vt. 427; Duffield v. Williamsport School District, 162 Pa. 476, 25 L. R. A. 152, 29 Atl. 742. [197 U.S. 11, 34] The latest case upon the subject of which we are aware is Viemester v. White, decided very recently by the court of appeals of New York. That case involved the validity of a statute excluding from the public schools all children who had not been vacinated. One contention was that the statute and the regulation adopted in exercise of its provisions was inconsistent with the rights, privileges, and liberties of the citizen. The contention was overruled, the court saying, among other things: 'Smallpox is known of all to be a dangerous and contagious disease. If vaccination strongly tends to prevent the transmission or spread of this disease, it logically follows that children may be refused admission to the public schools until they have been vaccinated. The appellant claims that vaccination does not tend to prevent smallpox, but tends to bring about other diseases, and that it does much harm, with no good. It must be conceded that some laymen, both learned and unlearned, and some physicians of great skill and repute, do not believe that vaccination is a preventive of smallpox. The common belief, however, is that it has a decided tendency to prevent the spread of this fearful disease, and to render it less dangerous to those who contract it. While not accepted by all, it is accepted by the mass of the people, as well as by most members of the medical profession. It has been general in our state, and in most civilized nations for generations. It is [197 U.S. 11, 35] generally accepted in theory, and generally applied in practice, both by the voluntary action of the people, and in obedience to the command of law. Nearly every state in the Union has statutes to encourage, or directly or indirectly to require, vaccination; and this is true of most nations of Europe. . . . A common belief, like common knowledge, does not require evidence to establish its existence, but may be acted upon without proof by the legislature and the courts.. . . The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases. In a free country, where the government is by the people, through their chosen representatives, practical legislation admits of no other standard of action, for what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not. Any other basis would conflict with the spirit of the Constitution, and would sanction measures opposed to a Republican form of government. While we do not decide, and cannot decide, that vaccination is a preventive of smallpox, we take judicial notice of the fact that this is the common belief of the people of the state, and, with this fact as a foundation, we hold that the statute in question is a health law, enacted in a reasonable and proper exercise of the police power.' 179 N. Y. 235, 72 N. E. 97.

Since, then, vaccination, as a means of protecting a community against smallpox, finds strong support in the experience of this and other countries, no court, much less a jury, is justified in disregarding the action of the legislature simply because in its or their opinion that particular method was-perhaps, or possibly-not the best either for children or adults.

Did the offers of proof made by the defendant present a case which entitled him, while remaining in Cambridge, to [197 U.S. 11, 36] claim exemption from the operation of the statute and of the regulation adopted by the board of health? We have already said that his rejected offers, in the main, only set forth the theory of those who had no faith in vaccination as a means of preventing the spread of

smallpox, or who thought that vaccination, without benefiting the public, put in peril the health of the person vaccinated. But there were some offers which it is contended embodied distinct facts that might properly have been considered. Let us see how this is.

The defendant offered to prove that vaccination 'quite often' caused serious and permanent injury to the health of the person vaccinated; that the operation 'occasionally' resulted in death; that it was 'impossible' to tell 'in any particular case' what the results of vaccination would be, or whether it would injure the health or result in death; that 'quite often' one's blood is in a certain condition of impurity when it is not prudent or safe to vaccinate him; that there is no practical test by which to determine 'with any degree of certainty' whether one's blood is in such condition of impurity as to render vaccination necessarily unsafe or dangerous; that vaccine matter is 'quite often' impure and dangerous to be used, but whether impure or not cannot be ascertained by any known practical test; that the defendant refused to submit to vaccination for the reason that he had, 'when a child,' been caused great and extreme suffering for a long period by a disease produced by vaccination; and that he had witnessed a similar result of vaccination, not only in the case of his son, but in the cases of others.

These offers, in effect, invited the court and jury to go over the whole ground gone over by the legislature when it enacted the statute in question. The legislature assumed that some children, by reason of their condition at the time, might not be fit subjects of vaccination; and it is suggested-and we will not say without reason-that such is the case with some adults. But the defendant did not offer to prove that, by reason of his then condition, he was in fact not a fit subject of vaccination [197 U.S. 11, 37] at the time he was informed of the requirement of the regulation adopted by the board of health. It is entirely consistent with his offer of proof that, after reaching full age, he had become, so far as medical skill could discover, and when informed of the regulation of the board of health was, a fit subject of vaccination, and that the vaccine matter to be used in his case was such as any medical practitioner of good standing would regard as proper to be used. The matured opinions of medical men everywhere, and the experience of mankind, as all must know, negative the suggestion that it is not possible in any case to determine whether vaccination is safe. Was defendant exempted from the operation of the statute simply because of his dread of the same evil results experienced by him when a child, and which he had observed in the cases of his son and other children? Could he reasonably claim such an exemption because 'quite often,' or 'occasionally,' injury had resulted from vaccination, or because it was impossible, in the opinion of some, by any practical test, to determine with absolute certainty whether a particular person could be safely vaccinated?

It seems to the court that an affirmative answer to these questions would practically strip the legislative department of its function to care for the public health and the public safety when endangered by epidemics of disease. Such an answer would mean that compulsory vaccination could not, in any conceivable case, be legally enforced in a community, even at the command of the legislature, however widespread the epidemic of smallpox, and however deep and universal was the belief of the community and of its medical advisers that a system of general vaccination was vital to the safety of all.

We are not prepared to hold that a minority, residing or remaining in any city or town where smallpox is prevalent, and enjoying the general protection afforded by an organized local government, may thus defy the will of its constituted authorities, acting in good faith for all, under the legislative sanction of the state. If such be the privilege of a minority, [197 U.S. 11, 38] then a like privilege would belong to each individual of the community, and the spectacle would be presented of the welfare and safety of an entire population being subordinated to the notions of a single individual who chooses to remain a part of that population. We are unwilling to hold it to be an element in the liberty secured by the Constitution of the United States that one person, or a minority of persons, residing in any community and enjoying the benefits of its local government, should have the power thus to dominate the majority when supported in their action by the authority of the state. While this court should guard with firmness every right appertaining to life, liberty, or property as secured to the individual by the supreme law of the land, it is of the last importance that it should not invade the domain of local authority except when it is plainly necessary to do so in order to enforce that law. The safety and the health of the people of Massachusetts are, in the first instance, for that commonwealth to guard and

protect. They are matters that do not ordinarily concern the national government. So far as they can be reached by any government, they depend, primarily, upon such action as the state, in its wisdom, may take; and we do not perceive that this legislation has invaded any right secured by the Federal Constitution.

Before closing this opinion we deem it appropriate, in order to prevent misapprehension as to our views, to observe-perhaps to repeat a thought already sufficiently expressed, namely-that the police power of a state, whether exercised directly by the legislature, or by a local body acting under its authority, may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression. Extreme cases can be readily suggested. Ordinarily such cases are not safe guides in the administration of the law. It is easy, for instance, to suppose the case of an adult who is embraced by the mere words of the act, but yet to subject whom to vaccination in a particular condition of his health [197 U.S. 11, 39] or body would be cruel and inhuman in the last degree. We are not to be understood as holding that the statute was intended to be applied to such a case, or, if it was so intended, that the judiciary would not be competent to interfere and protect the health and life of the individual concerned. 'All laws,' this court has said, 'should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.' United States v. Kirby, 7 Wall. 482, 19 L. ed. 278; Lau Ow Bew v. United States, 144 U.S. 47, 58 , 36 S. L. ed. 340, 344, 12 Sup. Ct. Rep. 517. Until otherwise informed by the highest court of Massachusetts, we are not inclined to hold that the statute establishes the absolute rule that an adult must be vaccinated if it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination, or that vaccination, by reason of his then condition, would seriously impair his health, or probably cause his death. No such case is here presented. It is the cause of an adult who, for aught that appears, was himself in perfect health and a fit subject of vaccination, and yet, while remaining in the community, refused to obey the statute and the regulation adopted in execution of its provisions for the protection of the public health and the public safety, confessedly endangered by the presence of a dangerous disease.

We now decide only that the statute covers the present case, and that nothing clearly appears that would justify this court in holding it to be unconstitutional and inoperative in its application to the plaintiff in error.

The judgment of the court below must be affirmed.

It is so ordered.

Mr. Justice Brewer and Mr. Justice Peckham dissent.

Footnotes

'State-supported facilities for vaccination began in England in 1808 with the National Vaccine Establishment. In 1840 vaccination fees were made payable out of the rates. The first compulsory act was passed in 1853, the guardians of the poor being intrusted with the carrying out of the law; in 1854 the public vacinations under one year of age were 408,824 as against an average of 180,960 for several years before. In 1867 a new act was passed, rather to remove some technical difficulties than to enlarge the scope of the former act; and in 1871 the act was passed which compelled the boards of guardians to appoint vaccination officers. The guardians also appoint a public vaccinator, who must be duly qualified to practise medicine, and whose duty it is to vaccinate (for a fee of one shilling and sixpence) any child resident within his district brought to him for that purpose, to examine the same a week after, to give a certificate, and to certify to the vaccination officer the fact of vaccination or of insusceptibility. . . .

Vaccination was made compulsory in Bavarla in 1807, and subsequently in the following countries: Denmark (1810), Sweden (1814), W urttemberg, Hesse, and other German states (1818), Prussia (1835), Roumania (1874), Hungary (1876), and Servia (1881). It is compulsory by cantonal law in 10 out of the 22 Swiss cantons; an attempt to pass a Federal compulsory law was defeated by a plebiscite in 1881. In the following countries there is no compulsory law, but governmental facilities and compulsion on various classes more or less directly under governmental control, such as soldiers, state employees, apprentices, school pupils, etc.: France, Italy, Spain, Portugal, Belgium. Norway, Austria, Turkey. . . . Vaccination has been compulsory in South Australia since 1872, in Victoria since 1874, and in Western Australia since 1878. In Tasmania a compulsory act was passed in 1882. In New South Wales there is no compulsion, but free facilities for vaccination. Compulsion was adopted at Calcutta in 1880, and since then at 80 other towns of Bengal, at Madras in 1884, and at Bombay and elsewhere in the presidency a few years earlier. Revaccination was made compulsory in Denmark in 1871, and in Roumania in 1874; in Holland it was enacted for all school pupils in 1872. The various laws and administrative orders which had been for many years in force as to vaccination and revaccination in the several German states were consolidated in an imperial statute of 1874.' 24 Encyclopaedia Britannica (1894), Vaccination.

> 'In 1857 the British Parliament received answers from 552 physicians to questions which were asked them in reference to the utility of vaccination, and only two of these spoke against it. Nothing proves this utility more clearly than the statistics obtained. Especially instructive are those which Flinzer compiled respecting the epidemic in Chemnitz which prevailed in 1870-71. At this time in the town there were 64,255 inhabitants, of whom 53,891, or 83.87 per cent, were vaccinated, 5,712, or 8.89 per cent were unvaccinated, and 4,652, or 7.24 per cent, had had the smallpox before. Of those vaccinated 953, or 1.77 per cent, became affected with smallpox, and of the uninocculated 2,643, or 46.3 per cent, had the disease. In the vaccinated the mortality from the disease was 0.73 per cent, and in the unprotected it was 9.16 per cent. In general, the danger of infection is six times as great, and the mortality 68 times as great, in the unvaccinated, as in the vaccinated. Statistics derived from the civil population are in general not so instructive as those derived from armies, where vaccination is usually more carefully performed, and where statistics can be more accurately collected. During the Franco- German war (1870-71) there was in France a widespread epidemic of smallpox, but the German army lost

during the campaign only 450 cases, or 58 men to the 100,000; in the French army, however, where vaccination was not carefully carried out, the number of deaths from smallpox was 23,400.' , Johnson's Universal Cyclopaedia (1897), Vaccination.

> 'The degree of protection afforded by vaccination thus became a question of great interest. Its extreme value was easily demonstrated by statistical researches. In England, in the last half of the eighteenth century, out of every 1,000 deaths, 96 occurred from smallpox; in the first half of the present century, out of every 1,000 deaths, but 35 were caused by that disease. The amount of mortality in a country by smallpox seems to bear a fixed relation to the extent to which vaccination is carried out In all England and Wales, for some years previous to 1853, the proportional mortality by smallpox was 21.9 to 1,000 deaths from all causes; in London it was but 16 to 1,000; in Ireland, where vaccination was much less general, it was 49 to 1,000, while in Connaught it was 60 to 1,000. On the other hand, in a number of European countries where vaccination was more or less compulsory, the proportionate number of deaths from smallpox about the same time varied from 2 per 1,000 of all causes in Bohemia, Lombardy, Venice, and Sweden, to 8.33 per 1,000 in Saxony. Although in many instances persons who had been vaccinated were attacked with smallpox in a more or less modified form, it was noticed that the persons so attacked had been commonly vaccinated many years previously. 16 American Cyclopedia, Vaccination (1883).
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> 'Dr Buchanan, the medical officer of the London Government Board, reported [197 U.S. 11, 1881] as the result of statistics that the smallpox death rate among adult persons vaccinated was 90 to a million; whereas among those unvaccinated it was 3,350 to a million; whereas among

vaccinated children under five years of age, 42 1/2 per million; whereas among unvaccinated children of the same age it was 5,950 per million.' Hardway, Essentials of Vaccination (1882). The same author reports that, among other conclusions reached by the Academie de Medicine of France, was one that, 'without vaccination, hygienic measures (isolation, disinfection, etc.) are of themselves insufficient for preservation from smallpox.' Ibid.

The Belgian Academy of Medicine appointed a committee to make an exhaustive examination of the whole subject, and among the conclusions reported by them were: 1. 'Without vaccination, hygienic measures and means, whether public or private, are powerless in preserving mankind from smallpox. . . . 3. Vaccination is always an inoffensive operation when

practised with proper care on healthy subjects. . . . 4. It is highly desirable, in the interests of the health and lives of our countrymen, that vaccination should be rendered compulsory.' Edwards, Vaccination (1882.)

The English Royal Commission, appointed with Lord Herschell, the Lord Chancellor of England, at its head, to inquire, among other things, as to the effect of vaccination in reducing the prevalence of, and mortality from, smallpox, reported, after several years of investigation: 'We think that it diminishes the liability to be attacked by the disease; that it modifies the character of the disease and renders it less fatal,-of a milder and less severe type; that the protection it affords against attacks of the disease is greatest during the years immediately succeeding the operation of vaccination.'

PUBLIC FORUM 18 February 2002

The meeting was called to order at 7:35 pm. by Ken Pearson with and introduction of himself as moderator for the meeting.
Ken explained the purpose of the meeting was to obtain positive and negative input on Reservation policing provided by White Earth Police Department. This information will be used to address the next level of Government.
He explained rules for the meeting and had a role call of invited guests from local governing bodies. In attendance were members from Spring Creek Twp., Eagle View Twp., Sugar Bush Twp., Callaway Twp., Riceville Twp., City of Ogema, and City of Callaway.
The floor was then opened for pro and con topics and were presented as follows:

Con- Ray Bellcourt, White Earth;

He disagrees with the formation of the White Earth Police Dept. It is an illegitimate police force; the agreement with Becker County is illegal. The court system in White Earth is not valid and cannot enforce warrants. This police department was put together without due process because the people were not asked about this and majority of enrolled members are against having a police force.

Con- Mike Ladue, North End of Reservation;

His house has been robbed twice, even with that he is not for the tribal police. He believes we have too many law enforcement persons in the area. He feels we are becoming a police state. He is concerned that with the over policing that it will create problems with young drivers and insurance rates. He also did not receive the opportunity to speak about having this police force and feels due process was also not done. He feels also that if the police was to be "Indians policing Indians" that this is also not happening because the Tribal Police are mostly white officers.

Con- Ed Peterson, Detroit Lakes;

He feels that the whole legal issue pertaining to the organization of this police department needs to be looked at. Public Law 280 was never taken into consideration. He also feels the people of the Tribe were not given a chance to voice there concerns.
The legal issue with the governing bodies is that there is no separation of power.

Con- Jerry Skov, Strawberry Lake;

He feels that this whole issue is a mass confusion. No one seems to know if this is a legal police force or not. He feels the first step should be to determine this.

Con- Leonard Allen Roy, Strawberry Lake;

He feels that the formation of this police force is a violation of Federal Law. He can understand why some business owners are for the police force but the police do things they don't have jurisdiction to do.

Con- Dan Steffl, Callaway;

He questions the funding of the White Earth Police Department. Since Mahnomen County and Clearwater County have ended the agreement with the police dept. does Becker County have to pick up any additional expenses? He feels the residents of Becker County cannot afford any additional expenses. The taxpayers cannot afford any extra police.

Con-Ted Torgeson, Sugar Bush Township;

He feels the police force are congregating in a small area since Mahnomen and Clearwater Counties have backed out of the agreement with White Earth Police Department. Communities are being over policed especially Callaway.

Con- Lenny Potter, White Earth;

He says he has lived on other reservations and that he has seen this type of police force before. They are illegal and usually pushed on the people. This is very similar to the police force on Mill Lacs Reservation. Another problem is the Tribal License Plates. Other police departments target them unfairly. He also feels that brutalities by police officers are a concern.

Con- Bill Wakefield, South White Earth;

He also feels we are over policed. His wife was stopped by a tribal police officer and asked if she was an enrolled member of White Earth Tribe? What does this have to do with proper police procedure? Why does Becker County recognize the tribe police dept. if it is not a legal dept.? These are questions he feels need to be answered.

Con-Laura Guthrie;

She states she has been directly affected by all three agencies in question. A White Earth Police Officer injured her daughter. No one seems to take responsibility for the departments actions. No one claims jurisdiction over the dept. She has been given no assistance in this matter because her daughter is an Indian Child. She feels Mahnomen and Clearwater misused the grant money that was awarded for policing and when the money was gone they ended the contract.

Pro- Laura Guthrie;

She feels the police dept. has been good in providing youth programs such as parades and role model activities.

Con- Leonard Roy;

He states he was pulled over by the tribal police and he told them they were not a legal police force. That they had no authority over him. The officer told him he would not write him a speeding ticket but for him not to expect any help in the future if he needed it.

Con- Clarence Roy, White Earth;

He states that the tribal police force is not a police department at all, that they are a Security Force put together by the Tribal Business Council. They do not protect people's rights. They only protect the Business Council.

Pro- Mike Ladue,

He feels some good is coming from the police dept. by way of traffic violation fees.

Con- Marvin Manypenny,

He feels there is a lot of misinformation going on and this is a very complex legal issue. First off the law was not followed in the creation of this police force and therefore the agreements are not valid. The Constitution of the Tribes has not been followed and that the Secretary of the Interior has to give consent for the creation of a tribal police force and that this never occurred. The tribal officials have to follow the correct procedures if they are going to do something like this.

The open floor for input was closed and Ken Pearson spoke on information he had obtained:

He has researched the agreement between White Earth and Becker County. The governing body that was put in place to regulate day-by-day action of the police dept. has not met once since the police dept. began operations. Therefore they are not hearing the concerns and issues of the people.

He also found that there is no control over the Dept. No separation of powers and no voting procedure.

He also found that the Tribes that make up the Reservation were not in agreement with signing any police agreements and that the contracts are signed as "White Earth Indian Reservation." No Tribe signatures.

The Grant Application has not been adhered to. Some areas have been taken care of some have not.

Pine Point had several issues that have not been checked into.

Ken has spoke with Tribal Officers and Sheriff Rooney.

- Rooney spoke on problems between Mahnomen and White Earth P.D. The threat of B.I. Retrocession is not real and the threat is bogus.
- Rooney was asked would Mahnomen and Clearwater enter back into agreement if things were changed? He said many things would have to change beginning with impartial powers, open court records, and information.

Ken also found that the tribal police are not patrolling reservation areas in Mahnomen and Clearwater Counties since the agreement with them have ended. The Counties are not patrolling them either.

Ken stated that he chose to have this meeting and to mediate it because of the phone calls he has been receiving from concerned residents within the reservation. The people's concerns are not being heard by any governing entity. The Callaway Liquor Store is being targeted and that City of Callaway Ordinances is not being considered.

The Tribal Police are doing the easy work such as traffic tickets and D.U.I.s. Drug trafficking and other serious problems are being ignored.

A group shall be established and should speak by way of a resolution.
The topic was placed before the floor to establish an entity and a name for this group. All were in favor for establishing a group and to call themselves:
" Concerned Coalition for Better Law Enforcement" or " Citizens for Legal Government".

Nominations were heard for the following positions:

President: Mike Ladue made a motion to elect Ken Pearson for this position and to combine this with the Spokesperson Position, second by Ted Torgeson, all in favor, none opposed. Motion carried.

Secretary: Motion made by Melvin Manypenny to elect Leonard Roy Jr. to this position, second by Jeff Leff, all in favor, none opposed, motion carried.

A resolution shall be constructed to cover the following topics:

1- Possible go to Federal level and get an injunction to end Police Department. Obtain Public Defenders.
2- Find out if there is any Policy and Procedures pertaining to White Earth Police Department.
3- Find out if there is a legal White Earth Police Department.
4- Address the issue that the people feel like they are giving up their personal rights.
5- Don't try to save what is already in place. The group feels the existing Police Department should be disbanded.

The floor was opened again to discuss what the group should do next? The decision was made for Ken Pearson to call another meeting when he and Leonard Roy Jr. are prepared with additional information.

Motion to close meeting was made by Wilhelm Walther, second by Jerry Skoe, all in favor, none opposed, motion carried.

There is one attachment to these minutes. An article by Tim Kjos shall also be presented.

[illegible] dies in shooting incident

Duplex in Pine Point is hit by two rifle bullets

By TIM KJOS
Staff Writer

A Ponsford teenager died of a self-inflicted gunshot wound late Dec. 31 in Pine Point following a shooting incident that night.

The 16-year-old died inside a Pine Point residence. No one else inside the dwelling at the time of the incident was injured.

The incident began when a White Earth Tribal Police officer reported at 11:22 p.m. New Year's Eve that he was attempting to stop a motorist traveling 71 miles per hour in a 30 mph speed zone on County Road 124.

The motorist, later identified as a 16-year-old youth, eventually stopped in front of a Pine Point duplex and exited the vehicle carrying two rifles.

The officer got out of his squad car and repeatedly asked the youth to drop the rifles, but the teenager refused. At one point, the 16-year-old turned and fired two shots from one of the rifles at the duplex.

According to a Becker County Sheriff's Department report, no one was struck or injured by those bullets.

The tribal police officer returned to his car because he was carrying a "ride along" and wanted to take the unmarned individual to safety.

The officer called for assistance, and then returned to the duplex. As he was getting out of the patrol car, the officer heard a single shot.

The tribal officer immediately entered the dwelling and ordered all occupants to leave. The officer entered one of the rooms and found the youth dead.

Three other agencies assisted with the incident: BCSD, Detroit Lakes Police Department and Minnesota State Patrol.

Becker County Tribal Forum
February 18th, 2002

Pro : Shannon Groth, Strawberry Lake area,

Before the Tribal Police began patrolling the area his house was broken into and everything was taken. Now he rarely sees people parking along his road and hanging around the area, and he has had no problems with break-ins. The presence of police is helping.

Pro: Mark Pacton, Owner of Garage in Ogema,

He has not had as much trouble with break- ins and vandalism and has had only two cars stolen since they began patrolling. This is far less than in the past. He also stated that he has been stopped for traffic violations and did not feel he was being picking on in any way.

Pro : Ken Pearson, gave statements from elderly in Round Lake and Minnie Point area,

He has visited with some elderly people from these areas who stated that they like seeing the Tribal Police around, now they see police cars in the area, prior to the Tribal Police they never saw a police car in the area unless they were called for help. This exposure has helped curb crime.

Con : Melvin Mennypenny,

Judge Richard Wilson of Walker, MN stated that the agreement between White Earth Tribal Business Council and Becker County to work with "Tribal Police" is illegal. There is no separation of state. Therefore the "Tribal Police" are really just a private security force for the Tribal Business Council.

Pro : Laura Guthrey, Strawberry Lake area,

Stated that it is positive that we are all meeting in this way to discuss this issue and work together for answers.

Con : Leonard Roy, Strawberry Lake,

Had a complaint about the incident that occurred in Pine Point and read the Article from the paper, which will be entered into the minutes from this meeting. He asked if it was common procedure for a police officer to leave the area when someone is shooting a gun. If this police officer would have stayed he may have been able to prevent this suicide. He also asked why the Detroit Lakes force is in Pine Point. The people of the White Earth Tribe did not have a voice in the decision to have the Tribal Force; therefore there is no legal agreement.

Pro : By woman whose family member also committed suicide,

It is unfair to place blame on this police officer for a suicide. This person chose to die, and would have found a way to die.

Pro : Sandra St.Claire, White Earth,

She is a dispatcher for Becker County and she has seen that the Tribal Force has helped improve response time to calls. They help cover all areas. She feels the complaints should be addressed to the Tribal Council for not letting the people have a voice. She also has a concern as to whether they are following the law.

Con : Marvin Mennypenny,

He has been against the establishment of this force from the beginning. The people have been fooled. Stated public law 280, process has not been followed. There needs to be a separation of powers. If it is done democratically, then so be it, but it was not. Until they do it in the right way it is just a façade.

Pro : Jim Jirava, Spring Creek Township,

He would like to know why there is an absence of Becker County Sheriffs at this meeting. He feels they should be here listening to the problems stated tonight. He would also like to know why Mahnomen County got out of the agreement with the Tribal Force, and feels Becker County should be questioning this as well. Ken Pearson then stated that he did not extend an invitation to any Police Force because he did not want and person to feel intimidated by their presence and therefore not state their true feelings of situation.

Con : Ray Belcourt His 2nd statement after there was no 1st time statements given

The Justice department can pump money into the reservation, but the county can't get any money for their own police department. There are now 18 Tribal Police in the area, if there is such a need for police why did the county never place a Sheriff in the area before. There was no forum for the Indian People on this issue. If a violation goes to Tribal Court there is no way to appeal a decision. This is taking away the people's rights. The Judge for the Tribal Court was only an attorney before.

Pro : Leonard Alan Roy- Richwood

He stated that there is a possibility of good coming from having a Tribal Force, but at this time have they been trained in the right way, can they neutralize a violent situation. He is concerned that the motivation to learn and do well is not there. If the intentions are good- then great!

Con: Mike Ladue, Waubun

He described an incident he was involved in that he felt very much in danger. He was traveling on the Richwood road; a tribal policeman flashed his lights for him to stop. He then called the County while driving and asked for a County Sheriff to come to the reservation line and meet him there and to let the Tribal officer know of his plans. He did not want to stop without that protection from County. When he arrived at the reservation line he stopped to wait, but the Tribal officer got out of his car and unbuckled his pistol in a squat. Is it common procedure to unbuckle your pistol and squat for a speeding violation of traveling 65 on a 55 mile/hour road? He feels we are giving up our rights as citizens.

Con: Melvin Mennypenny

Becker County and Mahnomen County Police force do your job, for everyone.
He described two incidents – one where he saw a man being hit with a baseball bat by another, all the Tribal police were standing around when they finally intervened they yelled at the injured man instead of giving him the first aid he required. The second incident he saw a man being beaten with a railroad tie all the police stood around and did nothing.

Con : Jeff Leff – 3 miles N. of White Earth

He is concerned that there is no appeal system in Tribal Court, in the real world the people have rights! He fears the Tribal force will end up becoming a goon squad using intimidation/ fear to control people. Everything is clouded, what do the Tribal police officers have enforcement over.

Con : Ray Belcourt

The Supreme Court stated that the MN state police force does not have jurisdiction on Tribal land. Now the County makes an agreement with Tribe and says they have jurisdiction now, how can that be?

Con : Leonard Roy

He described an incident in Pine Point in which shots were fired through the victim's window. The victim called 911 and told of problems and who they saw firing the gun. The Tribal Force got it a mixed up, they took a statement from the shooter then went to victims house and forced that person to lie on ground.

Con : Jeff Leff Waubun

He doesn't feel secure in his area with the Tribal Force around. He is tired of being a pun by elected officials. He feels they give the people free licenses and extended hunting to appease them but in the end they loose.

Pro : Leonard Alan Roy, Richwood

He feels it is positive that we are all here working together to get something done.

Citizens for Lawful Government

Who we are: Citizens for Lawful Government.

Why we are here: The agreement between Becker County and the White Earth Reservation Business Council

Resolutions:

1. Find out if there is a legal White Earth Police Force.
2. Address the issue that the people feel like they are giving up their personal rights.
3. Find out if there is any Policy and Procedures pertaining to the White Earth Police Department.
4. Don't try to save what is already in place. The group feels the existing Police Department should be disbanded.
5. If possible, go to Federal level and get an injunction to end Police Department. Obtain Public Defenders.

Boozhoo Waabishkiid Mai'ingan indizhinikaaz mang indoodem. Ode'imini Zagai'ganing indoonjibaa. (Hello my name is White Wolf and my clan is Loon. I am from Strawberry lake.)

There is a controversy existing over the legitimacy and status of the White Earth tribal courts and law enforcement system that are now operating *de facto (Black's Law Dictionary* defines *de facto* as a state of affairs that is being accepted for practical purposes but is *illegal or illegitimate)* and not with the consent of the tribal membership, which must be obtained if it is to be obtained through the procedures required for an amendment in the tribal constitution.

Whereas, no power has been delegated to the Tribal Executive Committee or the Reservation Business Committees which could even arguably support the establishment of the tribal court and the White Earth Tribal Police which are now operating *de facto* and illicitly and without benefit of constitutional legitimacy and without the consent of tribal membership, and before legitimacy is granted by the people it will be necessary to amend the tribal constitution or secure tribal constitutional reform by a constitutional convention, and

Whereas, the same would be necessary for the establishment of a duly authorized White Earth tribal police force, consent of the tribal membership and constitutional provisions not contained in the present document would be necessary as a pre-requisite to the establishment of the force; and

Whereas, the Associate Solicitor's office of the United States Department of the Interior had previously concluded in a memorandum dated September 30, 1980, that the intent of the constitution was to grant powers through Article V and VI rather than through Article I general purposes or the Preamble, and concluded again in 1986 that the Constitution of the Minnesota Chippewa Tribe must be amended before the Tribal Executive Committee or any of the tribe's reservation business committees may authorize a tribal court.

Whereas, the Associate Solicitor's office stated in the 1986 determination that, "It is simply unreasonable to conclude that the drafters of the constitution intended to give virtually unlimited authority to reservation business committees by authorizing them to make expenditures for reservation purposes, but then proceeded to provide several paragraphs detailing explicit authorities that would clearly be subsumed under the categories 'promoting the general welfare' or 'maintaining justice'. *Such a conclusion is especially untenable since the U.S. Supreme Court rejected such an approach with respect to the United States Constitution long before the Constitution of the Minnesota Chippewa Tribe was adopted. Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905),* and

Whereas, even the Secretary of the Interior cannot approve the purported authority of the tribal court unless and until the tribal constitution authorizes the tribal governing body or body to exercise the authority and jurisdiction, and the tribal constitution does not presently authorize the tribal court; and

Whereas, in establishing unconstitutional courts and law enforcement agencies without separation or powers protections or checks and balances deprives the tribal membership of any independent judicial review, and deprives the membership of a forum that can refuse or enforce an unconstitutional act of the tribal government at an appellate level, and

Whereas, that at present, there is no balance of power in the Minnesota Chippewa Tribe's government and the law enforcement agencies and tribal courts are acting *de facto* and not *de jure (de jure,* which means rightful, legitimate, just or constitutional), and

Whereas, in *Clinton v. United States (*U.S. Supreme Court, No. 97-1374, 1998) the Supreme Court of the United States through the written case opinion expounded, in regard to the separation of powers, that, "Separation of powers was designed to implement a fundamental insight: concentration of power in the hands of a single branch is a threat to liberty. *The Federalist* states the axiom in these explicit terms: 'The accumulation of all powers, legislative, executive and judiciary, in the same hands....may justly be pronounced the very definition of tyranny.' *The Federalist, No. 47,* p. 301 (C. Rossiter ed., 1961), and

Whereas, the Framers of the Constitution of the United States used the principles of separation of powers and federalism to secure liberty in the fundamental political sense of the term, quite in addition to the idea of freedom from intrusive governmental acts. "The idea and the promise were that when the people delegate some degree of control to a remote central authority, one branch of government ought not to possess the power to shape their destiny without a sufficient check from the other two. In this vision, liberty demands limits on the ability of any one branch to influence basic political decisions" (*Clinton* case opinion, id.), and

Whereas, perhaps one of the most oft-quoted passages from *The Spirit of the Laws* regarding the separation of powers, quoted both in court opinions and in discussions on political philosophy, is the following: *"When the legislative and executive powers are united in the same person, or in the same body of magistates, there can be no liberty; because apprehension may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner....Again, there is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator...were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything, were the same man, or the same body, whether of the nobles of the people, exercise those three powers, that of enacting laws, that executing the public*

resolutions, and of trying the causes of individuals", and that, when there is a lack of separation of powers, the whole power is united in one body, and as Montesquieu wrote, "*and though there is no external pomp that indicates a despotic sway, yet the people feel the effects of it at every moment"*

There is no justice in a system that does not know it, so I urge you to abolish your side of the agreement with the White Earth Reservation Business Council in an attempt to end this tyranny and dictatorship that has violated civil rights, human rights, constitutional rights, and treaty rights that have been taken away from the Members of the White Earth Nation without due process of law and also it has affected the rights of citizens that belong to the United States of America. Freedom, liberty, and justice for all is all that we ask for. Who knows how many more people will be treated in such an unjust fashion that is a disgrace to freedom and the face of democracy itself? How could a nation such as the United States of America just look over a government that is similar to that of a communist government? How many more men, women, and children will have to put up with such tyranny? I hope that this information has enlightened you enough to consider and change your position in the law enforcement agreement with the White Earth Reservation Business Council, and to never again assist in such an act that is a disgrace to essential democracy itself.

CITIZENS for LAWFUL GOVERNMENT

White Earth Reservation

June 14, 2002

Bridget C. Johnson
Project Specialist
State Court Administrator's Office
25 Constitution Avenue Suite 120
St. Paul, MN 55155

Re: Full Faith and Credit Committee
Comments for inclusion in Tribal Court State Court Forum

Dear Ms. Johnson:

Please find enclosed our letter of comments and supplementary attachments for distribution to the Committee.

Thank you.

Very truly yours,

Laura Guthrie

Laura Guthrie
Interim Secretary

To: Full Faith and Credit Committee
c/o Project Specialist Bridget C. Johnson
State Court Administrator's Office

Date: June 13, 2002

Re: Comments for inclusion in Tribal Court State Court Forum
Friday, June 21, 2002
9:30 a.m. in Room 230
Minnesota Judicial Center
25 Constitution Avenue
St. Paul Minnesota

Dear Ms. Johnson:

On behalf of the Citizens for Lawful Government organization of Callaway, Minnesota, which is located within the White Earth Indian Reservation, we would like to take this opportunity to offer the following comments and recommendations in regard to the issue of the extension of "full faith and credit" to tribal court proceedings:

1. Extension of "full faith and credit" in regard to the proceedings of the purported "White Earth Tribal Court" would be premature at this time because of the presently existing unconstitutionality and unlawful operation of the said court.

2. There is a legal and political controversy existing over the legitimacy and status of the White Earth Tribal Court; it is operating *de facto* as opposed to *de jure* and is acting without having been established by consent of the tribal membership through the legally required tribal constitutional amendment or in its alternative, constitutional convention held and approved by tribal membership and authorizing establishment of the so-called court.

3. Powers inherent in the tribe as a whole must be defined and exercised by the consent of tribal membership and under the present Revised Constitution and By-laws of the Minnesota Chippewa Tribe, the organic government document of the tribe, powers granted to the tribal government by the tribal membership must be enumerated in the constitutional article or articles setting out the powers of the governing body.

4. A statement of purpose such as is found in Article 1 of the Revised Constitution and By-laws is not sufficient to legitimize the present *de facto* tribal court. Attached and enclosed is an opinion of the Associate Solicitor of Indian Affairs, Office of the Solicitor, United States Department of the Interior; opined that the tribal constitution does not delegate to tribal officials the power the power to authorize tribal courts.

5. The Associate Solicitor's Office stated in the 1986 opinion determination that, "It is simply unreasonable to conclude that the drafters of the constitution intended to give virtually unlimited authority to reservation business committees by authorizing them to make expenditures for reservation purposes, but then proceeded to provide several paragraphs detailing explicit authorities that would clearly be subsumed under the categories 'promoting the general welfare' or 'maintaining justice'. *Such a conclusion is especially untenable since the U.S. Supreme Court rejected such an approach with respect to the United States Constitution long before the Constitution of the Minnesota Chippewa Tribe was adopted. Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905).*"

6. Even the Secretary of the Interior cannot approve the purported authority of the tribal court unless and until the tribal constitution authorizes the tribal governing body or body to exercise the authority and jurisdiction, and the constitution does not presently authorize the tribal court.

7. Resolutions 1-80 and 2-80 (attached) were attempts by the Tribal Executive Committee to take supreme power over the tribal membership without the people's consent, denying to the membership any checks and balances and denying them their rights under the tribal constitution and also denying them any independent judicial review.

8. The opinions of the United States Department of the Interior prior to 1994 on the lack of tribal constitutional authority to establish courts were rejected by Darrell Wadena, then-President of the Minnesota Chippewa Tribe in the attached letter beginning, "We, the membership of the Minnesota Chippewa Tribe, are writing to advise you that as of today, various past Departmental determinations which would diminish the scope of tribal authorities of the Minnesota Chippewa Tribe (MCT) and its constituent bands officially have no force or effect...." when in fact the membership of the Minnesota Chippewa Tribe did not consent to such letter.

9. In a letter from Ada E. Deer dated September 20, 1994 , attached, states that it was based upon the assumption that there were tribal constitutional checks and balances, which in fact did not and do not exist. There are no separation of powers protections for the members and no checks and balances in place and the Reservation Business Committees and the Tribal Executive Committee have attempted to assume supreme executive, judicial and legislative powers in one body.

10. In *Clinton v. United States (U.S. Supreme Court, No. 97-1374, 1998)* the Supreme Court of the United States through its written case opinion expounded, in regard to the separation of powers, that, "Separation of powers was designed to implement a fundamental insight: concentration of power in the hands of a single branch is a threat to liberty. *The Federalist* states the axiom in these explicit terms: 'The accumulation all powers, legislative, executive and judiciary, in the same hands. . . .may justly be pronounced the very definition of tyranny.' *The Federalist, No. 47, p. 301 (C. Rossiter ed., 1961).*"

There are presently cases pending in federal, state and tribal courts in which these issues have been raised and presented and are awaiting eventual decision. The Committee should refrain from any any discussion or recognition towards "full faith and credit" until the legal and political issues are determined, in the interest of justice and the protection of the citizens and tribal membership living on and tribal membership living on the White Earth Reservation.

It is our position and recommendation at this time that the Full Faith and Credit Committee:

1. Refrain from consideration of applying "full faith and credit" by state courts to White Earth Tribal Court proceedings, orders and judgments until and unless a proper tribal constitutional amendment or constitutional convention is conducted in an adequate time and place with full participatory democracy, authorizing a new tribal constitution with separation of powers and establishing a valid tribal court and law enforcement agency, if the membership so desires and votes approval of such a court.

2. Recognize that the Revised Constitution and By-laws of the Minnesota Chippewa Tribe does not presently contain the powers necesssary to hold valid court proceedings and discussing whether "full faith and credit" should be afforded is premature and not appropriate for consideration at this time as there are apparent constitutional violations along with denial of civil and human rights of both United States citizens and tribal members living within the boundaries of the White Earth Reservation.

I was requested to write this letter and present these views on behalf and for the Citizens for Lawful Government, composed of both Native Americans and non-natives living within the boundaries of the White Earth Reservation, at a duly called meeting of the Citizens for Lawful Government held June 12, 2002, in Callaway, Minnesota.

We hope we have not overwhelmed you at this time. If there are any comments or questions, please feel free to leave a message for me at (218) 983-3571. ***AS OUR ORGANIZATION ALWAYS SAYS, REMEMBER THAT THE LAST WORDS OF THE PLEDGE OF ALLEGIANCE TO THE FLAG ARE "LIBERTY AND JUSTICE FOR ALL" NOT "JUST US".***

Very truly yours,

Laura Guthrie

Laura Guthrie, as Interim Secretary, Citizens for Lawful Government

Additional Facts

Whereas, the Field Solicitor of the United States Office of the Solicitor advised as long ago as June, 1980 that where governmental action has the potential to affect people's lives in an intimate and drastic way, such as court jurisdiction does, the authority should be explicitly stated, and

Whereas, no power has been delegated to the Tribal Executive Committee or the Reservation Business Committees which could even arguably support the establishment of the tribal court and the White Earth Tribal Police which are now operating *de facto* and illicitly and without benefit of constitutional legitimacy and without the consent of tribal membership, and before legitimacy is granted by the people it will be necessary to amend the tribal constitution or secure tribal constitutional reform by a constitutional convention, and

Whereas, in 1986, the Associate Solicitor of Indian Affairs, Office of the Solicitor, United States Department of the Interior, opined to the Associate Solicitor, Division of Indian Affairs, regarding the authority of the Tribal Executive Committee and the Reservation Business Committees of the Minnesota Chippewa Tribe, that the Constitution of the Minnesota Chippewa Tribe does not delegate to tribal officials the power to authorize tribal courts, and determined the constitution of the Minnesota Chippewa Tribe was deficient in this respect as the people have not authorized tribal courts, and that a constitutional amendment would be necessary to authorize the establishment of tribal courts, and

Whereas, the same would be necessary for the establishment of a duly authorized White Earth tribal police force, consent of the tribal membership and constitutional provisions not contained in the present document would be necessary as a pre-requisite to the establishment of the force; and

Whereas, the Associate Solicitor's office of the United States Department of the Interior had previously concluded in a memorandum dated September 30, 1980, that the intent of the constitution was to grant powers through Article V and VI rather than through Article VI or the Preamble, and concluded again in 1986 that the Constitution of the Minnesota Chippewa Tribe must be amended before the Tribal Executive Committee or any of the tribe's reservation business committees may authorize a tribal court, and

Whereas, to conclude that any language in Article VI or the Preamble or general purposes provisions of the tribal constitution authorizes it to do anything further than the purposes states therein (to make expenditures, promote the general welfare of the tribe) would make unnecessary the detailed listing of specific authorities contained in the remainder of Article VI, and

Whereas, the Associate Solicitor's office stated in the 1986 determination that, "It is simply unreasonable to conclude that the drafters of the constitution intended to give virtually unlimited authority to reservation business committees by authorizing them to make expenditures for reservation purposes, but then proceeded to provide several paragraphs detailing explicit authorities ~~that would clearly be subsumed~~ under the categories 'promoting ~~the~~ general welfare' or 'maintaning justice'. *Such a conclusion is especially untenable since the U.S. Supreme Court rejected such an approach with respect to the United States Constitution long before the Constitution of the Minnesota Chippewa Tribe was adopted. Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905)*, and

Whereas, the Tribal Executive Committee responded to the 1980 Field Solicitor's opinion by issuing "Constitutional Interpretation No. 1" holding that it as the "supreme executive, legislative and judicial body" of the tribe had exclusive authority to interpret its constitution and then issued "Constitutional Interpretation No. 2" holding that both it and the reservation business committees have authority to establish court; however, the Associate Solicitor's office analyzed all the case law the Band cited and concluded it did not follow from those decisions that the BIA must always accept without question the decision of tribal forums (such as the TEC) on such issues, and that the federal statute used as purported authority to establish courts does not authorize tribal officials to adjudicate matters *if those officials have not been delegated such authority by the trial membership in the tribal constitution and did not preempt the prerogative of the tribal membership to decide whether or not to authorize its officials to exercise the jurisdiction the tribe has, by the people duly delegating such powers in the ~~constitution; and~~*

Whereas, even the Secretary of the Interior cannot approve the purported authority of the tribal court unless and until the tribal constitution authorizes the tribal governing body or body to exercise the authority and jurisdiction,

and the tribal constitution does not presently authorize the tribal court; and

Whereas, the Associate Solicitor's office in 1986 did disagree with the assertion that the Department of the Interior is obligated to construe the tribal constitution as broadly as possible on the ground that such construction will benefit the tribe, because the Department of the Interior did conclude that tribal members had not decided to empower the tribal government to authorize courts, and the same argument is valid in regard to the establishment of the White Earth Police Department now operating as *de facto* as opposed to *de jure* officers, and

Whereas, *Black's Law Dictionary* defines *de facto* as a state of affairs that is being accepted for practical purposes but is *illegal or illegitimate,* and is contrary to *de jure,* which means rightful, legitimate, just or constitutional; thus the White Earth tribal court judge and law enforcement officers are acting in possession of office but are there by usurpation, without lawful title, and maintaining display of force against the will and without the authorization of the people, the tribal membership, and have overturned the institutions of rightful government by setting up in lieu thereof said court and law enforcement personnel *de facto,* as mere pretenders and usurpers in their purported offices and titles, and

Whereas, Resolutions 1-80 and 2-80 were attempts by the Tribal Executive Committee to take supreme power over the tribal membership without the people's consent, further denying to the people any checks and balances and denying them any protection of their rights under the Revised Constitution and By-laws, and denying to the people the protection of the amendment process in the tribal constitution that will allow it to be changed if enough people are convinced of the necessity of doing so, and

Whereas, in establishing unconstitutional courts and law enforcement agencies without separation or powers protections or checks and balances deprives the tribal membership of any independent judicial review, and deprives the membership of a forum that can refuse or enforce an unconstitutional act of the tribal government at an appellate level, and

Whereas, the opinions of the United States Department of the Interior were rejected by Darrell Wadena, President of the Minnesota Chippewa Tribe on

May 31, 1994, in spite of the careful and thorough legal analysis contained in the opinions, by a letter to Ada Deer, Assistant Secretary, Indian Affairs in Washington, D.C., beginning with the paragraph, "We, the Membership of the Minnesota Chippewa Tribe, are writing to advise you that as of today, various past Departmental determinations which would diminish the scope of tribal authorities of the Minnesota Chippewa Tribe (MCT) and its constituent bands officially have no force or effect" when in fact the membership of the Minnesota Chippewa Tribe did not consent to such letter and the said President was speaking only for himself and the power grabbing individuals of the RBC's and TEC's at the time in the attempt to exercise tyrannical and supreme power repugnant to and in disregard of the tribal constitution; and the the members have not in fact ever voted to amend the tribal constitution to delegate the authority contained in the people to the powers of the RBC's and TEC's as enumerated in the tribal constitution, and

Whereas, in a letter from Ada E. Deer dated September 20, 1994, in which the then-President of the Minnesota Chippewa Tribe, Norman Deschampe, was advised the Associate Solicitor-Indian Affairs, Department of the Interior, reneged on the prior opinions of the Department and decided it would allow the Minnesota Chippewa Tribe to establish courts, the decision was a matter of political pressure upon a the Assistant Secretary only, and was issued based upon her reading of the Darrell Wadena letter which had misrepresented that it spoke for the membership, and the change in posture was based upon Ada Deer's assumption that the weight given the Tribe's *(sic)* interpretation of it's own constitution is greater if it the result of or subject to tribal constitutional safeguards and checks and balances, and no legal analysis was given as to any such safeguards being contained in the Minnesota Chippewa Tribe's constitution or in Resolutions 1-80 and 2-80 which assumed supreme power by, in and for a very few men; and

Whereas, such change in position was followed by the creation and establishment of courts and law enforcement agencies not beholden to any review or appellate processes, and beholden only to whomever the incumbent Reservation Business Committee persons would be, and are not authorized or beholden to the community as a whole that has never voted for a constitutional amendment allowing such powers, even though the establishment of such agencies has unconstitutionally and drastically affected the lives of the tribal membership without its consent, and

Whereas, the tribal government of the Minnesota Chippewa Tribe does in fact not only contain no separations of powers protections for the membership, and no checks and balances; the Reservation Business Committees and the Tribal Executive Committee are by the assumption of supreme power being allowed by acquiescence of the Department of the Interior (in refusing to enforce the tribal constitution organized under the federal Indian Reorganization Act) to further encroach upon the right of the people to have a constitution of limited powers and their right to amend the constitution (if the people consent to delegate to the Reservation Business Committees any powers not presently enumerated in Article V or VI of the Revised Constitution and By-laws of the Minnesota Chippewa Tribe), and

Whereas, Article XIII of the Revised Constitution and By-laws of the Minnesota Chippewa Tribe still provides that members shall be guaranteed the protections of the Constitution of the United States, but this Article is entirely disregarded by tribal government and the United States Government which has the trust responsibility to enforce the tribal constitution, as it did prior to the "*Ada Deer*" letter of 1994, in that in the system of federalism the U.S. Government is organized under by its constitution only the judicial branch of the government has the power to decide on a law's constitutionality (*decision of John Marshall, Chief Justice, in Marbury vs. Madison in 1803)* and the members of the Minnesota Chippewa Tribe have been blatantly and clearly denied any final judicial decision upon an unconstitutional act of the RBC's or the TEC because of the power assumed *ultra vires* in Resolution 1-80 and 2-80, and those resolutions attempt to do away with and violate the tribal constitution as the organic act and law governing the tribe; the Supreme Court decision in *Marbury vs. Madison* by Chief Justice Marshall went to great pains to make sure that judicial review was and would remain a power of the judicial branch, and that it be impartial, unlike Congress or the President, the basis of the decision being Article VI of the Constitution of the United States proclaiming the the U.S. Constitution is the supreme law of the United States (and it is this section also that protects treaties made between the United States and the Indian nations); and

Whereas, that at present, there is no balance of power in the Minnesota Chippewa Tribe's government and the law enforcement agencies and tribal courts are acting *de facto* and not *de jure,* and

Whereas, in *Clinton v. United States* (U.S. Supreme Court, No. 97-1374, 1998) the Supreme Court of the United States through the written case opinion expounded, in regard to the separation of powers, that, "Separation of powers was designed to implement a fundamental insight: concentration of power in the hands of a single branch is a threat to liberty. *The Federalist* states the axiom in these explicit terms: 'The accumulation of all powers, legislative, executive and judiciary, in the same hands....may justly be pronounced the very definition of tyranny.' *The Federalist, No. 47,* p. 301 (C. Rossiter ed., 1961), and

Whereas, the Framers of the Constitution of the United States used the principles of separation of powers and federalism to secure liberty in the fundamental political sense of the term, quite in addition to the idea of freedom from intrusive governmental acts. "The idea and the promise were that when the people delegate some degree of control to a remote central authority, one branch of government ought not to possess the power to shape their destiny without a sufficient check from the other two. In this vision, liberty demands demands limits on the ability of any one branch to influence basic political decisions" (*Clinton* case opinion, id.), and

Whereas, the keen political analysis of Charles de Secondat, Baron de Montequieu (1689-1755), the political philosopher in his influential work *The Spirit of the Laws* has a number of very important observations on the separation of powers, pointing out that democratic and aristocratic states are not in their own nature free, and only in moderate governments can political liberty sometimes be found, existing only when there is no abuse of power. Montesquieu also pointed out that, "*constant experience shews us that every man invested with power is apt to abuse it, and to carry its authority as far as it will go.*" To prevent this abuse, it is necessary, from the very nature of things, that power should be a check to power, as Montesquieu also stated, "*A government may be so constituted, as no man shall be compelled to do things to which the law does not oblige him, nor forced to abstain from things which the law permits,*" and

Whereas, perhaps one of the most oft-quoted passages from *The Spirit of the Laws* regarding the separation of powers, quoted both in court opinions and in discussions on political philosophy, is the following: *"When the legislative and executive powers are united in the same person, or in the same body of*

magistates, there can be no liberty; because apprehension may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner....Again, there is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator...were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything, were the same man, or the same body, whether of the nobles of the people, exercise those three powers, that of enacting laws, that executing the public resolutions, and of trying the causes of individuals", **and**

that, when there is a lack of separation of powers, the whole power is united in one body, and as Montesquieu wrote, "*and though there is no external pomp that indicates a despotic sway, yet the people feel the effects of it at every moment",* **and**

Whereas, in his famous speech before the Council and House of Representatives in 1776 the revered New England political speaker and advisor Samuel West, in one of the most influential justifications for the struggle for independence by the colonies, stated, "*The doctrine of nonresistance and passive obedience to the worst of tyrants could never have found credit among mankind had the voice of reason been hearkened to for a guide, because such a doctrine would immediately have been discerned to be contrary to natural law"* **and**

Whereas, Samuel West also stated in the same speech, "*that tyranny and arbitrary power are utterly inconsistent with and subversive of the very end and design of civil government, and directly contrary to natural law, which is the true foundation of civil government and all politic law. Consequently, the authority of a tyrant is of itself null and void ....as magistrates have no authority but what they derive from the people, whenever they act contrary to the public good, and pursue measures destructive of the peace and safety of the community, they forfeit their right to govern the people";* **Samuel West noted that magistrates are to consider themselves as servants of the people seeing that it is only from them that they can claim any right to power and authority, and if the people find themselves cruelly oppressed they can maintain their ground in defending their just rights against their oppressors**

Anishinaabeg Today

A Chronicle of the White Earth Band of Ojib

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White Earth Tribal Council Quarterly Meeting Minutes

White Earth Tribal Council
Quarterly Meeting
Sept. 17, 2002
Shooting Star Casino, Hotel & Event Center
Mahnomen, Minn.

hairman Doyle Turner called the meeting to order : 10:10 a.m. Secretary-Treasurer Franklin Heisler ook roll call.

lembers Present:

istrict I Rep. Irene Auginaush	Present
istrict II Rep. Anthony Wadena	Present
istrict III Rep. Kenneth Bevins	Present
ec.-Treasurer Franklin B. Heisler	Present
hairman Doyle Turner	Present

)thers Present:

en Perrault, Leech Lake Community Rep.
anine Oakley, Iron Range Community Rep.
'ince Byle, Bemidji
Melvin Manypenny

genda

he agenda was presented. Kenneth Bevins made a notion to adopt the agenda with amendments. Irene uginaush seconded the motion. Carried 4 for, 0 gainst

dditions:

Second-generation childcare providers
Police Policy and Procedure Handbook
ANA Grant

Anthony Wadena made a motion to approve the service line agreement as presented. Irene Auginaush seconded the motion. Carried 4 for, 0 against

Kenneth Bevins made a motion to adopt Resolution 001-02-028 instructing staff to follow guidelines when dealing with the constituency service and donation requests. Seconded by Franklin Heisler. Carried 2 for, 0 against, 2 silent

Second Generation Child Care Licenses

Anthony Wadena made a motion to approve the request from the Child Care Department to allow the licensure of seconded generation child care providers. Franklin Heisler seconded the motion. Carried 4 for, 0 against

ANA Grant

Irene made a motion instructing staff to make the ANA grant application from White Earth on the development of strategies to establish separation of powers (Executive, Legislative and Judicial) for our tribal government. This application would be for three years or more. Initially we would focus on planning and developing policies and procedures. Seconded by Kenneth Bevins. Carried 4 for, 0 against

Reports

White Earth Elders

Herb Roy thanked the council for financial help for the trip the elders went on to attend a national elder's conference. About 30 elders participated in

casino on the Iron Range because the mines have closed down and it would provide work. The land would have to be put into trust and the government has put a hold on putting any more land in to trust. Darrell Auginaush, WE Land Department will give her more information on putting land into trust. Darrell said he had already contacted the BIA regarding the land on the Iron Range and they advised him not to even try to put land into trust at this time. The Iron Range Community Council owns 80 acres.

✓ Approximately 1,100 members live on the Iron Range.

Leech Lake Community Council

Ken Perrault, Leech Lake Community, stated there are 1,200 White Earth enrolled members living on the Leech Lake Reservation. The needs they have involve the elders in their community. They need help in locating the WE enrolled members living on the Leech Lake Reservation. They would like the names, addresses, and phone numbers of the members to keep people informed and get their input. They are running ads to let people know what is happening and that there is going to be an election of officers for their community council.

Vince Byle

Vince Byle thanked the council for allowing him to be on the agenda. He wanted to talk about two issues:

1. He wanted to explore an early deer hunting season. Other tribes have been successful with early

NO. CT-89-1863

STATE OF MINNESOTA
IN SUPREME COURT

IN RE: RULES OF PROCEDURE FOR THE RECOGNITION OF TRIAL COURT ORDERS AND JUDGMENTS

REQUEST TO MAKE AN ORAL PRESENTATION

MINNESOTA TRIBAL COURT STATE COURT FORUM

Randy V. Thompson
Nolan, MacGregor & Thompson
2300 US Bank Center
101 East Fifth Street
St. Paul, MN 55101
Telephone 651-287-0002

Attorneys for Respondents
Native American Press/Ojibwe News
William Lawrence
Proper Economic Resource Management, Inc.

The undersigned hereby requests to make an oral presentation at the hearing on the Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments which is scheduled for 2:00 P.M. on October 29, 2002. A copy of the materials to be presented is attached to this request.

DATED: October 15, 2002

NOLAN, MacGREGOR & THOMPSON

By _____
Randy V. Thompson
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Telephone No. 651-227-6661

NO. CT-89-1863

STATE OF MINNESOTA
IN SUPREME COURT

IN RE: RULES OF PROCEDURE
FOR THE RECOGNITION OF TRIAL
COURT ORDERS AND JUDGMENTS

RESPONSE TO PETITION FOR ADOPTION OF A RULE OF PROCEDURE FOR THE RECOGNITION OF TRIBAL COURT ORDERS AND JUDGMENTS

MINNESOTA TRIBAL COURT STATE COURT FORUM

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INTRODUCTION

The Indian people residing on reservations in the United States are the only United States citizens who do not receive the protections of the Bill of Rights to the United States Constitution. Tribal governments, particularly those in Minnesota, do not enjoy an independent judiciary with a constitutional basis for its independence. Instead, tribal courts are controlled by the political branches of government that created the courts and appointed the judges. Tribal members who are disfavored do not find equal justice, and tribal courts are seeking to expand judicial jurisdiction over non-members who cannot participate in tribal government. Until there is reformation within tribal government, and until tribal government limits its jurisdiction to those persons who can participate in tribal government, this Court must reject the Petition for full faith and credit to avoid giving legitimacy to a flawed and constitutionally defective tribal court system.

In its most recent Indian law decision, *Nevada v. Hicks*, 533 U.S. 353 (2001), the United States Supreme Court noted that the "contention that tribal courts are courts of general jurisdiction is also quite wrong. A state court's jurisdiction is general, in that it lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. . . . Tribal courts, it should be clear, cannot be courts of general jurisdiction in this sense. . . ." 533 U.S. at 367 [citations omitted]. The Supreme Court observed that "hold[ing] a non-Indian subject to the jurisdiction of the tribal court" would be a first for the Supreme Court, but such a step "deserves more considered analysis" as Justice Souter's separate opinion demonstrates. 533 U.S. at 374.

Justice Souter's separate opinion points out some very sobering facts that must guide the Minnesota Supreme Court in considering the Petition before it:

> "The ability of nonmembers to know where tribal jurisdiction begins and ends, it should be stressed, is a matter of real, practical consequence given the special nature of [Indian] tribunals, *Duro v. Reina*, 495 U.S. 676, 693 (1990), which differed from traditional American courts in a number of significant respects. To start with the most obvious one, it has been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes. . . although the Indian Civil Rights Act of 1968 (ICRA) makes a handful of analogous safeguards enforceable in tribal courts, 25 U.S.C. 1302, the guaranties are not identical, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191,194 (1978), and there is a definite trend by tribal courts toward the view that they ha[ve] leeway in interpreting the ICRA's due process and equal protection clauses and need not follow the U.S. Supreme Court precedents jot-four-jot. . . . In any event, a presumption against tribal-court civil jurisdiction squares with one of the principal policy considerations underlying *Oliphant*, namely, an overriding concern that citizens who are not tribal members be protected from unwarranted intrusions on their personal liberty, 435 U.S. at 210.
>
> "Tribal courts also differ from other American courts (and often from one another) in their structure, in the substantive law they apply, and in the independence of their judges. . . . The resulting law applicable in tribal courts is a complex mix of tribal codes and federal, state and traditional law, . . . which would be unusually difficult for an outside to sort out.
>
> ". . . It is generally accepted that there is no effective review mechanism in place to police tribal courts' decisions on matters of non-tribal law, since tribal-court judgments based on state or federal law can be neither removed nor appealed to state or federal courts. . . . The risk, of course, is a risk of substantial disuniformity in the interpretation of state and federal law, a risk underscored by the fact that [t]ribal courts are often subordinate to the political branches of tribal governments, *Duro, supra*, at 693." 533 U.S. at 383-385 [citations omitted].

At the three hearings held by the Advisory Committee on General Rules of Practice, and in spite of the inability of that Committee to widely publish its hearing process, members of Minnesota's Native American community who had firsthand experience with tribal courts spoke forcefully against the Petition.

It is against this background of U.S. Supreme Court observation on tribal courts, the comments from tribal members opposing the Petition, and the Committee's unanimous

recommendation against the Petition that this Court is being asked to approve full faith and credit of tribal court orders and other processes as a non-controversial, procedural matter. The Respondents object to the adoption of the Petition on the strongest possible terms.

RESPONDENTS

The Respondents to this action are the Native American Press/Ojibwe News and its publisher, William Lawrence. Mr. Lawrence is a member of the Red Lake Band who has published articles that have appeared in a Law Review, books and numerous journalistic publications regarding the problems that exist with tribal governments and tribal courts in particular. The Native American Press/Ojibwe News is published weekly in St. Paul, Minnesota and covers matters of concern to those residing in Indian Country.

Respondent Proper Economic Resource Management, Inc. ('PERM") is a Minnesota non-profit corporation comprised of individuals whose goal is to ensure, through education and judicial action, that the rights of all citizens are afforded their full rights under the Constitution of the United States and that natural resources are properly protected, managed and made available for use and enjoyment by all citizens.

A FLAWED AND CLOSED PROCESS BY THE STATE COURT/TRIBAL COURT JUDGES FORUM LED TO THE PETITION PRESENTED TO THIS COURT

From the beginning, the Tribal Court-State Court Forum encountered significant problems. The Forum came under heavy criticism early on because in meetings held on tribal lands, the press and other individuals who wished to participate were excluded. The "compromise" was to provide that the meetings would be open when held on state lands, but when held on tribal lands it would be up to the tribe whether or not to make the meetings open.

Counsel for these Respondents, who has practiced for over a decade in the Indian law area representing both non-members and members in their issues with tribal government, attended the Forum meetings at Mille Lacs in May, 2000 and at Red Lake in September, 2000. It was the latter conference that was devoted to the full faith and credit issue, and counsel for these Respondents raised serious questions about the appropriateness of granting full faith and credit given the lack of an independent judiciary in most tribes and the efforts by tribes to claim jurisdiction over non-members who do not have the right to participate in tribal government.

Counsel for Respondents was prepared to attend the next meeting, scheduled for December 8, 2000 at the Minnesota Judicial Center, but it was cancelled. By letter dated December 13, 2000, counsel for Respondents asked to be notified of future Tribal Court-State Court Forum meetings and followed up with subsequent phone calls. See Exhibit A. Despite the fact that he was never notified of any future meetings, this Petition was presented in May 2002 as a "unanimous" and non-controversial proposal resulting from regular quarterly meetings. Not only was an experienced and informed counsel who raised questions about the full faith and credit proposal excluded from Forum meetings, more importantly the public, and particularly persons residing on and near reservations, were never included in discussing these issues. At the latest Forum meeting, held at the Mystic Lake Casino complex in September 2002, the first part of the Forum meeting was open to the public. When the Forum proposed to close the meeting to discuss the full faith and credit proposal, the undersigned and a White Earth tribal member objected to the closure, given Minnesota's open meeting law. Ultimately the Forum cancelled that part of the meeting, rather than having a public discussion of the issues. Given that this Petition has arrived before the Court based upon a flawed State/Tribal Forum process, in which

the public and those who ask difficult questions were excluded from meaningful participation, this Court on that basis alone should reject the Petition.

FUNDAMENTAL CONSTITUTIONAL PROBLEMS IN THE STRUCTURE AND FUNCTIONING OF TRIBAL COURTS MANDATE AGAINST FULL FAITH AND CREDIT RECOGNITION

A. There is No Constitutional Basis for the Creation of Most Tribal Courts.

Despite suggestions in the Petition to the contrary, the constitutions of the Ojibwe and Dakota bands do not provide a basis for the creation of tribal courts.[1] The Bands argue that the tribal courts were created under their "inherent powers". The problem with such a structure is that, without a constitutional basis for the creation of a court, there is no independent judiciary. The Fifth Circuit Court of Appeals recently ruled in *Comstock Oil & Gas Inc. v. Alabama and Coushatta Indian Tribes of Texas*, 261 F.3d 567 (5th Cir. 2001), cert. denied, 122 S.Ct. 1438 (2002) that when "the Tribe's constitution and bylaws, as amended. . . contained no provisions for the creation of a judiciary", the effort to create a tribal court through the adoption of a tribal judicial code was "impermissibl[e]". 261 F.3d at 572. The Fifth Circuit went on to hold that "no tribal court properly existed" under these circumstances. *Id.*

The Petition ignores the Fifth Circuit precedent and asks this Court to grant full faith and credit to any and all tribal court judgments without regard to whether there is a constitutional basis for the creation of those tribal courts. Respondents submit that all tribal courts in Minnesota share this fundamental defect.

B. There is No Separation of Powers in Tribal Courts and No Independent Judiciary.

Given that there is no constitutional basis for the creation of most tribal courts, the tribal courts that exist are subject to the control of the tribal council that passed the laws that created

[1] The Red Lake Constitution provides for a court of Indian Offenses.

the courts and appointed the judges to those courts. A careful examination of this state of affairs will reveal that the same handful of tribal lawyers who represent the tribes sit as judges in each other's courts. The result is a predictable effort to advance the political agenda of tribal government, and with non-members and disfavored members being subject to unequal justice because the tribal judges are not truly independent.

A few cases will demonstrate this fact. In *Grand Portage Band of Chippewa v. Melby*, the Grand Portage Band sought to assert zoning jurisdiction over a non-member who was operating a marina on privately owned land within the original exterior boundaries of the Grand Portage Reservation. This private land was subject to state and county regulation and taxation. Even though this non-member had applied for a permit from Cook County to construct his building, the Grand Portage Band passed an ordinance (after he had obtained his County permit) that required him to obtain a zoning permit from the Grand Portage Band. When the non-member refused to recognize this regulatory authority, the Grand Portage Band literally created a tribal court in which it filed the first (and for several years only) suit against Mr. Melby to assert its jurisdiction over him. The tribal council that authorized the litigation and created the tribal court also handpicked its trial court judge, Anita Fineday,[2] to hear the case.

When Mr. Melby appealed the predictable result to the Grand Portage Court of Appeals, the land use administrator who had been a previous named party to the suit now sat on the tribal council, and he participated in picking the judges to hear the appeal. When a former party to the suit selects the judges, there is at least a question about the appearance of fairness. The result was that Mr. Melby lost at the Grand Portage Court of Appeals (See Exhibit B), and then

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[2] Ms. Fineday is counsel for the Mille Lacs Band, as is Mary Al Balber who served on the Grand Portage Court of Appeals

proceeded to Federal Court to contest tribal court jurisdiction. At this juncture the case settled with the Band buying Mr. Melby's land, but not without Mr. Melby expending substantial monies in legal fees. Six months after the case settled, the Supreme Court's decision in *Atkinson Trading v. Shirley*, 532 U.S. 645 (2001) reversed virtually every misguided holding asserted by the Grand Portage Court of Appeals in its effort to assert jurisdiction over Mr. Melby. Nevertheless, the full faith and credit proposal would have made this decision by the Grand Portage Band's handpicked and specially created court enforceable in Minnesota.

In *Penn v. United States*, a case that is pending in the United States District Court for North Dakota, Judge Conmy has issued two decisions that express how appalled he was by the treatment of Margaret Penn at the hands of the Standing Rock Sioux Reservation Tribal Court. See Exhibits C and D. Margaret Penn is a lawyer by training and worked for several years as the chief prosecutor for the Standing Rock Sioux Tribe. Although her heritage is part Turtle Mountain Ojibwe, she does not have sufficient blood quantum to be enrolled or eligible for enrollment in that band. Legally she is therefore a non-Indian, although like many people in Indian Country she is of mixed ethnic background. Margaret Penn was fired by the Standing Rock Sioux Tribe from her position as chief prosecutor, and went to work as a grant writer for a battered women's shelter. She also brought a lawsuit against the Standing Rock Sioux Tribe for wrongful termination.

To get rid of Margaret Penn, an *ex parte* order was issued by the Standing Rock Sioux Tribal Court banishing her from the Standing Rock Sioux Reservation. She was summarily removed, under threat of arrest, from both her place of employment (the battered women's shelter) which was located on fee (privately) owned land, as well as from the home she rented from a non-Indian rancher that was on fee (privately) owned land, and even prevented from

being on the state highways that cross the Standing Rock Reservation. Judge Conmy's opinion directs the appropriate questions about these tribal court processes. Nevertheless, the Petition before this Court would recognize and give full faith and credit to all decisions of the Standing Rock Sioux Tribe.

These are but two examples of what is occurring in Indian Country. *See also* the Affidavits of Clara Niiska and William J. Lawrence regarding the Red Lake court system. The Red Lake Tribal Court is notorious for its abuse of tribal court processes. Serious questions were raised regarding this court as much as twenty years ago in a law review article by William J. Lawrence in the North Dakota Law Review, and yet those problems have gone unaddressed. See attachments to the Lawrence Affidavit.

C. There is No Guarantee of Basic Rights.

As Justice Souter pointed out in the quote in the Introduction, the Bill of Rights is not applied to tribal governments and therefore Indian people and others are unprotected by the Bill of Rights in its dealing with tribal governments. While Congress passed the Indian Civil Rights Act ("ICRA"), a decision by the Supreme Court holds that the ICRA can only be enforced in tribal court. The result is a Catch-22 in which some (but not all) of the Bill of Rights is applied to tribal government through the ICRA, but since the ICRA can only be enforced in tribal courts, which are not independent judicial fora, the result is that the tribal government, whose actions are challenged, controls the judiciary that decides whether or not the civil rights were violated. In short, the ICRA has been an abject failure because tribal courts are not independent.

D. There is No Judicial Oversight, Accountability, or Review Process and the Result is Disuniformity.

Because tribal courts operate independently of the structure of the state and federal courts, there is no appeal process to assure uniformity of decisions. There is no process by which a decision in tribal court can be reviewed by a state or federal court to assure that state or federal law was properly applied. *See, Nevada v. Hicks.* Without accountability and appellate review, the unfairness that may result from a lack of judicial independence goes unchecked.

E. Tribal Courts are a Political Effort to Assert Jurisdiction over Non-members.

There is a considered effort within tribal government to expand the power and reach of tribal government. Part of that effort involves the assertion of tribal judicial jurisdiction over non-members who happen to reside on former or current reservation lands. Given the profound political implications of empowering tribal governments that seek to assert jurisdiction over non-members, a careful pause must be taken before tribal court judgments are granted full faith and credit. There are two excellent political and judicial systems in the State of Minnesota, one by the State and one by the Federal Government, that are open to **all** persons to participate regardless of their ethnic background. In contrast, tribal governments are only open to persons who are members of a particular tribe, and tribal courts are the instrumentalities of these governments. Since tribal courts are unwilling to limit their judicial jurisdiction only to the members of the tribe, full faith and credit cannot and should not be granted until these jurisdictional disputes are resolved. There is no reason why the state courts cannot be utilized to decide disputes between members and non-members, when both are citizens of the State of Minnesota.

F. The Elimination of Most Ojibwe Reservations.

Tribal courts assert jurisdiction over all persons residing within the boundaries of the "reservation". The stubborn fact remains, however, that an 1889 Act of Congress resulted in an agreement with all of the Chippewa (Ojibwe) tribes in Minnesota that disestablished all of the Ojibwe reservations except Red Lake and White Earth. This act, known as the Nelson Act, 25 Stat. 642 (1889) resulted in a negotiated agreement between the United States and the various Chippewa Bands. The Chippewa Bands agreed to sell, cede and relinquish all right, title and interest in and to all of the reservations in Minnesota except Red Lake and White Earth. The latter two reservations were "diminished" or reduced in size. Nevertheless, the Bands residing in these former reservations, including the Leech Lake Band, the Fond du Lac Band, the Grand Portage Band, and the Mille Lacs Band, assert jurisdiction over the entire original reservation and, in the materials accompanying this Petition, claim "broad civil jurisdiction" over **all** persons within those boundaries.

Justice Diana Murphy, writing for the Eighth Circuit Court of Appeals in *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (1999), cert. denied 120 S. Ct. 2717 (2000) considered a virtually identical statute that applied to the Yankton Sioux Tribe in South Dakota. The Eighth Circuit held that the Yankton Sioux Reservation lands that had passed out of tribal ownership were no longer "Indian Country," and were therefore no longer part of the reservation. As a result, the Yankton Sioux Reservation was "diminished" to a small parcel of trust land. This same analysis is not only true in Minnesota, it is the subject of a pending lawsuit entitled *County of Mille Lacs v. Melanie Benjamin*, Civ. No. 02-407, United States District Court, District of Minnesota, Fifth Division, which is currently before Judge Rosenbaum. Mille Lacs County is contesting the claim by the Mille Lacs Band that the original reservation, created by an 1855 Treaty, still exists. As

long as this issue is outstanding for most of the Ojibwe Bands in Minnesota, recognizing tribal court orders, when the geographical basis claimed for tribal jurisdiction is under substantial question, would be premature. Proceeding with caution until the outcome of this litigation is known is certainly appropriate.

The reality is that former reservations are more precisely checkerboards of land which are owned in varying amounts by Indians and non-Indians. Nationwide, in 1990, nearly one-half of reservation residents were non-Indians. *See* Bureau of Census, U.S. Department of Commerce, 1990 Census of Population, Social and Economic Characteristics, American Indian and Alaska Native Areas 3 (1990). The reason for the widespread settlement of non-Indians on former reservation lands was the policy of the United States in the late 1800s and early 1900s to break up reservations, allot some of the lands to the tribal members, and sell off other lands to non-members, in an effort to assimilate the Indian people into the mainstream of American society. This was done through the General Allotment Act and other similar acts, such as the Nelson Act in Minnesota. Two-thirds of the Indian lands allotted under the General Allotment Act were acquired by non-Indians. *See, County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 254-56 (1992).

The actual percentage of land ownership in Minnesota varies widely. Of the original Leech Lake Reservation, less than 5% was owned by the tribe or individual Indians. *See, State v. Forge,* 262 N.W.2d 341, 345, n.1 (Minn. 1977). These percentages are reversed at Grand Portage, where the Grand Portage Band or its members own approximately 95% of the land, in trust or fee. Nevertheless, at the Grand Portage Reservation, two-thirds of the residents are non-members of the Grand Portage Band. Given this checkerboard of ownership and tribal

membership, there are fundamental and important policy questions that must be considered before this Court grants full faith and credit to the decisions of tribal courts.

THE PROPOSAL IN THE PETITION ITSELF IS FLAWED IN ITS DESIGN AND BURDENS.

Initially, it should be observed that most states have dealt with full faith and credit issues through the legislative process. For example, the State of South Dakota, by statute, has provided a basis in which tribal court orders may be "recognized as a matter of comity in the state courts of South Dakota under certain terms and conditions". S.D. Stat. §1-1-25 (1986). Indeed, examining the Survey of State Application of Full Faith and Credit to Tribal Court Judgments, Appendix C to the Petition, only a handful of states have acted through court rules, while most who have acted have done so through legislation. Minnesota should be no different since it has the precedent of adopting, by statute, the Uniform Enforcement of Foreign Judgments Act. The legislative process is better able to hold hearings where persons affected can voice their needs and concerns, particularly persons residing on original reservation areas. The Legislative process is designed to weigh the competing policy concerns and craft rules appropriate to each tribal court that seeks recognition of its orders.

Second, the burden of proof is placed on the party to the tribal court litigation to attack the validity of the tribal court judgment. What is unclear is where that attack must take place. For example, North Dakota requires that the "recognizing court" be satisfied that certain criteria are met. Furthermore, the proposed rule in this Petition ignores one part of the North Dakota proposed rule, that the "order of judgment does not contravene the public policy of the State of North Dakota." Additionally, the proposed rule does not include the procedural protection

contained in the North Dakota rule, which requires that there be a notice of filing and stay of enforcement provisions. The proposed rule before this Court has no such procedural protection.

South Dakota's statute is better than the North Dakota rule. First, it requires that the party seeking recognition of the tribal court order has the burden to "establish by clear and convincing evidence" that the order is entitled to recognition. If the state court is satisfied, then it can recognize the tribal court order as a matter of comity, not full faith and credit.

Minnesota has a different status from both North Dakota and South Dakota, because of Public Law 280. Adopted in 1953 (67 Stat. 588, codified as amended at 18 U.S.C. §1162, 25 U.S.C. §§1321-26, 28 U.S.C. §1316), Public Law 280 granted criminal and civil jurisdiction over Indian reservation lands to state governments in five states, including Minnesota. The other states were California, Nebraska, Oregon and Wisconsin. The United States Supreme Court has recently held that, even in the absence of Public Law 280:

> "Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border. Though tribes are often referred to as sovereign entities, it was long ago that the Court departed from Chief Justice Marshall's view that the laws of [a State] can have no force within reservation boundaries. . . . Ordinarily, it is now clear, an Indian reservation is considered part of the territory of the state."
> *Nevada v. Hicks*, 533 U.S. at 361-362 [citations omitted].

The Supreme Court held in 1992 that "the platonic notions of sovereignty" which had guided Chief Justice Marshall in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) have lost their independent sway over time. *County of Yakima v. Confederated Tribes and Bands of Yakima Nation,* 502 U.S. 251, 257 (1992). The Court noted that its "more recent cases have recognized the rights of States, absent a congressional prohibition, to exercise criminal (and implicitly, civil) jurisdiction over non-Indians located on reservation lands. We have even observed that state jurisdiction over the relations between reservation Indians and non-Indians

may be permitted unless the application of state laws 'would interfere with reservation self-government or impair a right granted or reserved by federal law'." *Id.* at 257-258. This is a recognition of state jurisdictional power even in the absence of Public Law 280.

Given that the State of Minnesota has criminal jurisdiction over all reservations except Red Lake, and extensive civil jurisdiction under both Public Law 280 and under its inherent jurisdictional powers as a result of the Supreme Court's decision in *Nevada v. Hicks*, there is no reason for this Court to consider a rule that would grant full faith and credit to tribal court decisions except those decisions that are between tribal members. Otherwise, the State of Minnesota is abdicating its full adjudicative authority and empowering tribal courts to exert judicial decision-making which is neither necessary nor wise given the power granted to the State of Minnesota by Congress. This Court should be considering rulemaking that would make it clear to the district courts how far their jurisdiction extends over matters occurring within the boundaries of original reservations. This would eliminate many of the jurisdictional issues that are created when parties do not know whether or not the state courts are open to hearing their disputes, by making it clear that the state courts have extensive jurisdiction for all of Minnesota's citizens and throughout her entire borders.

This Court must take several steps before it grants either full faith and credit or comity to the decisions of a tribal court. First, there must be a process by which the tribal court's structure, history, constitutional basis and decision-making are reviewed to assure that they meet the minimal constitutional requirements. Second, neither North Dakota nor South Dakota has gone as far as this Petition proposes in recognizing <u>all</u> tribal court decisions. North Dakota recognizes only the judgments of tribal courts in the State of North Dakota. South Dakota goes even further, and except in case of child custody, domestic relations or other exceptional

circumstances, will grant comity only to tribal courts in South Dakota that "also grant comity to orders and judgments of the South Dakota courts." In other words, the rule ensures that the tribal court must accord the same deference to state court judgments before it will enforce the tribal court's decisions. The Petition, on the other hand, would recognize the decisions of the current 295 tribal courts (of approximately 550 tribes that could potentially create courts) without examining the structure and functioning of those courts and without any practical way of assuring that all those hundreds of tribal courts granted the same deference to the decisions of the Minnesota courts.

As the Petition admits, tribal courts are issuing decisions that concern Minnesota citizens. That is the unique province of the Minnesota state courts, which are open to participation by all citizens. If this Court is going to consider granting full faith and credit to tribal court decisions, then there is a constitutional mandate to assure that the Constitution of the State of Minnesota and the protections offered by Minnesota's judicial system are in place to govern those decisions. Tribal court judges and tribal court attorneys must meet the qualifications to practice mandated by the State of Minnesota. Tribal court attorneys must be subject to Minnesota's Code of Professional Responsibility and oversight by the Board of Professional Responsibility. Tribal court judges must similarly be bound by a Code of Judicial Ethics and be subject to oversight by the Minnesota Supreme Court and its agencies.

These are steps that have been taken by the Minnesota Supreme Court to assure that the protections in the Minnesota and United States Constitution are applied to Minnesota's judicial process, and that citizens are not denied the fundamental rights of due process and equal protection. Tribal courts must assure that persons within its jurisdiction are given at least those constitutional protections accorded to Minnesota citizens under the United States Constitution

and the Constitution of the State of Minnesota. If the tribal court is going to apply Minnesota law to Minnesota citizens, then tribal court judges must swear to uphold and defend the Constitution of the State of Minnesota.

To assure that all of these processes are carried out, any discussion of full faith and credit must contain a provision that allows tribal court decisions to be reviewed by the Minnesota's courts to assure that state law is uniformly applied and the constitutional protections are carried out in a uniform manner. Petitioners will vehemently object that this is contrary to the sovereignty rights of the tribal courts. But as the Petition admits, the Indian people in Minnesota are interwoven into the fabric of all of the people of Minnesota, and all of Minnesota's political and judicial processes. To give recognition to tribal court decisions that are not subject to review by the state or federal courts would be a grave mistake, because it is creating the opportunity for far greater disharmony and confusion than exists today. Respondents submit that the Supreme Court has a constitutional obligation to assure that all courts in Minnesota that seek validity under the auspices of this Court's rulemaking meet the standards for minimal constitutional protection.

CONCLUSION

Based upon all of the above, the Respondents respectfully request that this Court reject the Petition as the result of a flawed process that excluded the public and voices that questioned full faith and credit. Instead, the Court should refer the matter to the Minnesota Legislature for appropriate hearings and legislative action.

RESPECTFULLY SUBMITTED,

DATED: October 15, 2002

NOLAN, MacGREGOR & THOMPSON

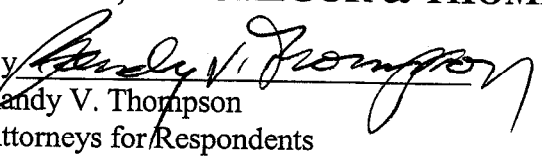
By 
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EXHIBIT A

STAPLETON, NOLAN, PERSIAN, MacGREGOR, THOMPSON & HYNES

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December 13, 2000

Amy L. Turnquist
Project Specialist
Court Services Division
State Court Administration
Minnesota Judicial Center
25 Constitution Avenue, Suite 120
St. Paul, MN 55155

RE: Tribal Court/State Court Forum

Dear Ms. Turnquist:

I attended the Tribal Court/State Court Forums at Mille Lacs Lake in May, 2000 and at Red Lake in September 2000. I had planned on attending the forum meeting that was scheduled for December 8, 2000 at the Minnesota Judicial Center, but it had been cancelled.

Would you please put me on the mailing list to receive notification of future Tribal Court/State Court Forum meetings. Your assistance in this regard is appreciated.

Very truly yours,

RVT:jlk

RANDY V. THOMPSON

*CERTIFIED AS A SPECIALIST IN CIVIL TRIAL ADVOCACY BY THE NATIONAL BOARD OF TRIAL ADVOCACY AND THE MINNESOTA STATE BAR ASSOCIATION

EXHIBIT B

IN THE TRIBAL COURT OF APPEALS
OF THE GRAND PORTAGE BAND OF CHIPPEWA

GRAND PORTAGE INDIAN RESERVATION **STATE OF MINNESOTA**

Grand Portage Band of Chippewa, Through its Land Use Administrator Lawrence Bushman,	
Plaintiff/Appellee,	**MEMORANDUM OPINION and ORDER**
vs.	
Carroll Melby,	App. #99-001
Defendant/Appellant.	

Per Curiam (Chief Justice Anderson and Associate Justices Balber and Pommersheim).

I. Introduction

The Grand Portage Reservation was established by the Treaty of 1854.[1] The Reservation was subject to the misguided (allotment) policies of both the General Allotment Act[2] and the Nelson Act.[3] The allotment period was effectively reversed by the Indian Reorganization Act of 1934.[4] The

[1] 10 Stat. 1109 (1854).

[2] 24 Stat. 388 (1887).

[3] 25 Stat. 642 (1889).

[4] 25 U.S.C. 461-479 (1934).

ENDORSED
FILED IN MY OFFICE THIS DATE 2/22/00
Authorized Signature of THE GRAND PORTAGE BAND OF CHIPPEWA TRIBAL COURT

FILED IN MY OFFICE THIS DATE-TIME 2/18/00 2:10pm
Clerk of GRAND PORTAGE BAND OF CHIPPEWA TRIBAL COURT

Grand Portage Chippewa voted, along with five other Minnesota Chippewa Bands,[5] in favor of the IRA and in favor of joining together as the Minnesota Chippewa Tribe. As a result, the first contemporary Grand Portage Reservation tribal government was established in 1939 in accordance with a "sub-charter" approved by the Minnesota Chippewa Tribe. The Grand Portage Band, the Plaintiff/Appellee in this proceeding (also referred to herein as the "Band"), is currently governed by the Minnesota Chippewa Tribe Constitution (as amended) which was adopted in 1963.

The Grand Portage Band has worked effectively to reacquire allotted lands within the reservation and to maintain its land base. The Grand Portage Reservation is comprised of approximately 48,000 acres, the vast majority of which is undeveloped. Ninety-five percent (95%) of the Reservation consists of land held in trust by the United States for the Band and its members; three percent (3%) is held in fee by the Band or other governments; and only two percent (2%) is held in fee by non-Indians. Approximately 550 people live on the Reservation, of which two-thirds are Indian.

The land owned by Carroll Melby,[6] the Defendant/Appellant in this proceeding (hereinafter referred to as "Melby"), is part of that two percent of the Reservation held by non-Indians. Except for the portion bordering Lake Superior, this land is completely surrounded by Grand Portage trust land. The land owned by the Appellant was originally part of an allotment made to Joseph Godfrey Montferrand, a Grand Portage Indian, by a trust patent issued on March 1, 1897 under the provisions of the General Allotment Act and the Nelson Act. A fee patent was issued to Montferrand on Sept. 14, 1911. Since this time period is less than the twenty-five year trust period specified in the General Allotment Act, it is presumed that Montferrand's fee patent was issued pursuant to the Burke Act[7] which provided - upon a finding of "competency" - for a fee patent to issue without the allotee's

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[5] The other Chippewa Bands include: White Earth, Leech Lake, Fond du Lac, Bois Forte, and Mille Lacs.

[6] More accurately, Carroll Melby is the managing trustee of Herbert Iver Melby Revocable Trust established by his father (now deceased) in 1967. The commercial enterprise located on this land is the Voyageurs Marina.

[7] 34 Stat. 182 (1906).

request and before expiration of the normal twenty-five year trust period. Montferrand's allotment was subsequently sold to S. L. Johnson, a non-Indian, in separate transactions in 1921 and 1923. The allotted land was ultimately sold to Herbert Melby, the Appellant's (non-Indian) father in 1967. On this site, Melby operates Voyageurs Marina which has three hotel rooms, a small store, and dockage to accommodate commercial boat traffic.

The current controversy results from the Melby's decision to erect a metal building for storage and boat repair on his property. In August 1995, Melby obtained a building permit from Cook County. Melby refused to seek a building permit or variance from the Grand Portage Band, and his failure to do so violated the Band's Land Use Ordinance.[8] Melby had received notice from both the Band and Cook County about the existence of the Band's (new) Land Use Ordinance. Despite such knowledge, Melby chose not to seek a permit or variance and erected the building in 1996.

In August 1997, the Band initiated this lawsuit against Melby in the Tribal Court for his failure to comply with the Band's Land Use Ordinance. Melby did not file an answer, asserted no substantive defenses, but simply moved to dismiss for lack of jurisdiction.

At the same time, Melby filed a lawsuit against the Band and Tribal Court in federal court seeking to enjoin them from exercising any kind of jurisdiction over him. On August 13, 1998, Judge Alsop ruled against Melby[9] and directed him to exhaust his tribal court remedies in accordance with

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[8] Grand Portage Band of Chippewa Indians, Ordinance 95-02 (1995). The Cook County setback requirement from Lake Superior is 50 feet, the Band's 100 feet. The building was erected approximately 90 feet from the shoreline and while satisfying the Cook County requirements, the building clearly violated the Band's Land Use Ordinance.

[9] *Melby v. Grand Portage Band of Chippewa* (DC, MN, 5th Div.) (1998). Judge Alsop also explicitly ruled that the Grand Portage Reservation was not diminished by the Nelson Act of 1889. In addition, he found no waiver of tribal sovereign immunity, but that a lawsuit seeking prospective injunctive relief against a tribal officer was permitted. He specifically dismissed the action against the Tribe and the Tribal Court.

the directives of *National Farmers Union v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987).

At the Tribal Court level Melby's motion to dismiss the Band's lawsuit was heard before Judge Fineday, Chief Judge of the Grand Portage Tribal Court. After making extensive findings of fact and conclusions of law, Judge Fineday denied both Melby's motion to dismiss and the Band's motion for summary judgment.

Melby filed a proper and timely interlocutory appeal on the issue of jurisdiction and the Band timely cross-appealed the denial of its motion for summary judgment. After extensive briefing by the parties, oral argument in this matter was held before the Tribal Court of Appeals at the Grand Portage Reservation on August 6, 1999.[10]

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[10] Just prior to oral argument, Melby filed an Affidavit of Conflict dated August 3, 1999 (just three days prior to oral argument) requesting that each member of the Grand Portage Tribal Court of Appeals recuse themselves because the panel was appointed by Grand Portage Reservation Tribal Council. Dean Deschampe is the Band's Land Use Administrator and a member of the Reservation Tribal Council, and Norman Deschampe is the Chairman of the Grand Portage Reservation Tribal Council. Both are Grand Portage Band members. Under Melby's claim, because each Tribal Court of Appeals member was appointed by the Grand Portage Reservation Tribal Council, the appellate court panel must recuse themselves because of an "employment" relationship with the Grand Portage Tribal Council. In the alternative, Melby seeks to strike the affidavits of Norman Deschampe and Dean Deschampe. Aside from being procedurally defective for not being timely filed under Rule 36(c) of the Grand Portage Rules of Civil Procedure, the Motion fails as being substantively and logically deficient. Neither of the Deschampes are parties to this case in their individual or official capacities, nor as such do they serve as "employers" of the judges on this panel. The grounds presented by Melby would serve to disqualify any tribal court from functioning and, by logical extension, any state or federal court from hearing cases in which a state or federal government interest were at issue.

II. Issues

This appeal raises two issues, namely:

A. Whether the Tribal Court improperly denied Melby's motion to dismiss for lack of jurisdiction; and

B. Whether the Tribal Court improperly denied the Band's motion for summary judgment.

III. Discussion

A. Jurisdiction

The issue of jurisdiction is a question of law and is properly reviewed *de novo*. This is the appropriate general legal standard of federal courts and most tribal courts for review of legal conclusions, and therefore this Court adopts it as the proper standard of review in this matter.[11]

Analysis of tribal court jurisdiction involves a review of both tribal and federal law. In the instant case, however, there is no dispute as to whether Melby violated tribal law (for he has specifically acknowledged actions in violation of tribal law) and there is no claim that the Band's

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[11] *See e.g. Filetech S.A. v. France Telecom S.A.*, 147 F.3d 922, 930 (2nd Cir. 1998): "[t]he standard of review established for district court decisions regarding subject matter jurisdiction is clear error for factual findings and *de novo* for legal conclusions." In addition, matters of tribal law are generally not subject to federal review. *Basil Cook Enterprise v. Regis Mohawk Tribe*, 117 F.3d 61, 66 (2nd Cir. 1997). Oddly enough, Melby never addresses the standard of review issue - going so far as to express no opinion on the matter when queried from the Bench at oral argument - and is therefore deemed to have waived any claims regarding the standard of review.

Land Use Ordinance exceeds the bounds set by tribal constitutional or other positive tribal law.[12] Therefore the sole issue before the Court is to determine whether the Band's Land Use Ordinance and its application to non-Indian land owners is permissible as a matter of federal law.

Neither the U.S. Constitution nor any act of Congress prohibits the application of the Band's Land Use Ordinance to Melby. The dispositive key is rather whether the federal common law principles articulated in *Montana v. United States*, 450 U.S. 544 (1981)[13] and applied in the one tribal zoning case decided by the Supreme Court, *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 404 (1989), permit tribal jurisdiction in this matter.

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[12] *See e.g.* Grand Portage Band Judicial Code at Title 1, Ch. II, § 1 (1997) which provides:

> The jurisdiction of the Tribal Court shall extend to: . . .
>
> (b) All actions arising under the Land Use and Zoning Ordinance, and to all persons alleged to have violated provisions of that Ordinance, provided that the action or violation occurs within the boundaries of the Grand Portage Reservation, including all lands, islands, water, roads, and bridges or any interests therein, whether trust or non-trust status and notwithstanding the issuance of any patent or right-of-way, within the boundaries of the Reservation, and adjacent waters of Lake Superior and lands and waters within the area ceded by the Treaty of 1854, and such other lands, islands, waters or any interest therein hereafter added to the Reservation. Hereinafter, reference to "Reservation" shall include all lands and waters described in this paragraph.

[13] Although *Montana* has become increasingly entrenched in Supreme Court Indian law jurisprudence, it is worth recalling how far it departs - without constitutional or congressional authorization - from the previous 150 years of federal Indian law which presumed tribal authority within Indian country unless expressly limited by Congress. *Montana*'s new rule created a presumption against tribal authority on fee land within the reservation, a presumption that may be overcome only by satisfying either of the prongs of the well known *Montana* proviso. This development of a federal judicial plenary power cannot pass without comment. The law is the law but it is not always just or persuasive.

Unfortunately, *Brendale* is no beacon of analytical clarity. Its three plurality opinions for two different holdings relative to the 'closed' and 'open' portions of the Yakima Reservation are something of a confused and unresolved muddle. Yet parse it we must. And in so doing, it is not difficult to conclude that the Grand Portage Reservation in its entirety is quite analogous to the 'closed' portion of the Yakima Reservation. In both the 'closed' portion of Yakima Reservation and the entire Grand Portage Reservation, less than two percent of the land is held in fee by non-Indians and the overwhelming amount of land in both cases is undeveloped wilderness. The Grand Portage Reservation is in no way comparable to the 'open' part of Yakima Reservation in which almost half the land is owned in fee by non-Indians and the population is 80% non-Indian (*Brendale* at 492 U.S. 445).

These findings nevertheless have to be refracted through the lens of the *Montana* proviso which provides:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[14]

As noted by both Justice Stevens in his fact specific (plurality) opinion and Justice Blackman's more general (plurality) opinion, zoning is necessary to protect the 'welfare of the Tribe' especially in a situation - such as Grand Portage - where the land is overwhelmingly held in trust and where the land is undeveloped. Therefore it is clear to this Court that that portion of the *Brendale*

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[14] *Montana*, 450 U.S. at 565-567.

case holding tribal zoning of fee land permissible under the *Montana* proviso relative to maintaining the 'welfare' of the tribe also applies to the case at bar.

It is also instructive to recall some of the particulars of *Montana* that are not present here. *Montana* involved a discriminatory land use regulation that treated non-Indian hunting and fishing on fee land different from tribal members hunting and fishing on tribal trust land. In distinction, the Grand Portage Tribal Land Use Ordinance treats all landholders the same. Melby does not seek equal treatment but rather a 'privileged' status requiring his land to be treated differently from 98% of land on the Reservation. In addition, in *Montana*, the state stocked much of the fish and some of the game on the reservation and arguably had some legitimate interest in these 'resources', while in contrast in the instant case Melby does not (and presumably cannot) demonstrate any equivalent state and/or local interest. These observations are important in order to see - not only from that necessary conceptual view but also from a quite practical view - that the Grand Portage Band is simply seeking to treat everyone the same in the context of land use and there are no overriding state and/or local interests to the contrary.

Because of the unique facts of this case, this Court must also decide whether the 'consensual' prong of *Montana* proviso is satisfied. None of the opinions in *Brendale* take this tack but it nevertheless seems appropriate in this instance. In both *Montana* and *Brendale*, the tribes sought to regulate what we might call the 'private' use of private land, while in this case the tribe seeks to regulate (in part) the 'public', 'commercial' use of Melby's land. Melby wants to use his land differently to advance commercial and hence public use, rather than strictly private or personal use. This distinction matters. Tribes have long been recognized to have wide authority - both as a result of inherent sovereignty and the right to exclude - to regulate commercial and tax activities within the reservation. See e.g. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), *Williams v. Lee*, 358 U.S. 217 (1959). For example, the Grand Portage Band could clearly require Melby to have a tribal business license and/or reasonably tax his commercial activities. Engaging in commerce on the reservation clearly places that activity, whether by Indians or non-Indians, within the reach of

tribal authority. Zoning regulation of commercial entities falls clearly within the sphere of inherent tribal sovereignty and/or the exercise of the right to exclude as an act of sovereignty.

In addition, Melby has participated in commerce with the Band and tribal members. This participation is exhibited by Melby's use of tribal water facilities, and, until recently, Melby's use of tribal waste disposal facilities. Commerce - as opposed to mere private residence - presupposes interaction with the community and its members and the authorization or tolerance by the sovereign to engage in such business. In a word, it is 'consensual' activity. If the Grand Portage Band cannot regulate - by non-discriminatory land use planning - commerce within the reservation, *Montana* will have been extended dangerously beyond its facts and rationale into a situation where it threatens to swallow tribal sovereignty in its entirety. Surely that was not the intent of *Montana,* and this Court will not engage in such ill considered jurisprudence.[15]

In sum, the Grand Portage Band's non-discriminatory Land Use Ordinance violates neither federal nor tribal law and satisfies both prongs of the *Montana* proviso as being 'consensual' in nature, the violation of which would be a direct threat to the 'health and welfare' of the Band. Therefore, the Band possesses jurisdiction over the zoning controversy between the Band and Melby.

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[15] To anticipate a likely query: *Strate v. A-1 Contractors*, 117 S.Ct. 1404 (1997) does not apply to the case at bar. That case involved a tort action resulting from a car accident involving two non-Indians on a state highway running through the Fort Berthold Reservation in North Dakota. This case is not analogous. This case does not involve a private tort between two non-Indians on a state highway but rather an attempt by the Band to regulate - inter alia - the commercial use of land on the reservation. This dispute involves the tribal sovereign directly; public commerce as opposed to a private tort; and a tiny piece of non-Indian land completely surrounded by trust land (and Lake Superior), not a state highway running through a reservation.

B. Summary Judgment

Having determined that the Band has regulatory jurisdiction, the Court must determine whether the Tribal Court improperly denied the Grand Portage Band's Motion for Summary Judgment.

This Court's jurisdiction to hear this appeal arises under the authority of Title 2, Rule 41(g) of the Grand Portage Judicial Code. This Court's review of Judge Fineday's Order finds that she has provided an excellent summary of the findings of fact and conclusions of law in this case, and the parties' extensive briefs have appropriately established an adequate record for this Court to determine the procedural adequacy and merits of the motion for summary judgment.

The Band claims that upon the affirmative finding that Melby and his land are subject to the Band's regulatory and adjudicatory jurisdiction, the Band is entitled to summary judgment as a matter of law. That decision rests upon finding in favor of the Band on two issues at dispute by the parties: that the Band's motion for summary judgment was procedurally appropriate, and that the Band is entitled to summary judgment as a matter of law.

With respect to the procedural appropriateness of the Band's motion for summary judgment, Rule 29 of the Grand Portage Rules of Civil Procedure (which resembles Federal Rule 56(a)) reads as follows:

> Any time 20 days after commencement of an action, any party may move the Court for summary judgment as to any or all of the issues presented in the case and such shall be granted by the Court if it appears that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Despite Melby's arguments regarding lack of discovery or other claimed procedural defects in this proceeding, Rule 29 permits the filing of a summary judgment motion anytime 20 days after commencement of an action. There is no requirement in the Rule that Melby or any litigant file an Answer to the Complaint before a Motion for Summary Judgment could be made and acted upon by the Tribal Court. The Band's motion was therefore procedurally appropriate.

Upon our finding that the motion for summary judgment was procedurally appropriate, it is not clear that additional discovery would produce any materials facts necessary to defeat the Motion for Summary Judgment. The Court must measure the Band's motion for summary judgment, combined with an analysis of Melby's undisputed actions, against the Band's Land Use Ordinance in order to determine whether the Band is entitled to summary judgment as a matter of law.

The Band's adopted Land Use Ordinance requires all land owners to apply for building permits or variances before constructing buildings or other structures within reservation boundaries. Article 12.01 of the Band's Land Use Ordinance requires that an application for a building permit be made to the Band's Land Use Administrator before any building or structure is erected, constructed, reconstructed, altered, moved or enlarged. The findings of Judge Fineday and the record before us clearly document the undisputed fact that Melby violated the terms of the Band's Land Use Ordinance by not obtaining a building permit from the Band, by not obtaining a variance from the Band's set-back requirement as set forth in the Land Use Ordinance, and by proceeding with construction of a storage building in violation of the Band's Land Use Ordinance. Melby does not dispute this. Apparently, it is Melby's belief that had he applied for a permit under the Band's Land Use Ordinance, he would have accepted the jurisdiction of the Grand Portage Band. (Defendant's Reply Brief at 3) We have already shown that the Band's jurisdiction over Melby existed notwithstanding his intentional resistance to comply with the Band's Land Use Ordinance, and Melby has shown that his intentional acts were in clear contravention of the Band's Land Use Ordinance.

Melby appears to claim exemption from the Band's Land use Ordinance by reciting facts that he planned his building, applied for and obtained a Cook County building permit,[16] ordered materials for his building, and paid a nonrefundable deposit before the Band adopted its zoning ordinance. This information merely serves to illustrate Melby's obvious failure to take the necessary steps to comply with the Band's Land Use Ordinance, even after he was aware of adoption of the Ordinance and its possible application to his project. Those facts do not provide a basis for Melby to show that he was not or should not be subject to the Band's Land Use Ordinance, and instead show how he took deliberate steps to avoid the requirements of the ordinance. The information does not defeat the Band's motion that it is entitled to summary judgment as a matter of law.

This Court must address Melby's claim that the mere application of the Land Use Ordinance to his activities is discriminatory in nature (Defendant's Reply Brief at 3). Melby ignores the fact that he has the same rights as any Band member or non-band member in seeking a variance under the Land Use Ordinance. It is difficult to find that the Grand Portage Band discriminated against Melby when Melby did not avail himself to exercise his right to seek a variance under the Band's Land Use Ordinance. Melby's claim of discrimination falls under the weight of the effect of his conscious choice to disregard the Band's Land Use Ordinance in its entirety. The Band's Land Use Ordinance is applicable to all landowners within the reservation boundaries, and was established to be non-discriminatory in its application. Because Melby has chosen to not adhere to its application, he has no basis to claim it is discriminatory in nature. When Melby makes other claims of discrimination or constitutional violations as a result of his lack of voting power or voice in the government establishing the ordinance, his claim of a lack of equal protection is also an untested assumption. Melby may be making an all-too-common assumption that permeates the present-day

[16] It does not matter that Melby applied for and was granted a building permit from Cook County because the Band's Land Use Ordinance is not limited or affected by Cook County's actions in this matter. Furthermore, the "opinion" of jurisdictional authority provided to Melby by the Cook County Planning Director is not relevant in this case because governing law is federal and tribal law (not state law), and Melby certainly should have been aware that such an opinion would not provide conclusive authority on this issue. This Court is not sympathetic to Melby when he cites his volitional acts contrary to existing regulations as argument why the Court should not find jurisdiction and should not grant summary judgment in this case.

view of many Indian activities such as the exercise of self-government or retained treaty rights: that a different right is a "special", unequal right that by its mere exercise discriminates against those who are not Indian. Melby's assertions in this vein are without merit. This Court finds no "special" or unequal right conferred upon Indians or non-Indians as a result of application of the Band's Land Use Ordinance. Melby cites no authority for his broad claims of discrimination or violation of constitutional rights. The Supreme Court has never upheld such claims and in fact, has often held to the contrary. *See e.g. Williams v. Lee*, 358 U.S. 217, 223 (1959) ("It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.").

Melby has also raised the argument that the Band's Motion for Summary Judgment violates Judge Alsop's August 13, 1998 Order referring this dispute to Tribal Court for the exhaustion of jurisdiction. A review of Judge Alsop's Order finds that the Order merely stayed Melby's request for an order enjoining the enforcement of the Band's Land Use Ordinance, pending exhaustion of tribal remedies on the question of the Tribal Court's jurisdiction over Melby's land and actions thereupon. Nothing in Judge Alsop's Order prohibits the Tribal Court from acting upon the summary judgment motion; expeditious resolution of this issue will significantly aid final disposition of this dispute.

By virtue of the fact that Melby did not obtain either a building permit under, or a variance from, the Band's Land Use Ordinance, it is therefore undisputed that as a matter of law Melby violated the Grand Portage Band's Land Use Ordinance. This is the classic situation that calls for summary judgment. There are no issues of material fact. Melby has repeatedly admitted that he did not comply (and does not plan on complying) with the Band's Land Use Ordinance. *See e.g. Bauer v. Albermarle Corp.*, 169 F.3d 962, 968 (5th Cir. 1999) ("This Court recently held that a summary judgment motion can be decided without any discovery"). Combined with the fact that the Band has proper jurisdiction to enforce its Land Use Ordinance in this matter, this Court hereby remands this matter to the Tribal Court for purposes of finding that the Band is entitled to summary judgment in this matter and that judgment should be entered accordingly.

IV. Conclusion

For all the above stated reasons, the Court affirms the trial court's decision recognizing tribal court jurisdiction and reverses its judgment in denying summary judgment in favor of the Band and remands so that judgment be entered accordingly.

IT IS SO ORDERED

Dated: February 15, 2000

Christopher D. Anderson
Chief Justice

Mary Al Balber
Associate Justice

Frank Pommersheim
Associate Justice

EXHIBIT C

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Margaret A. Penn,

Plaintiff,

-v-

A1-98-085

Isaac Dog Eagle, Associate Judge,
in his official capacity and personally;
et. al.

Defendants.

MEMORANDUM AND ORDER

I have been reviewing my admittedly less than great knowledge of literature to try to come up with some appropriate analogy to illustrate the absurdity of all elements of this action and of the facts underlying it. Alice in Wonderland or the Wizard of Oz come to mind, but the situation is so bizarre that perhaps something of Kafka or Sartre would be better.

Ms. Penn, the plaintiff, is not an enrolled tribal member or apparently eligible for such enrollment. She recites that she is 1/8th Chippewa in reference to parentage, but not eligible for enrollment. I therefore conclude that she is not an "indian", and that she certainly is not a member of the Sioux Tribe who claim sovereignty on the Standing Rock Reservation. Fort Yates, the seat of Tribal Government of the Standing Rock Reservation, is located within the borders of the Sovereign State of North Dakota and the Sovereign Nation of The United States of America. The reservation itself is located in both North Dakota and the equally Sovereign State of South Dakota. In North Dakota, the reservation occupies an area also organized as Sioux County, a political subdivision organized and operated under the laws and constitution of the

State of North Dakota.

All resident occupants of the area within the reservation located within the exterior boundaries of Sioux County are potential electors of officials of Sioux County, of officials of the State of North Dakota, and of other Boards, including probably the election of representatives to the Mosquito Vector Control Board, and of course Federal officials-- the representative, two senators and the President of the United States. This potential to be an elector is not racially based, but is premised upon citizenship in the United States of America.

Only enrolled members of the Sioux Tribe are potential electors of the officials elected under the constitution of the Sovereign Sioux Tribe. This potential is racially based.

Ms. Penn, a non-lawyer, was at one time employed as a tribal prosecutor in Tribal Court. At the time of the major underlying incident, she was working for an advocacy organization in the areas of domestic violence and spouse abuse.

She is a party to litigation pending in Tribal Court involving her previous employment as a prosecutor, seeking either reinstatement or damages for an alleged wrongful termination.

Somehow, (and I refuse to schedule an evidentiary hearing to learn the details) Ms. Penn stepped on someone's toes and the result was an "Banishment Order" issued by "Associate Judge Isaac Dog Eagle" exercising "traditional authority".

The pleadings contain the following excerpts from the factual statement:

"On July 24, 1998, at approximately 2:00 p.m., Petitioner, Margaret A. Penn, was served with an order directing that under a traditional banishment she be removed from the boundaries of the Standing Rock Sioux Indian Reservation by Frank Landis, Sheriff of Sioux County, and John Vettleson, Captain of Bureau of Indian Affairs Law Enforcement and supervising office of Standing Rock Sioux Tribal Police."

"Sheriff Landis and Captain Vettleson directed petitioner that she must leave Tender Hearts Against Family Violence, Inc., where she was the only staff person on duty, and that they would accompany her to her home, allow her time to retrieve some possessions, and then escort her to the boundaries of the Standing Rock Sioux Indian Reservation from which she was excluded by order of the Standing Rock Sioux Tribal Court."

"Petitioner asked Captain Vettleson if she returned to the Reservation would she be arrested and Captain Vettleson stated that his officers would be obligated to arrest her. Sheriff Landis and Captain Vettleson followed petitioner as she drove from Fort Yates to her home in Selfridge, North Dakota, then both men assisted petitioner in loading a few personal possessions into her vehicle. Sheriff Landis and Captain Vettleson, in a law enforcement vehicle, then followed petitioner as she left her home in Selfridge, North Dakota, and drove the approximately 30 miles to the exterior boundary of the Standing Rock Sioux Indian Reservation where they executed a u-turn and drove off and petitioner continued, leaving the exterior boundaries of the Standing Rock Sioux Indian Reservation."

This statement would make a wonderful test question in a course on American Constitutional law. "please identify the constitutional rights of Ms. Penn violated in the above statement." Banished? From a political subdivision of a State? Without a hearing? Of a citizen of the United States? Evicted from her home under threat of arrest if she did not voluntarily comply? Evicted from her home with the cooperation and assistance of the Sheriff of Sioux County, apparently acting in his official capacity with the power of government behind him? I have the impression that as soon as someone with some appreciation of the rights possessed by all United States citizens learned of the "order" of banishment, it was somehow canceled by action of the Tribal Council. One wonders if the Sheriff and the BIA Police Captain would have

carried out an order for summary execution by hanging if ordered by the "associate judge".

As stated, Ms. Penn has an action pending in Tribal Court. The Tribal Court of the Standing Rock Sioux Tribe is not an independent judicial branch, although on paper it looks good. In the past, the salaries of elected judges whose decisions have offended the council have been terminated by the tribal council, despite tribal constitutional prohibitions. As a "sovereign" who has not consented to suit in this court no recourse is available to the now unpaid judge other than through the same tribal court now possibly presided over by an "associate judge" appointed by the same Tribal Council---who is getting the salary sought by the complainant.

It may perhaps show that I find the conduct towards Ms. Penn outrageous.

She sues in Federal Court, attempting to invoke the limited jurisdiction of this Court by reference to the Indian Civil Rights Act, 25 U.S.C. 1302 and 1303; 28 U.S.C. 1331, Federal Question Jurisdiction; and 28 U.S.C. 1343, Civil Rights and Elective Franchise. Named as defendants are the "associate judge" Isaac Dog Eagle, officially and personally, the Tribe itself, the chairman of the Tribal Council and all of its member, named in their official capacities, the Tribal attorney, officially and personally, an administrative officer, officially and personally, and four individuals named in their personal capacity.

She requests that a writ of habeas corpus issue ordering the removal of any Tribal Court Order restricting her freedom to move at will through the various areas of the United States, including the Standing Rock Sioux Reservation. The Tribe and its officials respond by pointing out that she is already victorious on this issue in that the order has been rescinded and it is certainly not likely that anyone will attempt this again. They argue, and correctly, that any action based on the Indian Civil Right Act is subject to dismissal as the sole remedy of Habeas is now moot as no restriction on freedom presently exists. The prayer for relief also requests

intervention in the action presently pending in Tribal Court, and a request that I find the United States District Court has jurisdiction to hear "any cause of action arising out of the issuance and execution of the banishment order."

The petition for the Writ of Habeas Corpus is now dismissed as having been mooted by the cancellation of the offending order, and the court finds that the balance of the requested relief is beyond the limited jurisdiction of this court under the pleading filed.

The petition is dismissed as to all named and served defendants, without prejudice to any claims or causes of action the petitioner may have which are separate and independent of the habeas remedy afforded by the Indian Civil Rights Act.

Dated this 27th day of January, 1999.

Patrick A. Conmy
Judge of the District Court

NOTICE OF ENTRY
Take notice that the original of this copy was entered in the office of the clerk of the United States District Court for the District of North Dakota on the 27 day of Jan. 1999
EDWARD J. KLECKER, CLERK

By: Deborah Thom
Deputy

(27)

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Margaret A. Penn,

Plaintiff,

vs.

United States of America, et al.,

Defendants.

Case No. A1-00-93

MEMORANDUM AND ORDER

Before the Court are two motions for summary judgment. One filed by the United States on behalf of the Federal Defendants and one filed by the Sioux County Defendants. Both motions are based primarily on theories of absolute and qualified immunity. The parties agree that the Sioux County Commissioners should be dismissed because the Sioux County Sheriff is independently elected and not subject to control by the Sioux County Commissioners. The Court will so dismiss. The Court has previously dismissed and/or consolidated all the federal defendants such that only the United States remains. The federal defendants are sued under the Federal Tort Claims Act. The county defendants are sued under 42 U.S.C. § 1983 and various state law torts.

FACTUAL BACKGROUND

There is little dispute over the facts of this case which are unusual in the extreme. Plaintiff Margaret Penn is 1/8th Turtle Mountain Chippewa. She is not an enrolled member of any Indian tribe or eligible for enrollment in any tribe. Her status is that of a non-Indian and nonmember of the Standing Rock Sioux Tribe. Plaintiff has a law degree from the University of Boulder. She has previously worked as a prosecutor on the Standing Rock Sioux Indian

Reservation.

In August 1996 Plaintiff was fired from her job as prosecutor after getting involved in several disputes with Tribal officials. Plaintiff filed a civil lawsuit in Tribal Court based on her dismissal. She remained on the reservation and began working at Tender Hearts Against Family Violence, Inc., a nonprofit organization serving battered women. The Tender Hearts program was embroiled in some controversy of its own. On July 24, 1998, Faith Taken Alive, co-director of the Tender Hearts program, filed a "Petition For Traditional Custom Restraining Order" with the Standing Rock Tribal Court. The petition alleged Plaintiff had a gun and was making threats against Tribal officials and had filed a multimillion dollar lawsuit against the Tribe. On July 24, 1998, Associate Judge Isaac Dog Eagle issued an order for Plaintiff's temporary exclusion from the reservation. The banishment order was attested to by the Clerk of Tribal Court. The order was issued *ex parte* and without a hearing. The order provided a hearing would be held on the matter within thirty days but no such hearing was ever scheduled or held.

The banishment order was given to Bureau of Indian Affairs ("BIA") Captain John Vettleson for service. The service of tribal court orders is carried out by BIA officers as this is the stated policy of the Department of the Interior. Captain Vettleson consulted with superiors who told him to serve the order. Prior to serving the order Captain Vettleson attempted to contact the United States Attorney's Office but was unable to do so. Vettleson also called Sioux County Sheriff Frank Landeis and asked him to assist in service of the order.

The parties dispute whether the order was civil or criminal in its nature. This was not the first exclusion order Vettleson had served. While the order was issued as a civil order, the Plaintiff asserts it was in fact a criminal punishment.

Sheriff Landeis and Captain Vettleson knew the Plaintiff was not a Tribal member. The

petition itself stated the Plaintiff was a nonmember. The gun referenced in the petition was actually in the possession of Sheriff Landeis and had been for several months. Plaintiff had given the Sheriff the weapon out of fear it would be stolen from her home in Selfridge where there had been a number of burglaries.

Sioux County is unique in that its borders coincide with the exterior boundaries of that portion of the Standing Rock Reservation which lie within North Dakota. Sheriff Landeis is the sole state law enforcement official in Sioux County. Sheriff Landeis regularly requests BIA law enforcement back him up and he returns the favor when BIA makes a similar request. Such cooperation is not unusual and is really a necessity when one considers the vast amount of territory to be covered, the overlapping jurisdictions and the very rural nature of the area.

The order was served on the Plaintiff at the Tender Hearts' office in Fort Yates. Plaintiff was allowed to retrieve some belongings at her residence in Selfridge and was then escorted to the reservation boundary. Plaintiff drove her own vehicle and was followed by Vettleson and Landeis in a police vehicle. Penn was informed by Captain Vettleson that if she failed to comply with the order she would be arrested. The complaint does not allege excessive force was used in service of the banishment order.

On August 31, 1998, Plaintiff commenced a Habeas Corpus action in this court seeking to have the banishment order declared illegal. On the same date the Plaintiff filed an administrative claim for damages with the BIA. Upon motion of the Tribe, Associate Judge Dog Eagle vacated the banishment order on September 14, 1998. The federal habeas action was later dismissed. While that dismissal was on appeal, Plaintiff settled the matter and the Tribal Court action for $125,000. The current action was filed on July 21, 2000.

The essence of the Plaintiff's complaint is that the banishment order should not have been

carried out because it clearly violated the law. The Plaintiff does not object to the manner in which the order was enforced, only that it was. Claims one through five are against the federal defendants under the Federal Tort Claims Act for failure to administer and monitor, failure to train, malicious prosecution, illegal arrest and seizure, and intentional infliction of emotional distress. Claim six is against the federal defendants under 42 U.S.C. § 1983. Claims six through eleven are state law claims against the county defendants. Those claims are for failure to administer and monitor, failure to train, malicious prosecution, illegal arrest and seizure, and intentional infliction of emotional distress. Claim twelve is against the county defendants under 42 U.S.C. § 1983.

ANALYSIS

I. Summary Judgment Standard

The standard for granting a motion for summary judgment is well-settled. A movant is entitled to summary judgment if he or she can "show that there is no genuine issue as to any material fact and that [he or she] is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56©. The moving party bears the initial burden of showing the Court that, on the evidence before it, there is no genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). If the moving party meets its burden, the nonmoving party must then "set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); see also Celotex Corp., 477 U.S. at 324. Those specific facts must generate evidence from which a jury could reasonably find for the nonmoving party; the mere existence of a scintilla of evidence supporting the nonmoving party's position is not sufficient. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). The Court must construe all reasonable inferences in favor of the nonmoving party, and it may not properly grant summary judgment where the issue turns on the credibility of witnesses.

Celotex Corp., 477 U.S. at 322-323.

II. Immunity

The Court will address the applicability of absolute and qualified immunity to both the federal and county defendants as a whole. The analysis is the same with the exception of the jurisdiction of the law enforcement officers. See Harlow v. Fitzgerald, 102 S.Ct. 2727, 2733 (1982).

There is a presumption in the law that qualified rather than absolute immunity is sufficient to protect public officials in the performance of their duties. Robinson v. Freeze, 15 F.3d107, 108 (8th Cir. 1994). Qualified immunity protects government official from liability for discretionary actions unless those actions violate clearly established constitutional rights. King v. Beavers, 148 F.3d 1031, 1034 (8th Cir. 1998).

Absolute immunity has been recognized for legislators in their legislative capacity and judges in their judicial functions. Harlow, 102 S.Ct. at 2732. Presumably, tribal court judges enjoy the same absolute immunity as their state and federal counterparts. Prosecuting attorneys, prison wardens and parole board members have also been recognized as enjoying absolute immunity for conduct flowing from their official duties. Patterson v. Von Riesen, 999 F.2d 1235, 1236 (8th Cir. 1993).

Courts have regularly held that public officials who act pursuant to a facially valid court order issued by a court of competent jurisdiction enjoy quasi-judicial absolute immunity for enforcing the order. Id. at 1240. Officials acting outside their jurisdiction lose that immunity. Id. at 1239. Officials must not be required to act as "pseudo-appellate courts" second guessing judicial orders. Id. at 1241. If officials cannot carry out the orders and directives of judges

without fear of being sued then the authority of the court will have been compromised and it will be unable to function effectively. Id. at 1240.

The banishment order was quite unusual. Facially valid does not mean lawful and an erroneous order may still be valid. Turney v. O'Toole, 898 F.2d 1470, 1473 (10th Cir. 1990). The order was issued as a civil order. The petition and order are couched in the terms of a restraining order and call for a hearing to be held in thirty days. The order was signed by a Tribal Judge and attested to by the Tribal Clerk.

Captain Vettleson and Sheriff Landeis were acting within their territorial jurisdiction. BIA policy calls for the service of process by BIA law enforcement officers. See 25 U.S.C. § 2802. Their actions took place on the reservation and in Sioux County. Vettleson and Landeis had served banishment orders in the past. Vettleson regularly served tribal court orders as part of his job and Landeis often assisted him. This was a professional courtesy necessary to an area with a maze of jurisdictions and few law enforcement officers of any type. To be sure, Landeis' presence was in his official capacity. He was in uniform and presumably armed. He clearly participated in the service of the order.

All of this having been said, the question remains as to the eligibility of the Sheriff and Captain Vettleson for either absolute or qualified immunity. The Court Order of banishment was issued by the Court of a sovereign separate and apart from that of the State of North Dakota or the county, although one whose geographical area within the State of North Dakota is the same as the political subdivision represented by the Sheriff. Law enforcement agencies cooperate with each other as a matter of policy. The Sheriff of Sioux county does not, however, have any legal obligation to enforce or assist in the enforcement of any Tribal Court Order. Captain Vettleson, as a BIA employee, does have such an obligation.

Immunity should extend to good faith actions taken within the jurisdiction of the officer. As general rule, an officer carrying out a court order is clothed with immunity regardless of the idiocy of the order, but there has to be a limit to this policy. If the Tribal Court had ordered summary execution of Ms. Penn, surely Captain Vettleson and the Sheriff would not have carried out the order, although with the constitutional sanctity of the home of a citizen the action of summary eviction from the home and the County with absolutely no due process ranks right up there with summary execution.

I do not find the Order to be "facially valid." Ms. Penn is not a tribal member or even an "Indian" for purposes of Tribal Court jurisdiction. The facts recited by the parties indicate that the Court had issued other "banishment orders" in the past. A continuation of a clearly unconstitutional course of conduct does not create legitimacy. The Order would be unconstitutional even if directed toward a tribal member. It is inconceivable to me that any law enforcement officer, trained in the constitutional requirements of arrest and search and seizure, could believe that an *ex parte* order forcing someone from their home and County of residence for a minimum period of 30 days could be valid.

It may be argued, and probably will be so argued on appeal of this Order, that the denial of immunity will emasculate the effectiveness of law enforcement in that some determination of legitimacy of a court order will be required of the officers. I reject that argument in the belief that some determination of legitimacy is the clear duty of a law enforcement officer. "Just following orders" should not be an excuse when the order is patently unconstitutional.

It is ordered:

1. The United States of America is hereby substituted as the sole defendant on behalf of all other named defendants with regard to the claims filed by the Plaintiff under the Federal Tort

Claims Act. In all other respects, the motion of the Federal defendants is denied.

2. Sioux County and its Board of Commissioners, all sued in their official capacities, are dismissed as defendants as being without authority or ability to control or direct the action of the Sioux County Sheriff's Department and its Sheriff, Frank Landeis. In all other respects, the motions for summary judgment by Sheriff Landeis and the Sioux County Sheriff's Department are denied.

SO ORDERED

Dated this 6th day of March, 2002.

Patrick A. Conmy, Senior District Judge
United States District Court

NOTICE OF ENTRY
Take notice that the original of this copy was entered in the office of the clerk of the United States District Court for the District of North Dakota on the 6th day of March 2002
EDWARD J. KLECKER, CLERK
By: Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Margaret A. Penn,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. A1-00-93
	)	
United States of America, et al.,	)	
	)	
Defendants.	)	

ORDER OF CLARIFICATION

The parties have requested a clarification of this Court's Order dated March 6, 2002. The Court states the following in order to clear up any ambiguity:

1. The plaintiff's Bivens and §1983 claims against Bodin, Armstrong and Vettleson are preserved.

2. The United States has been substituted as the sole defendant only on the claims arising under the Federal Tort Claims Act.

SO ORDERED

Dated this 29th day of March, 2002.

Patrick A. Conmy, Senior District Judge
United States District Court

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NO. CT-89-1863

STATE OF MINNESOTA
IN SUPREME COURT

IN RE: RULES OF PROCEDURE
FOR THE RECOGNITION OF TRIAL
COURT ORDERS AND JUDGMENTS

REQUEST TO MAKE AN ORAL PRESENTATION

MINNESOTA TRIBAL COURT STATE COURT FORUM

The undersigned hereby requests to make an oral presentation at the hearing on the Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments which is scheduled for 2:00 P.M. on October 29, 2002. A copy of the materials to be presented is attached to this request.

DATED: October 15, 2002

Bill Lawrence
500 North Robert Street, Suite 205
St. Paul, Minnesota 55101
Telephone 651-224-6656

No. Cx-89-1863

STATE OF MINNESOTA
IN SUPREME COURT

IN RE: RULES OF PROCEDURE
FOR THE RECOGNITION OF TRIBAL
COURT ORDERS AND JUDGMENTS

AFFIDAVIT OF WILLIAM J. LAWRENCE

1. I am William J. "Bill" Lawrence, publisher of the *Native American Press/Ojibwe News*. I have been addressing the problems of 'tribal courts' since the late 1960s, when I was working on the Red Lake Reservation as Director of Economic Development. I wrote a critique of the Red Lake Indian courts in a law review article, "Tribal Injustice: The Red Lake Court of Indian Offenses," published in the *North Dakota Law Review*, Vol. 48, No. 4, Summer 1972, pp. 639 – 659 [Exhibit A].

2. Despite my and *Native American Press* staff's explicit requests for advance notification of any action by the Minnesota Tribal Court State Court Forum, I learned of the Forum's "Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments" (filed with the State of Minnesota in Supreme Court, *In Re: Rules of Procedure for the Recognition of Tribal Court Orders and Judgments*, on April 11, 2002) through publication in the *Legal Ledger*, one day in advance of the Rules Committee Hearing.

3. My only son, Joel W. Lawrence, age 28, of Bemidji, Minnesota, died unexpectedly on Friday May 17, 2002. I am currently in Bemidji for the visitation and funeral of my son.

4. I request that my article in the *North Dakota Law Review* be filed with the Rules Committee.

5. I also request that my article, "In Defense of Indian Rights," pp. 391 – 404, in *Beyond the Color Line, New Perspectives on Race and Ethnicity in America*, Thernstrom and Thernstrom, eds., (2002) be filed with the Rules Committee. [Exhibit B].

6. My concerns about the process of the Minnesota Tribal Court State Court Forum were expressed at some length in my editorial, "Gardebring's resignation from MN Supreme Court will impact Native community," p. 4, *Native American Press/Ojibwe News*, July 3, 1998. [Exhibit C]. In that editorial I write in part,

> ... A number of us in the Native community, especially those who have had the misfortune of experiencing tribal courts in action, have been concerned about Gardebring's state court/tribal court initiative. We are concerned because of the lack of tribal courts' independence from tribal council influence, lack of competency, lack of judicial review, lack of public defenders or representation of one's choice, lack of court rules, lack of documentation, lack of *due process*, conflicts of interest, and of course, the ever-present tribal use of the sovereign immunity defense in actions against them.
>
> We became even more concerned when all three state court /tribal court committee meetings that were held on reservations were closed to the public – an arrangement Justice Gardebring agreed to, apparently without qualm. Close meetings are a fact of life on reservations.
>
> Another matter that bothered many of us was the composition of the committee. All of the lawyers and Native members of the committee were from the tribal establishment i.e. either employees of the tribes or in some other way on the tribal payroll. And the committee appeared to be hand-picked by Gardebring.
>
> No public input was permitted, although several people with concerns rose to express their opposition to the work of the committee at one meeting. At both of the off-reservation tribal court/state court committee meetings that this publisher was allowed to attend there were security guards present, creating an air of intimidation to those who would dare to ask questions. When one person in attendance asked, "How can you

recognize and legitimize courts that don't even abide by their own laws and constitutions? These are not real judges or real courts," Justice Gardebring responded, "That's an internal tribal matter."

So that makes it okay, or at least none of her concern? It's not an "internal tribal matter" when the state is seriously talking about giving full recognition to all tribal court actions and rulings. ..."

7. One of my most serious concerns about the process is that the people who deal with tribal court systems on behalf of Indian people, and the Indian people themselves, were excluded from Forum meetings, and never had an opportunity to speak. The only people whose viewpoints have been presented are tribal attorneys representing the tribal establishment, tribal court judges, and others with a vested interest in the tribal court system and in promoting "Indian sovereignty." The state court judges who participated in the Forum do not have firsthand knowledge of the day-to-day operations of tribal courts.

8. I request leave to file a complete affidavit on or before June 1, 2002, and further request that I be accorded full opportunity for my testimony be heard by the Rules Committee in the matter of the Minnesota Tribal Court State Court Forum's "Petition for Adoption of Rule of Procedure for the Recognition of Tribal Court Orders and Judgments."

William J. Lawrence

Subscribed to and sworn to before me
this 22nd day of May, 2002.

Romaine R. Powell

Notary Public, _____ County, MN.
My commission expires on _____.

ROMAINE R. POWELL
Notary Public
Minnesota
My Commission Expires Jan. 31, 2005

EXHIBIT A

NOTES

TRIBAL INJUSTICE: THE RED LAKE COURT OF INDIAN OFFENSES

> The success of any legal system depends upon its acceptance by the people to whom it applies. Insofar as the system is an integrated part of the web of social norms developed within a society's culture (with due exception for imposition by some organized minority force), it will be accepted as a parcel of habit-conduct patterns in the social heritage of the people. The eternally primary function of law in any society (despite the "rule of conduct" thinkers) being to close any breach which has opened between grievance-bearers, and meanwhile to restrain individuals from the breach of certain norms of either initial conduct or adjustment which are deemed of vital importance by the society concerned, it follows in the main that the fewer the demands that are made upon the law, the greater the good for the society. Law-in-action exists only because less stringent methods of control have failed to hold all persons in line or in harmony, on points of moment. The extension of the sphere and importance of observable law in the more highly developed societies is not in itself an index of social progress. It is merely an index of a greater complexity of the society and hence of the norms or imperatives to be observed, and hence, finally, of an increasing difficulty in obtaining universal adherence to such norms. Conversely, this means that the less call there is for law as law, and upon law as law (relative to the degree of complexity of a society), the more successful is that society in attaining a smooth social functioning.[1]

I. INTRODUCTION

Spotted Tail, a Sioux leader, appropriated the wife of a crippled Sioux named Medicine Bear. He offered the offended husband a compensation for his loss. While these negotiations were proceeding, a friend of Medicine Bear named Crow Dog transformed the matter into a blood feud on August 5, 1881, by shooting the appropriator to death. The murder occurred on the Rosebud Reservation in South Dakota. Crow Dog was tried and convicted in the federal court, but his attorney obtained a writ of habeas corpus from the Supreme Court of the United States. The Court unanimously held that Crow Dog in his relations with other Indians on the reservation, was gov-

1. K. LLEWELLYN & E. HOEBEL, THE CHEYENNE WAY; CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE 289 (1941).

erned by tribal law and was responsible only to tribal authorities.[2] The Crow Dog incident and resulting Supreme Court decision revealed a dilemmatic interstice between traditional Indian justice and that of the dominant society. The changes in life style and dependency of most tribes on the federal government usually resulted in the breakdown of tribal legal systems creating a judicial vacuum on most reservations. It is interesting to note that the federal government's initial response to this void was designed more to prohibit certain tribal practices than to provide justice. The Report of the Indian Justice Planning Project (1971) describes this dilemma as follows:

> Falling upon the traditional justice system of the Indians with the cultural and traumatic effect of a bombshell was the first effort of the white man to "outlaw certain of the old heathenish dances, such as the sun-dance, scalp-dance etc." and to prevent social activities that "are intended and calculated to stimulate the war-like passions."[3] This "effort" in the area of Indian justice led to the creation of Courts of Indian Offenses.

The Courts of Indian Offenses were nothing more than earlier attempts by the Bureau of Indian Affairs[4] to administer a "rough and ready" form of Anglo-Saxon justice. These courts were characterized in the only reported case squarely upholding their legality as "mere educational and disciplinary instrumentalities by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian."[5] One defense of their legality is the doctrine that the Courts of Indian Offenses "derive their authority from the tribe rather than from Washington."[6]

Whichever of these explanations is offered for the existence of the Courts of Indian Offenses their establishment cannot be held to have destroyed or limited the powers vested by existing law in the Indian tribes over the province of law and order and the administration of civil and criminal justice.

II. ESTABLISHMENT OF COURTS OF INDIAN OFFENSES[7]

A. BACKGROUND

The Courts of Indian Offenses were established by an adminis-

2. 1 T. HAAS, THE INDIAN AND THE LAW 5 (1949).
3. 1883 SEC. OF INTER. ANN. REP. Ser. 2190, P. XI.
4. Established in 1824 under the War Department. In 1849 it was moved to the Department of the Interior, where it remains today. It will be referred to throughout this note as the Bureau, the BIA or the Indian Service.
5. United States v. Clapox, 35 F. 575 (D. Ore. 1888). *Cf. Ex Parte* Bi-a-lil-le, 12 Ariz. 150, 100 P. 450 (1909).
6. Rice, *The Position of the American Indian in the Law of the United States*, 16 J. COMP. LEG. 78, 98 (1934).

trative act of the Commissioner of Indian Affairs as a result of a request by the Secretary of the Interior in 1883.[8] Courts of Indian Offenses were established where the Superintendent and Commissioner of Indian Affairs determined they were practical and desirable. The history of the development of the Courts of Indian Offenses suggests that the federal government's sense of priorities left something to be desired. For example, the Indian police systems were organized in 1878,[9] and not until 1883 did the federal government see fit to establish the court system, and not until 1888 did Congress see fit to appropriate any money to finance the courts.[10] It would seem that the federal government since the early days of the Indian Service, has been police-oriented, and that the courts, which are the heart of any system of justice, have been low in the order of priorities for assistance in improving or expanding the law and order system. Because of this, the courts presently are in the greatest need of renovation.

B. MAJOR CRIMES ACT OF 1885

The *Crow Dog* decision[11] is often referred to as the blood feud that prompted Congress to pass the Major Crimes Act of 1885.[12] This legislation provided for the trial and punishment of Indians committing murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. Later the crimes of incest, robbery, and assault with a deadly weapon were added.[13] Together, they are known as the "ten major crimes." These offenses, plus embezzlement of tribal funds[14] and the infringement of a few federal laws applying to both Indians and non-Indians, constitute the only acts of Indians against each other that are federal crimes.[15]

III. THE RED LAKE COURT OF INDIAN OFFENSES

A. ESTABLISHMENT

The Red Lake Court of Indian Offenses was established in 1884[16] pursuant to regulations promulgated by the Bureau of Indian Af-

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7. Courts of Indian Offenses should be distinguished from traditional courts which existed formally or informally in nearly every tribe prior to the coming of the European and tribal courts which were created by the Indian Reorganization Act of 1934. Act of June 18, 1934, ch. 576, 48 Stat. 984, *as amended,* at 25 U.S.C. §§ 461-79 (1970).

8. 1883 SEC. OF INTER. ANN. REP. Ser. 2190.

9. W. HAGEN, INDIAN POLICE AND JUDGES (1966).

10. *Id.* at 111.

11. *Ex Parte* Crow Dog, 109 U.S. 556 (1883).

12. Act of March 3, 1885, ch. 341, §9, 23 Stat. 385, *as amended,* 18 U.S.C. §§ 1153, 3242 (1970), *upheld in* United States v. Kagama, 118 U.S. 375 (1886).

13. Act of June 28, 1932, ch. 284, 47 Stat. 337 (*codified at* 18 U.S.C. §§ 1153, 3242 (1970).

14. Act of Aug. 1, 1956, Pub. L. No. 70-871, 70 Stat. 792.

15. *See e.g.,* 18 U.S.C. §§ 433, 1154-65, 1853 and 25 U.S.C. §§ 179, 202 (1970).

16. E. MITTELHOLTZ, HISTORICAL REVIEW OF THE RED LAKE RESERVATION (1957).

fairs.[17] These regulations provided guidelines for court organization and procedure and an abbreviated criminal and civil code. In recruiting judges, the agent was directed to seek out Indians "intelligent, honest and upright, and of undoubted integrity." Aside from that, the only qualification required was that prospective jurists not be polygamists. The rules also stipulated that the court was to be presided over by Indian judges, with the first three ranking officers of the reservation police force to serve without compensation.[18]

The courts were to meet at least twice a month. The grant of jurisdiction was extensive; a court could rule "upon all such questions as may be presented to it for consideration by the agent."[19] The rules specifically assigned to the courts such offenses as the injurious phases of certain of the old heathenish dances mentioned above, plural marriage, the interference of medicine men with the civilization program, destruction of property following death, payment for the privilege of cohabiting with a female and intoxication and the liquor traffic. In general, "the civil jurisdiction of such court shall be the same as that of a Justice of the Peace in the state or territory where such court is located."[20]

The original rules of court were amended on March 12, 1894, to allow selection of judges from the body of the band. Provision was also made for the disposition of funds collected as fines. It was made an offense for an Indian to leave the reservation without permission of the agent. According to one Red Lake historian,[21] it was common practice for the agent to bring trusted Indians from the main agency at White Earth to hear and decide disputes between tribal members. Presumably, these people were members of the Indian police force at the White Earth Reservation.[22] One author has said that these early proceedings were "more in the nature of courts martial than civil courts and practically registered the decrees of the Indian agent."[23] Although appeals could be taken from the court to the Indian Bureau, there is no record of any appeals ever having been made.

On December 13, 1906, the first independent agency was established at Red Lake.[24] With a full time agent stationed at Red Lake,

17. T. HAAS, *supra* note 2, at 6. These regulations were approved by the Secretary of the Interior in 1883.
18. *Id.*
19. *Id.*
20. 39 RULES FOR COURTS OF INDIAN OFFENSES 120 (1883).
21. Interview with Erwin F. Mittelholtz, Guidance Counselor, Minnesota Department of Education, in Bemidji, Minnesota, December, 1969 [hereinafter cited as Mittelholtz interview].
22. The White Earth Reservation is located in Becker, Clearwater and Mahnomen counties in northwest Minnesota.
23. W. HAGEN, *supra* note 9, at 110.
24. E. MITTELHOLTZ, *supra* note 16, at 42.

the court was able to sit more frequently and local members of the band were utilized as judges.

The revised regulations continued in force with little or no change until new departmental regulations were approved by the Secretary of the Interior on November 27, 1935.[25] These regulations were the result of the Indian Reorganization Act (IRA) of 1934[26] which was enacted to reverse the allotment policy by imposing an indefinite period of trusteeship and, among other things, provide machinery by which local self-government groups could be organized. The Red Lake Band, organized prior to the IRA,[27] saw no benefit from the act for themselves and therefore rejected it, although one feature of the act which the band did take advantage of was the "law and order" code drafted by the BIA.[28] This code thus became the basis for the judicial structure of the Red Lake Court of Indian Offenses.

B. TRIBAL CODE OF INDIAN OFFENSES

In 1952, the Red Lake Band of Chippewa Indians extensively revised its code of Indian offenses. The code is comprised of the following five chapters:[29]

Chapter I—Rules of Court
Chapter II—Eighty sections dealing primarily with criminal law
Chapter III—Game and Fish, 8 sections
Chapter IV—Civil Actions, 15 sections
Chapter V—Domestic Relations, (includes probate), 6 sections

The code is presently in the process of revision and hopefully, this revision will be completed "before the rivers cease their flow and the grass its growth."[30]

In addition, an adoption ordinance (no. 1-65) was drafted by the Red Lake Band in 1965 which provided for the adoption of Indian residents of the Red Lake Reservation. This ordinance contains 13 sections, and is said[31] to be desperately in need of revision because of its inadequacy.

C. JURISDICTION

The rather confused pattern of jurisdiction on Indian reservations

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25. T. HAAS, *supra* note 2, at 6.
26. Act of June 18, 1934, ch. 576, 48 Stat. 984, *as amended*, at 25 U.S.C. §§ 461-79 (1970). *See generally* Comment, *Tribal Self Government and the Indian Reorganization Act of* 1934, 70 MICH. L. REV. 955 (1972).
27. The Red Lake Band organized a General Council on April 18, 1918, to conduct tribal administration. The initial tribal constitution was also adopted at that time, and was revised in 1958. E. MITTELHOLTZ, *supra* note 16, at 83-87.
28. 25 C.F.R. §§ 11.1-11.806 (1968 Supp.).
29. Copies of the code and the Red Lake Band's constitution are on file at the library of the University of North Dakota School of Law.
30. This choice of words is a satirical response to the phrase often used in treaties with the Indians by the United States Government to depict the length of time the Indians were to retain their lands.
31. Interview with a former BIA official who chose to remain anonymous.

today is largely an outgrowth of their legal history, especially that portion concerning original tribal sovereignty and its subsequent erosion. Since the tribes were sovereign, they were possessed of certain criminal and civil jurisdiction which did not depend on a delegation of power from the federal government.[32] It was nevertheless clear that the federal government, by the combined rights of conquest[33] and its own constitutional grant,[34] had plenary power over Indian Affairs and could regulate them to the extent Congress chose to do so.[35] *Worcester v. Georgia*[36] made clear that the states had no regulatory authority over Indian Affairs unless that power was granted to them by Congress.

While these basic principles are simple enough, the jurisdictional morass that overlies them is not. Much of the confusion is caused by three developments: (1) Congress has chosen to exercise only part of its power, leaving other matters to the tribes and in some cases granting regulatory power to the states; (2) the tribal authority itself has not been regarded as purely territorial, but has instead been construed to apply only to Indians, or in some cases, to all matters involving Indian self-government;[37] and (3) the reservations are not actually under the control of the states, but they do lie within state boundaries, leaving the states with some power of regulation over non-Indians[38] and perhaps over Indians where such regulation does not interfere with the rights of tribal self-government.[39]

The jurisdiction of the Red Lake Court of Indian Offenses[40] may be defined by two parameters—race and geography.[41] Non-Indians are not subject to criminal or civil suit in the tribal court without consent;[42] a crime committed by a non-Indian on a reservation may, however, be a federal offense,[43] or prosecuted in state courts.[44] It is unsettled whether a non-Indian bringing a suit in tribal court consents to counter-claims raised by an Indian defendant.[45]

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32. Crosse, *Criminal and Civil Jurisdiction in Indian Country*, 4 ARIZ. L. REV. 57 (1962).
33. Cherokee Nation v. Ga., 30 U.S. (5 Pet.) 1 (1831).
34. U.S. CONST. art. 1, §8, cl. 3.
35. United States v. Kagama, 118 U.S. 375 (1886).
36. 31 U.S. (6 Pet.) 515 (1832).
37. Williams v. Lee, 358 U.S. 217 (1958); Kane, *Jurisdiction Over Indians and Indian Reservations*, 6 ARIZ. L. REV. 237, 242-243 (1964).
38. Draper v. United States, 164 U.S. 240 (1896); United States v. McBratney, 104 U.S. 621 (1881).
39. Kennerly v. District Court of Mont., 400 U.S. 423 (1971); Williams v. Lee, 358 U.S. 217 (1958); Ghahate v. Bur. of Rev., 80 N.M. 98, 451 P.2d 1002 (1969).
40. The jurisdiction of this court is set out in 25 C.F.R. §11.22 (1968 Supp.).
41. *See generally* ASSOCIATION ON AMERICAN INDIAN AFFAIRS, FEDERAL INDIAN LAW ch. 4 (rev. ed. 1958) [hereinafter cited as FEDERAL INDIAN LAW]; Cohen, *Indian Rights and the Federal Courts*, 24 MINN. L. REV. 145 (1940); Note, *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818 (1968).
42. FEDERAL INDIAN LAW 371.
43. *Id.* at 323-24.
44. In State of Minnesota v. Halthusen, 261 Minn. 536, 113 N.W.2d 180 (1962), the court held that Minnesota has jurisdiction over crimes committed against non-Indians by non-Indians on the Red Lake Reservation.
45. *See* Note, 81 HARV. L. REV. 1818 (1968), *supra* note 41, at 1819.

Civil suits against band members who are reservation residents may generally be brought only in tribal court, regardless of the situs of the cause of action.[46] However, in practice, the tribal court is ineffective in enforcing its judgments and for all practical purposes, most band members receive little or no satisfaction in bringing civil cases before the court. As a result it is extremely difficult to bring a civil matter to final adjudication.

In regard to criminal actions against band members, the tribal courts have jurisdiction only over conduct occurring on the reservation,[47] excluding the eleven major crimes over which federal courts have been given exclusive jurisdiction.[48] Somewhat complicating this jurisdictional no-mans-land is the fact that the Justice Department has an unwritten policy of non-involvement in Indian cases.[49] The only cases that the United States Attorney normally prosecutes are those in which a conviction appears to him to be quite likely.[50]

D. COMPOSITION

The Red Lake Court of Indian Offenses is composed of three judges, all of whom are band members. To qualify, a judge must be a tribal member with no felony record and have no convictions for misdemeanors within the previous year. One of the three is appointed chief judge while another is usually designated juvenile judge. A judge's term and selection seems to be dependent upon two criteria, tribal politics and availability of funds. Although the BIA still has appointment authority, it is tribal politics, through the council's confirmation power, which makes the ultimate decision.

The BIA furnishes a clerk of court who performs nearly all clerical and administrative functions. Currently, four tribal members are certified to practice before the court.[51] Their appearances are usually in criminal matters since most members of the tribe feel it rather futile to bring a civil action. Court facilities are in keeping with the overall image and prestige the court commands on the reservation—a small one roomer in the agency police station.

E. COURT INADEQUACIES

1. *Education and Training*: All three of the current judges have received no formal higher education; none has received any special education for their jobs. While they may be men of excellent

46. FEDERAL INDIAN LAW 863-69.
47. 18 U.S.C. §1152 (1970).
48. 18 U.S.C. §1153 (1970).
49. Interview with Mr. Robert Renner, United States Attorney for Minneapolis District, November 21, 1969.
50. *Id.*
51. The author is one of the four. Many of the comments in the remainder of this note are based on personal observation of the Red Lake court.

judgment, well acquainted with the people and their ways, they are often not able to wed their practical knowledge with the operation of the imposed court system. The result, more often than not, is a misinformed application of the "legal" code with a disregard for traditional values — the worst of both worlds. Despite the fact that the present judges are well aware of their inadequacies and shortcomings, and often express their desire for training in legal methodology, they are extremely reluctant to attend such training sessions.

2. *Selection and Pay*: Judges of the Red Lake Court of Indian Offenses are appointed to indefinite terms by the agency superintendent with the approval of the tribal council. The "approval of the tribal council" could be more accurately described as "at the pleasure of the council," since judgeships are usually awarded as part of the spoils system. Obviously, a judge whose tenure is based on tribal politics tends to be extremely insecure and far from independent. Recently, the band contracted with the BIA under the Buy Indian Act[52] to pay the salary of the chief judge.[53] The other two judges are paid on a daily rate[54] with the funds coming from proceeds of the court. The low rate of pay makes it difficult to get the most qualified people to take an appointment. The desirability of a tribal judgeship is further hampered by the low prestige, due to lack of understanding of the judges' role, as well as the fact that judges may incur some public resentment from their judgments.

3. *Lack of Independence*: Perhaps the most fundamental problem of the tribal court is the total lack of judicial independence. Perhaps the two most significant reasons for this lack of independence at Red Lake are the dictatorial regimes which have dominated the political scene and the total dependence of the tribal judiciary on the BIA's legal paternalism. It is an unusual case at Red Lake when the agency superintendent or the tribal politicians do not make their views known to the court. In cases beyond the judicial competence of the tribal judges, and where the superintendent feels the matter too controversial for local resolution, he or the chief judge write the area solicitor for advice.[55]

It would seem that the fact that the judges are paid indirectly by the BIA through the Buy Indian Act, as well as the fact that the agency furnishes facilities and all administrative help, would

52. Act of Nov. 2, 1921, ch. 115, 42 Stat. 208, (codified at 25 U.S.C. §13 (1970)).
53. The Government service employment rating for the chief judge is GS-5. The salary is approximately $5,300 per year.
54. The present rate is $30.00 per day.
55. The area solicitor is an attorney employed by the Department of Interior, stationed in Minneapolis, Minnesota, to render legal advice to the BIA, Department of the Interior, and the Indian tribes in the area. The solicitor is not allowed to furnish legal services to individual Indians.

bring the Red Lake Court under the *Colliflower* rule.[56] But it appears that certain tribal politicians and BIA officials desire that the court be maintained in its present incompetent state.

4. *Administrative Problems*: As mentioned above, the court does not have its own clerk, and has to rely on the BIA police clerk, part-time, for all record keeping. While the court keeps a docket, there is no standard record which permits meaningful studies of repeating offenders, the nature of the court's business, or many other elementary matters. The handling of money received from fines also appears to be done in a slipshod manner and is a source of potential embarrassment, or worse, for courts and clerks.

5. *Lack of Precedent*: The Red Lake Court of Indian Offenses is not a court of record. Consequently, when a judge is faced with a legal problem he has no way of knowing which other judges have been faced with the same problem and what they have done about it. Since there is a high turnover in judges, yielding to pressure groups, the same type of case may even be decided differently from year to year. There is a clear need for reporting of unusual or significant cases arising in court, for making this reporting available to all judges, and for instruction of all judges in the use of precedent. It is unclear what the court's reaction would be to one of the parties to a suit recording all proceedings.

6. *Appeals*: Despite the fact that the rules of court provide for appeal of all court decisions, there is no appeal system which operates in practice. An examination of pertinent records reveals that there has never been an appeal taken from a tribal court judgment. Even if the appeals system were activated, it provides for the original trial judge and his two associates to hear the case, so that the trial judge would preside over the appeal of his own decision.

7. *Alcohol Problem*: Perhaps the greatest defect of the tribal code is that it deals with alcohol problems solely as criminal offenses. This approach has not proved overwhelmingly successful in non-Indian society, and it is even less so in the typical tribal setting, where extreme social disorganization exacerbates the alcohol problem.

In 1952, a local-option system was substituted for the statutory ban on the sale or use of alcohol on reservations.[57] The processing or introduction of intoxicating liquor into a reservation where the tribe has not by ordinance permitted liquor to enter is still a federal offense, whether committed by an Indian or non-Indian.[58] Article

56. Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965).
57. 18 U.S.C. §1161 (1970).
58. *Id.*

45 of the Red Lake Code of Indian Offenses prohibits the possession of alcoholic beverages on the reservation. It is true, of course, that alcoholism is often a serious problem among Indians—crimes associated with drinking constitute most of the criminal charges involving Indians.[59]

Reservation prohibition not only has been ineffective in preventing access to alcohol, but has contributed to the problem. As was the case with the national prohibition, there is widespread disrespect for the law, an unwillingness on the part of reservation officials to enforce it, easy access to bootleg liquor and development of groups economically interested in retention of the law. It is ludicrous to consider that the only legal way in which a tribal member can bring liquor on the reservation is in his stomach. The necessity of consuming a purchase before returning to the reservation contributes to the incidence of drunkenness, as well as that of driving while intoxicated. Residents of the reservation are forced to drive twenty-five miles one way in order to purchase strong beer or hard liquor.

It is common knowledge on the Red Lake Reservation that members of the tribal council have for some time dealt in the bootleg liquor traffic[60] and are protected from prosecution by the present tribal chairman.

8. *Due Process*: The greatest shortcoming and most basic criticism of the court is its nearly total disregard for due process of law. The court is notorious for giving improper notice. There have been numerous cases in which judges have failed to allow parties to present testimony and evidence in their behalf. In one case the judge would not even let the defendant deny or answer allegations presented by his opponent. It is this type of proceeding which has caused the court to lose respect on the reservation and has prompted many to refer to it as a "Kangaroo Court."[61]

Since the passage of the Indian Civil Rights Act of 1968,[62] the court, tribal and BIA officials have been extremely sensitive to any threat to enforce provisions of the act in court proceedings. For example, Title II of the act provides, in substance, that no Indian tribe in exercising its power of local self-government may engage in any action (with certain important exceptions) which the federal or

59. COURTS OF THE NAVAJO TRIBE, 1966 ANN. REP.

60. This normally involves the wholesale purchase of cheap wine at contiguous establishments and their retail upon the reservation. The sale of wholesale alcohol to juveniles has greatly complicated the problem.

61. Webster's Seventh New Collegiate Dictionary defines "Kangaroo Court" as follows: "1. A mock court in which the principles of law and justice are disregarded or perverted. 2. A court characterized by irresponsible, unauthorized or irregular status or procedures."

62. Act of April 11, 1968, 82 Stat. 77, 25 U.S.C. §§1301-1303 (1970). Other provisions of the act and their implications for the Red Lake court are discussed *infra*.

state governments are prohibited from undertaking by the first ten and fourteenth amendments to the Constitution. The resultant effect on the Red Lake Court of Indian Offenses is that it will have to administer standards of "due process of law," *e.g.*, it will have to honor the privilege against self-incrimination and protect against convictions based on an illegal search and seizure. As of the time of this writing, no provision of the act has been utilized in any proceeding on the Red Lake Reservation.

9. *Cultural and Traditional Influences*: Although it has been seen that the primary reason for establishing courts of Indian Offenses was to prohibit certain tribal customs and mannerisms, ironically, today they are defended principally on the ground that they preserve traditional ways. Whenever there is any talk or effort to reform or modernize the Red Lake court, the traditionalists, those whom it benefits, are the first to the lines to preserve and protect the culture and traditions of the Red Lake Chippewa. This is amusing since a substantial amount of historical and legal research has failed to uncover any semblance of a pre-Anglo legal system of the Red Lake Band.[63] It seems instead that the tribal groups that defend the court on the above grounds do so primarily to protect, or in some way justify, the court's incompetency.

10. *Lack of Means to Enforce Court Judgments*: Another serious shortcoming off the Red Lake court is its inability to enforce judgments. Perhaps no other shortcoming has led to more widespread disrespect and outright contempt for the court. Nothing is more frustrating to a successful litigant than to have been adjudicated relief and find that it is worthless. This factor has obviously added to the present law enforcement problem on the reservation.

11. *Use of State Law in Tribal Court*: The classic principle is that states have no jurisdiction over Indians on the reservations in the absence of an explicit grant by Congress, because federal power is exclusive.[64] Although there are two provisions of the tribal code which provide for the use of state law in court proceedings,[65] in practice they have little utility. As a matter of political expediency, any mention of applying Minnesota law in the tribal court brings a loud hue and cry from those who claim that it is a step toward state control and termination. This author considers this ludicrous as the recent policy of the federal government and three recent

63. Lawrence, The Legal System of the Red Lake Reservation 4 (unpublished 1970), a copy of this paper is on file at the library of the University of North Dakota School of Law.

64. FEDERAL INDIAN LAW 501.

65. Ch.2, §87; Ch.5, § 2.

Minnesota Supreme Court decisions[66] have all pointed toward giving the band more autonomy over local affairs.

The most detrimental aspect of the inability of the State of Minnesota to enforce its judgments on the Red Lake Reservation is what is referred to by many as the creation of a "debtor's paradise." Probably the most notorious for non-payment of debts and the passing of bad checks is the present tribal chairman. His disregard for his debts has set an example that has destroyed nearly all extensions of credit to reservation residents.

Another consequence of this jurisdictional jungle is the fact that there is no "full faith and credit" extended to tribal court judgments. However, there is a 1950 Arizona Supreme Court decision[67] which upheld a judgment of the Navaho tribal court. Obviously, also a concern here is the matter of the court's competence or lack of it.

12. *Federal Review*: Until recently, the decisions of the tribal court have not been subject to federal review.[68] In *Colliflower v. Garland*,[69] however, the Ninth Circuit held that federal habeas corpus was available to test an imprisonment ordered by the Fort Belknap Court of Indian Offenses.[70] The court reasoned that the relationship between the Fort Belknap Court and the federal government, as defined in part by the historical development of the court, was such that the court had become a federal agency and therefore amenable to some form of federal review. It would seem that the historical development of the Red Lake Court sufficiently parallels that of Fort Belknap. In addition, the recent contract between the Red Lake Band and the BIA to fund judges' salaries and court expenses would keep it within the *Colliflower* rationale.

13. *Lack of Federal Prosecution*: On the evening of May 22, 1971, the Superintendent of Schools of Red Lake School District Number 38 took his seven-year-old son for a ride on his Honda. While turning his Honda around near the Littlerock Community Center he was knocked from his bike and beaten up by six juveniles. After receiving no satisfaction from tribal authorities he telephoned the United States Attorney, who initiated an investigation into the matter. The finding of the investigation was that there was no federal jurisdiction and the matter was entirely tribal. The tribal court promptly heard the case and sentenced the culprits to six-month suspended sentences and a fine which was never paid. This incident vividly points out the serious gap in the law enforcement

66. Comm. of Taxation v. Brun, 286 Minn. 43, 174 N.W.2d 120 (1970); Sigana v. Bailey, 282 Minn. 367, 164 N.W.2d 886 (1969); State v. Lussier, 269 Minn. 182, 130 N.W.2d 488 (1964).
67. Begay v. Miller, 70 Ariz. 380, 222 P.2d 624 (1950).
68. *See e.g.*, Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956).
69. 342 F.2d 369 (9th Cir. 1965).
70. Fort Belknap Reservation is located in northcentral Montana.

structure of the Red Lake Reservation. The inability to obtain federal prosecution in the lesser felony crimes has probably helped to promote juvenile delinquency and lawlessness on the reservation.

14. *Lack of Impartiality of Judges*: One of the serious problems that haunts the court is the lack of impartiality of tribal judges. Biases and prejudices are open and flagrant. Tribal politicians, BIA administrators, relatives of the court and other factors all influence the court's decisions. Interestingly, a nephew of the chief judge acts as law counsel and it is a rare case where that judge disqualifies himself. In those cases where there are pressure groups on both sides, the controversy is usually delayed until forgotten or one group is out of town and then a surreptitious judgment is rendered. With no enforcement mechanism on the reservation the other side merely ignores the judgment, therefore making the whole process meaningless.

A favorite tactic employed by the court to assure the outcome it desires is to notify only the party whom it feels should prevail, of the date and time of adjudication. Obviously, the lack of presence of the adversary allows the court to resolve the dispute in an amiable atmosphere.

15. *Lack of Incarceration Facilities*: The only incarceration facilities on the Red Lake Reservation are two cells in the basement of the police station. One former law enforcement official speaks of the structure's inadequacy by his continued reference to it as the "hole." Naturally, there has been great reluctance on the part of judges and law enforcement officials to detain anyone there for more than a few hours. Recently, the band contracted with the county of Beltrami to house those committed for more than seven days. This has alleviated the problem of facilities for adults. However, only minors who have committed a felony, which is a federal offense, are committed to the county jail. This inability to isolate the problem juvenile from his peers has undoubtedly contributed to the present juvenile problem on the reservation. Juvenile delinquency is considered to be the number one law enforcement problem at Red Lake. The court's nearly complete incompetency in dealing with this problem is readily apparent on the reservation.

16. *Drugs*: Despite the fact that the BIA and tribal officials deny it, the drug problem has also reached the Red Lake Reservation. No doubt the high mobility of tribal members between the reservation and the Minneapolis metropolitan area has been the prime cause in the introduction of drug traffic at Red Lake. Evidence of its seriousness may be demonstrated by the drug related deaths of three juveniles which occurred on the reservation last year. All

three deaths were the result of overdoses of heroin or other drugs. On March 18, 1972, a seventeen year old girl was found dead at the base of the water tower in Red Lake. As is the normal case on the reservation, the incident was purposely hushed up by the tribe and the BIA, and left to a quiet, perfunctory investigation by the FBI. Since the reservation is a closed society, outside news media are nearly totally banned from coverage of such incidents. According to information furnished to this author, there have been at least seven unsolved homicides on the Red Lake Reservation in the past twenty years.[71] Speculation characterizes the most recent incident as a drug-related homicide. It appears that the local drug pushers, who are generally known to most reservation residents, are like the bootleggers—immune from prosecution.

17. *Apathy:* Perhaps the most unacceptable aspect of the incompetencies of the Red Lake Court of Indian Offenses, and its resulting adverse effect on the entire legal system and law enforcement process, is the nearly total apathy displayed by the BIA, tribal officials, the federal bureaucracy and far too many members of the band itself. It seems as though there is a concerted effort on the part of the BIA and tribal officials to maintain the court in its present inadequate state.

An attempt to apply for an OEO legal services project[72] for the Red Lake Reservation was blocked by the tribal chairman.[73] It has become a fact of reservation life today that Indians have now replaced non-Indians as the prime exploiters of their own people. As another tribal member recently mentioned to this writer, it is now a case of Indians holding other Indians back. A recent example of this situation occurred when the governor of Minnesota was considering the appointment of an Indian to head a state department. After a search of qualified individuals and a series of interviews with available candidates, it seemed as though the Governor's Office had found a potential appointee. When the word was passed by way of the "moccasin vine,"[74] the Red Lake tribal chairman and another of equal stature campaigned against the appointment. The result was that a non-Indian was appointed. This apathy is further demonstrated by the fact that despite the passage of the Indian Civil Rights Act of 1968, its provisions have yet to be introduced on the reservation. In fact, one of the court judges went so far as to threaten an attorney from a nearby com-

71. Interview with a tribal official who chose to remain anonymous.
72. Interview with James E. Lawrence, former Director, Community Action Program, December, 1971.
73. *Id.* The only way the chairman would have approved the project was if it could have been operated by the tribal attorney from his office in Duluth, Minnesota. This is a distance of approximately 200 miles from the reservation.
74. The Indian version of the "grape vine."

munity with incarceration in the tribal jail if he appeared in court representing a tribal member.[75]

The people's apathy may be explained, more or less, as a conditioned phenomena. This phenomena developed over a period of many years in which the people had little or nothing to say about their fate and humbly and without hesitation accepted the offerings of the Indian Bureau. This conditioned apathy continues to this day and has now carried over into the manner in which the tribal council manages their affairs. Despite the fact that their affairs and resources are plagued by corrupt, irresponsible and self-interested officials, they feel it is not the way of the Indian to rebel. When you add this brand of management to the usual inefficiency and incompetence of the BIA, it is easier to understand the Red Lake situation.

18. *Failure of the Court to Achieve Objectives*: The contemporary scene on the Red Lake Reservation is an existing testimonial to the fact that even the most basic object of Secretary Teller in establishing the courts of Indian Offenses was never achieved. In addition to the inadequacies of this court, there are still practicing medicine men on the reservation. Other traditional mannerisms, such as the nature language, dance, beadwork, religion and others have been revived, in some cases from near extinction. Today many of these mannerisms are in the vogue and fashion among the young. It is no wonder that a court, which was inadequate to deal with the reservation judicial problems in 1884, is totally incompetent to cope with the complex problems it now faces on the Red Lake Reservation.

IV. CASE STUDIES

A. NUMBER ONE

On June 26, 1971, at an intersection in the community of Redby on the Red Lake Reservation, a motorcycle collided with a car. The driver of the cycle was a 14 year old boy who was accompanied by a girl of about the same age. The cycle driver sustained a broken leg and some internal injuries while the girl was not seriously injured. The damages to the cycle amounted to $450.00. The driver and single passenger of the car were uninjured although the vehicle sustained $750.00 damage. The cause of the accident is still in dispute, but it seems that the cycle ran into the car.

On the day of the accident, the parents of the cycle driver filed criminal complaints against both the driver[76] and the passen-

75. The attorney is a member of the Beltrami County Bar and practices law in Bemidji, Minnesota.
76. Pursuant to ch.2, §21, Red Lake Code of Indian Offenses.

ger[77] of the automobile. There was no claim in the complaints for personal injuries or property damage. The criminal charges against the defendants were highly unusual in light of the fact that the investigating officer did not issue a citation to either party. Whether complainant did in fact allege damage to the cycle is not clear. Perhaps the unusual procedure of this case can be explained by the fact that the father of the injured boy is a nephew of the chief judge and also acts as lay counsel before the court.

The first four times the court was scheduled to adjudicate the case, the plaintiff did not appear and the fifth time the judge did not. Finally, at the sixth scheduled time all parties were present. During the proceeding, the court clearly showed its bias on the side of the plaintiff, as the defendants were not allowed to answer questions or present their side of the controversy. According to witnesses of the accident, one of the reservation police officers who investigated the accident perjured himself on behalf of the plaintiff. The court found the defendant liable and awarded damages of $450.00 to the plaintiff.

The defendants then appealed to this writer for help and when all the facts and evidence were assembled, the advice given to the defendants was to file a cross-complaint asking for damages to the car and to ask for a jury trial.

In examining the facts of the accident, it appeared that a very definite question of jurisdiction was presented. In 1904, the Red Lake Band ceded 320 acres to the United States Government to establish a railroad[78] line from Bemidji, Minnesota, to Redby. Nearly the entire acreage was situated in and around the village of Redby. Since train service was terminated in approximately 1935, the ceded acreage is in what is now considered checkerboard ownership. Individual Indians and non-Indians still own some parcels while others have been restored to the band. It is the author's belief that the site of the accident is in private ownership and therefore under the jurisdiction of the County of Beltrami.

The hearing on the cross-complaint was set for a Friday in August at which time this writer was to represent the cross-complainant. Due to other commitments on that date, this author was forced to request a delay until the following Monday. The judge denied this request for apparent reasons. The author then retained an attorney from Bemidji, Minnesota, to appear for him. The attorney called the tribal judge to ask the time of the hearing and other pertinent information and was promptly informed that if he came to the reservation, he would be thrown in jail and would not

77. Pursuant to ch.2, §35, Red Lake Code of Indian Offenses.
78. Act of Feb. 20, 1904, Pub. L. No. 33-23, ch. 161, 33 Stat. 46.

be allowed to appear in court. Shortly thereafter, the attorney was at the tribal courtroom, but denied entrance. However, when the plaintiff saw the attorney arrive, he got into his car and drove off. The appearance of the attorney nearly sent everyone connected with the court into panic and completely frustrated the operation of the court. The matter has received no further adjudication to this day.

B. CASE STUDY NUMBER TWO

Another interesting case occurred during the Christmas season of 1971. On the night in question, a tribal member residing in a community contiguous to the reservation went to the village of Red Lake to visit relatives and spend the night. Shortly after all of the occupants of the house had gone to bed, there was a pounding at the door and when it was opened, six juveniles forced their entry. A fight ensued between a male occupant of the house and the juveniles, which ended with the defender unconscious. The juveniles victimized the other occupants, females and children, broke a mirror and did other damage to the home, stole one purse, and then left. The police were notified immediately and complaints were filed against the juveniles for breaking and entering, damage to property, theft, and assault and battery. Shortly thereafter, the complainants were threatened with bodily harm if they did not drop the charges.[79] As one of the juveniles was the son of the tribal secretary it was obvious that the court was not equal to the task. The complainant asked this writer for advice which resulted in a telephone call to the presiding judge. The judge's response was that justice would be done and shortly thereafter the complainants were awarded a $75.00 judgment. Naturally, the judgment was never collected and the matter was laid to rest. The juveniles were never charged with any criminal violation nor was any charge ever contemplated.

V. THE 1968 INDIAN CIVIL RIGHTS ACT

A. GENERAL

In 1968, Congress, exercising its plenary authority over Indian tribes, enacted the Indian Bill of Rights as part of the Civil Rights Act.[80] In areas where the courts had been unwilling to find tribal power restricted by the Constitution, Congress statutorily imposed on tribal governments a list of specific restraints consisting almost entirely of language copied verbatim from the Constitution, mainly from the Bill of Rights.

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79. Interview with complaining witness who chose to remain anonymous.
80. Act of April 11, 1968, 82 Stat. 77, 25 U.S.C. §§1301-1303 (1970).

For reservation Indians, tribal sovereignty is not an abstract concept, cultural relic, or even a vanishing institution. On the reservation, the tribe represents to its members not only the local government, but also a dominant force in their economic and social lives. Its powers include the authority to define conditions of tribal members, to regulate domestic relations of membership, to prescribe rules of inheritance, to levy taxes, to regulate property within the jurisdiction of the tribe, to control the conduct of members by tribal legislation, to administer justice, and to determine allocation of communally-owned wealth. Thus the tribal government exercises the most important governmental power for most reservation Indians. Moreover, the actions of tribal government frequently exceed the constitutional limits imposed on state and federal governments.

When the Senate Subcommittee on Constitutional Rights discovered that reservation Indians were not accorded the same rights, privileges and immunities by their tribal governments as was required of the state and federal governments, their reaction was not whether to act, but rather how far and how fast to proceed.[81]

The 1968 Indian Bill of Rights, in language copied from the Constitution, enumerates specific rights that are not to be abridged by tribal governments. The bulk of the statute incorporates amendments one and four through eight of the Bill of Rights, with the following variations: establishment of religion is not prohibited; the right to council is guaranteed only at the defendant's own expense; and, complementing the statute's limitation of Indian Courts to criminal penalties of six months and $500.00 for one offense, there is no right to indictment by a grand jury, and the petit jury right assures a jury of six members in all cases involving the possibility of imprisonment.[82]

In addition to language from the Bill of Rights, two other Constitutional word formulas are included: the requirement that the tribe not "deny to any person within its jurisdiction the equal protection of the laws"[83] and the prohibition against bills of attainder and ex post facto laws.[84] Although the writ of habeas corpus is the only remedy mentioned in the act, courts, in a number of recent decisions, have implied that appropriate remedies exist to effectuate the purpose of Congress. If no remedy other than a writ of habeas corpus were available, a large portion of the rights guaranteed by the statute would be unprotected and therefore ineffectual. For instance, exclusion of members from the reservation

81. S. 961, 89th Cong., 1st Sess. (1965).
82. Act of June 2, 1924, 43 Stat. 253, (*codified at* 8 U.S.C. § 202 (1970)).
83. U.S. CONST. amend. XIV, §1.
84. U.S. CONST art. I, §§9, 10.

or revocation of tribal membership rights, discriminatory allocation of communal resources, prevention of certain religious practices on the reservation, and the taking of private property for public use without just compensation would be infringements of rights declared by the statute that would receive little or no protection from the habeas corpus provision. Lack of other remedies would clearly defeat Congressional purpose.[85]

Title II of the act directs the Secretary of the Interior to prepare and recommend to the Congress a model code governing the administration of justice by courts of Indian Offenses on Indian reservations. As of the date of this writing this has not been accomplished.

B. IMPLICATIONS FOR THE RED LAKE COURT OF INDIAN OFFENSES

The Indian Civil Rights Act of 1968 has far reaching implications for the Red Lake Court of Indian Offenses. In view of the current operational problems and inadequacies of the court, it is hard to justify the court's continued existence in its present state. With the argument that the court dispenses justice according to tribal tradition and culture now moribund, there really isn't any justification to preserve the court. The requirements of due process alone should be sufficient to upgrade the court's overall competency.

Naturally, the traditionalists, the romantics, and those with vested interests in the present court will set forth the hue and cry of the tribal sovereignty argument. The argument goes as follows: the tribe as sovereign over its domain is the sole authority in determining the nature and power of the judicial system as well as everything else. This argument dissipates in view of the fact that all tribal legislation must first be approved by the BIA to become effective, and the realization that no tribe could long exist without federal aid. These two characteristics of present day tribal life fall far short of the sovereignty of an "autonomous state." Also, the band's adoption of a supposedly democratic form of government and its insistence upon possessing all the attributes of a democracy should be taken into consideration in operating a court of justice.

The three generally accepted arguments for tribal courts are as follows: (1) the effective application of a different law may require a specialized judge; (2) only Indian courts render justice equitably to Indians; and to many Indians, (3) "Indian justice"

85. "[I]t is the duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose." J. I. Case v. Borak, 377 U.S. 426, 433 (1964). It has been held proper to imply a civil remedy under the Act. Solomon v. LaRose, 335 F. Supp. 715 (D. Neb. 1971).

is distinct from "white justice" since it represents a special concern for the individual before the court. These arguments have some validity, but when a person's liberty is at stake, the paramount concern should be for the defendant's constitutional rights and not for some anachronistic notion of fairness.[86]

It seems to this writer that the Court of Indian Offenses could be upgraded to comply with the Civil Rights Act of 1968 without diminshing the present state of tribal sovereignty of the Red Lake Band.

VI. CONCLUSION

It is an ironic twist of fate that a court which was originally designed to eradicate the historic way of life of the Indian people is now defended by many as a preserver of tradition. The only explanation for this dichotomy is that many Indian cultures are so diluted with non-Indian ways that what remains is a bastardized culture.

The reservation system itself in America is a dilemmatic anachronism, a crude attempt at pacification doomed to failure from its inception. Today that failure haunts the American scene and is now nurtured by the conscience of the American people. As in the past, the federal government's policy in dealing with Indians and Indian affairs is anomalously naive, vacillating from policy to policy, from administration to administration. The result of this pendant approach is that the government is only becoming more deeply enmeshed in a quagmire that neither it nor the Indian people can much longer endure. Unfortunately, the perennial losers in this episode of American history are the Indian people, who have grown apathetic to the decisions on their fate emanating from Washington. Despite the recent proliferation of spending programs on reservations, as well as elsewhere in this country, more designed to pacify than rehabilitate, the fate of the vanishing American has been decided. The final chapter of this purely American drama will conclude when those of the dominant society tire of their current infatuation with the noble savage.

It is obvious that the present constitution and operation of the Red Lake Court of Indian Offenses is in desperate need of overhaul. Taking into consideration the many inadequacies, it seems doubtful that the present court structure could be renovated or upgraded to comply with the Indian Civil Rights Act of 1968. No doubt in the near future, the Red Lake court will be confronted with the provisions of this act.

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86. Lawrence, *supra* note 68, at 25.

It is apparent that the inadequacies of the court and its ineffectiveness in enforcing its judgments have contributed to the deterioration of present day tribal life. In fact, conditions have become so bad that the present Red Lake Agency (BIA) Superintendent will not reside with his family on the reservation despite the availability of government quarters and a tribal resolution requiring such residency.

It is the author's opinion that the present Red Lake Court of Indian Offenses should be replaced by an entirely new court, independent of both the BIA and tribal pressure groups. A court of increased jurisdiction should be established in its place. The new court should have jurisdiction over all tribal and federal offenses and sufficient authority to enforce its judgments. The court should be staffed by attorneys, both as judges and counsel and should utilize tribal members in all other positions. Initially the court could continue to utilize the present position created through the Buy Indian Act. Other BIA funds could be used by changing a few priorities. Certainly the BIA could eliminate a few unnecessary junkets, conferences, or a road or two through the aboriginal wilderness. The tribe could also assist by establishing a legal services project on the reservation and better utilizing the $16,000 retainer it pays to the current tribal attorney. Attorneys from adjacent communities or possibly the nearby Federal Magistrate, could act as judges. Another possibility would be the use of federal judges from the Minnesota District Court. Also, it isn't too far-fetched to think that in the not too distant future, Indian attorneys could attain federal judgeship and be utilized specifically for Indian courts. Obviously there would be complications to be worked out in setting up a court of this nature, but looking at the other alternative makes it appear the only way out.

WILLIAM J. LAWRENCE

EXHIBIT B

In Defense of Indian Rights

WILLIAM J. LAWRENCE

WHAT SHOULD AMERICA'S policies toward American Indians be as we enter the new millennium? Should Indian tribes be viewed as "sovereign nations," "domestic dependent nations," wards of the federal government, or membership organizations similar to culturally based nonprofit corporations? Should Indians be viewed as full Americans with the same rights and responsibilities as every other American? Or should Indians and tribes attempt to maintain a "separate but equal" status in American life, and should a separate status continue indefinitely?

In fact, today, Indian people are *citizens* of the United States, *citizens* of the state in which they reside, and, in some cases, *members* of a tribe representing some aspect of their genealogical heritage. Tribal membership should not affect the citizenship rights of Indian people, but it often does. And the status of tribal governments, in some cases, even affects the citizenship rights of non-Indian citizens who come in contact with a tribal government.

As of the 1990 U.S. census, there were 1,959,234 people who identified themselves as Indian, 60 percent of whom are enrolled members of one of

the 557 federally recognized tribes, bands, or communities.[1] But many, if not most, people who identify themselves as "Indian" are actually only one-quarter or less Indian, with the balance of their family lineage being of some other racial combination. In fact, many people who consider themselves Indians are of a primarily non-Indian heritage and ethnicity.

The percentage of Indian people living on reservations has been in continuous decline in recent decades. Currently, less than 20 percent (437,431) of the Indian population live on reservations. And 46 percent (370,738) of the total number of people living on reservations are non-Indians.[2] On the nine most populous Indian reservations in the country other than the Navajo, less than 20 percent of the population is Indian. Most Indian reservations are populated primarily by non-Indian families, many of whom were invited to homestead on reservation land in the late 1800s during the "allotment era," when the federal intent was to abolish the system of Indian reservations and merge Indian people and land into surrounding communities. And many reservation families include both Indian and non-Indian family members, resulting in children who have some Indian genealogy but may not have a blood-quantum high enough to qualify for tribal membership, generally considered to be one-quarter.

In light of these facts, what should current and future policies be regarding Indian people, tribes, and reservations? At some point, the federal government must reassess its policy of maintaining so-called "Indian reservations" and treating Americans who have an Indian heritage or identity as a separate class of citizens. Should that occur when Indians are 10 percent, 5 percent, or 2 percent of the reservation population? How long should the federal government maintain a Bureau of Indian Affairs (BIA), Indian Health Service, and other programs solely for citizens with some Indian genealogy? This nation is rapidly approaching a time when there will hardly be any Indians left on reservations, and those Indians who remain there will hardly be Indian.

History: Where We've Been

In the U.S. Constitution, no governmental powers are set aside for, granted to, or recognized as existing for Indian tribes. In fact, no plan was laid out in the Constitution for how to deal with Indian tribes at all, although the United States considered tribes to be under its dominion. Nowhere in the U.S. Constitution, or in any treaty or in any federal statute, are Indian tribes recognized as sovereign. The Supreme Court confirmed this in 1886 when it stated: "Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States or of the States of the Union. There exist within the broad domain of sovereignty but these two."[3]

The first American treaty with Indians was signed in 1778 with the Delaware Indians. The last was signed with the Nez Perce in 1868. Over a span of approximately 100 years, nearly 400 treaties were negotiated between dozens of Indian tribes and the U.S. government, most during the westward expansion of the mid-1800s. Nearly a third were treaties of peace. The rest were treaties ceding Indian land to the U.S. government and establishing reservations.[4] During this period, the United States paid more than $800 million for the lands it purchased from tribes.[5]

Treaties were *not* solemn promises to preserve in perpetuity historic tribal lifestyles, lands, or cultures, as is often claimed today. In fact, plans for assimilating Indian people into mainstream American life were spelled out in most treaties, often requiring that treaty payments be used for construction of schools, homes, programs to train Indian adults in agriculture, and promises to aid the transition from a subsistence lifestyle to active citizenship. Rather than being an indication that tribes were sovereign, many treaties specifically noted the lack of tribal sovereignty, and through treaties, many individual Indians and even entire tribes became U.S. citizens.[6] In 1871, Congress ended all treaty making with tribes and stated that the federal government would instead govern Indians by federal policy, acts of Congress, and presidential orders.

Great Indian leaders in history, such as Chief Joseph of the Nez Perce, Sitting Bull and Crazy Horse of the Sioux, Geronimo of the Apache, and many others, are remembered for their steadfast resistance to being placed on Indian reservations and becoming wards of the federal government. Chief Joseph expressed a common view of his time when he said in 1879:

> Treat all men alike. Give them all the same law. Give them all an even chance to live and grow. All men were made by the same Great Spirit Chief. They are all brothers. The mother Earth is the Mother of all people, and people should have equal rights upon it. We only ask an even chance to live as other men live.[7]

In 1887, the federal government too decided that attempting to keep Indian tribes separate from the rest of American civilization was not a good idea. The Board of Indian Commissioners wrote in its recommendations to Congress:

> No good reason can be given for not placing . . . [Indians] under the same government as other people of the States . . . where they live. No distinction ought to be made between Indians and other races with respect to rights or duties. No peculiar and expensive machinery of justice is needed. The provisions of law in the several States . . . are ample both for civil and criminal procedure, and the places of punishment for offenses are as good for Indians as for white men.[8]

These words resonate even more today, 135 years after the Civil War resulted in the end of black slavery and 35 years after the civil rights movement ended a separate status for black Americans. Yet America still maintains race-based tribal courts, tribal laws, tribal sovereign immunity, and a policy of tribal "self-governance," cutting off reservation Indians and non-Indians from equal justice under law.

In 1887, Congress passed the Dawes Act, also called the General Allotment Act, with the idea that Indians would fare better living as full citizens and individual members of society rather than as members of tribes. Under the Dawes Act, reservation lands held by the federal government were divided into parcels for individual Indian families after they were deemed

"competent" to handle their own affairs. The stated intent was to merge Indians into American society and to give them the means, through land ownership, of being self-sufficient members of the larger community. When all reservation land had been allotted or sold, the plan was then to abolish the BIA and thus eliminate federal bureaucratic control over Indian life.[9]

The "allotment era" lasted approximately fifty years, during which time tribal land holdings fell from 138 million acres in 1887 to 48 million acres in 1934.[10] Many Indians lost title to their property because their land was arid or untillable or because they were for other reasons unable to make a living for themselves or pay taxes. But allotment also allowed many individual Indians to own land, support themselves through farming, become U.S. citizens, and be active members of the larger community instead of relying on federal handouts for survival.

In 1924, the Indian Citizenship Act extended national and state citizenship to all Indians born within the territorial limits of the United States who were not already citizens and granted them the right to vote. This Act should have made Indians equal to all other citizens of the United States, with the same Constitutional protections, rights, and responsibilities. But the federal government has continued to treat Indians separately from other citizens, especially if they live on reservations.

In 1933, John Collier became commissioner of the BIA under President Franklin D. Roosevelt. Collier initiated a new federal Indian policy called the "Indian New Deal," which became law as the 1934 Wheeler-Howard Act, also known as the Indian Reorganization Act. Collier admired Chinese communism, which he saw as a model for society. He wanted to implement these communist ideals on American Indian reservations, including communal ownership of property and central control of economic, political, and cultural activities.[11] Many of these key aspects of the Indian Reorganization Act are still in effect on reservations today.

The Indian Reorganization Act moved away from assimilation, again made Indians wards of the federal government, and provided for placing previously allotted land back into federal trust, with the federal govern-

ment, not Indian people, holding the title. The law also provided a means through which tribes that did not have a reservation could gain federal recognition and reestablish reservation lands. Under the Indian Reorganization Act, reservations expanded an estimated 7.6 million acres between 1933 and 1950,[12] and BIA authority, programs, and staff were also expanded. Today, there are approximately 53 million acres of land in federal trust status for Indian tribes.[13]

After World War II, President Dwight D. Eisenhower established a "termination policy" in which the "trust responsibility" of the federal government to maintain Indian tribes would be terminated. The resolution that put this policy into effect stated: "It is the policy of Congress as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States."[14] Full integration was once again the stated federal policy toward Indians.

Under the termination policy, tribes could continue to exist as they chose, but federal supervision of Indian lands, resources, and tribal affairs would end, and the BIA and Indian reservations would eventually cease to exist.[15] In 1953, there were 179 federally recognized tribes.[16] By 1970, when the termination policy unofficially ended, almost 100 tribes, with an approximate total tribal membership of only 13,000 (less than 2 percent of the total Indian population), had their relationship to the federal government terminated.[17] Few tribal members were actually affected by the termination policy, owing largely to resistance in Congress to implement it.

The federal Indian Claims Commission, which existed from 1946 to 1977, paid $880 million to a number of tribes as compensation for instances in which tribes had not received fair compensation for lands they sold to the United States in the nineteenth century. Tribes made over 500 claims before the Indian Claims Commission and won awards in 60 percent of them. Most were property rights claims.[18]

Modern Times: Lack of Accountability in Tribal Governments

The idea that Indian tribes should "govern themselves" as they wish has romantic appeal, but, in practice, tribal sovereignty and self-governance have created many problems.

"The accumulation of all powers—legislative, executive, and judiciary—in the same hands, may justly be pronounced the very definition of tyranny," wrote James Madison, a founding father of the U.S. Constitution.[19] Today, the biggest exploiters and abusers of Indian people are tribal governments, in part because there is no guaranteed or enforceable separation of powers in tribal governments. Many of the largest and best-known American Indian tribes have rampant, continuous, and on-going problems with corruption, abuse, violence, or discord. There is a lack of oversight and controls in tribal governments. Most tribes do not give their members audited financial statements of tribal funds or casino funds, which on many reservations may represent tens or even hundreds of thousands of dollars per tribal member. It is literally impossible for tribal members to find out where all the money is going.

The underlying problem is that true democracy does not exist on Indian reservations. Tribal elections are often not free and fair elections, and typically they are not monitored by any third party. And true democracy includes more than just the presence of an election process. Democracy is also defined by limiting the power of the government by such things as the rule of law, separation of powers, checks on the power of each branch of government, equality under the law, impartial courts, *due process*, and protection of the basic liberties of speech, assembly, press, and property.[20] None of these exist on most Indian reservations.

Tribal chief executives and tribal councils possess near-dictatorial control over tribal members. Not only do they control the tribal court, police, and flow of money, but they also control which tribal members get homes, jobs, and health care services, and under the Indian Child Welfare Act,

they can claim more control over children who are enrolled members than the children's own family, especially non-Indian family members. If they live on a reservation, Indian people who speak up run the risk of losing their homes, jobs, health care, and other services, making internal government reform even more difficult.

Some try to justify tribal government abuses and denial of civil rights by arguing that tribal members "consent" to being governed by the tribe and therefore willingly give up some of their inherent rights of citizenship. But if asked, the vast majority of tribal members never consented to any such thing.

Unfortunately, many Indian people who remain on the reservation either do not see themselves as having much choice, owing to personal addictions, depression, poverty, and despair, or because they are themselves benefiting from the unaccountable tribal system. Most of those who are in between these two extremes have left the reservation.

With many tribes claiming expanded jurisdiction and regulatory authority, including zoning, licensing, and taxing authority within long-extinguished former reservation boundaries, many non-Indians, too, are finding themselves subject to unaccountable tribal governments, without their consent and without a right to vote in tribal government elections.

The issue of consent might be relevant if tribes were simply membership organizations like any other religious, cultural, or community group, in which it can be assumed that if you don't want to be part of the group, you don't join. But the federal policy of the past thirty years, as described by the American Indian Policy Review Commission, has been to expand tribes from being membership organizations to being literal governments sanctioned by the United States, with actual legal authority over people who may or may not have given their consent to being governed. This expanding authority of tribal governments is dangerous to the rights and freedoms of Indian people.

Congressman Lloyd Meeds (D-Washington), wrote in his dissent attached to the American Indian Policy Review Commission's Final Report in 1977:

> The blunt fact of the matter is that American Indian tribes are not a third set of governments in the American federal system. They are not sovereigns. . . . It is clear that nothing in the United States Constitution guarantees to Indian tribes sovereignty or prerogatives of any sort. . . . To the extent tribal Indians exercise powers of self-government in these United States, they do so because Congress permits it. . . . American Indian tribal governments have only those powers granted them by the Congress.[21]

In spite of the American Indian Policy Review Commission's Final Report in 1977 laying out increased tribal "self-determination," "sovereignty," and "self-governance" as solutions to problems plaguing Indian reservations, in spite of the 1988 National Indian Gaming Regulatory Act, and in spite of the thirty-year push for increased tribal governmental power, the statistics show that life is getting worse for Indian people on reservations. Many news stories of late have documented shocking rates of murder, suicide, and violent assault, exceeding even that of the nation's core cities.[22] Claims of tribal sovereign immunity present additional problems. There are numerous cases of tribal casino patrons being injured or abused, businesses contracting with tribal casinos not getting paid for their services, and tribal casino workers being harassed and threatened, with no legal recourse. Any other business can be held accountable for such misdeeds in a state or federal court. But by claiming tribal sovereign immunity, tribal casinos have become the only businesses in the entire world that can totally avoid legal responsibility and liability within the United States.[23]

Many articles describe in detail the problems of trying to get anything resembling a fair hearing in tribal courts, which are not guaranteed to be separate from the tribal administration, where judges may not know anything about the law, where decisions are likely not documented, where *due process* is typically nonexistent, and where cases frequently don't even get a hearing because of claims of tribal sovereign immunity.[24] Yet many well-intentioned advocates for Indian causes mistakenly believe that increased tribal government rights is the same as protecting the rights of Indian people. Nothing could be further from the truth. Past civil rights movements provide lessons for the present. The late Hubert H. Humphrey,

former U.S. senator, vice president, and presidential candidate, said in his famous civil rights speech fifty years ago at the 1948 Democratic National Convention: "There are those who say this issue of civil rights is an infringement on states rights. The time has arrived for the Democratic Party to get out of the shadow of state's rights and walk forthrightly into the bright sunshine of human rights."[25] Replace the word *state* with the word *tribe*, and you get a statement many Indians and non-Indians wish they would hear from their leaders today: "There are those who say this issue of civil rights is an infringement of *tribal* rights. The time has arrived to get out of the shadow of *tribal* rights and walk forthrightly into the bright sunshine of human rights."

The U.S. Supreme Court has in recent years expressed concern about the lack of controls on tribal sovereign immunity, including in May 1998 in its ruling in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies.* Even as they upheld tribal sovereign immunity, the majority wrote:

> Though the doctrine of tribal [sovereign] immunity is settled law and controls this case, we note that it developed almost by accident. . . . [The 1919 precedent-setting case of] *Turner* . . . is but a slender reed for supporting the principle of tribal sovereign immunity. . . . Later cases, albeit with little analysis, reiterated the doctrine. . . . There are reasons to doubt the wisdom of perpetuating the doctrine. [W]e defer to the role Congress may wish to exercise in this important judgment.[26]

In this 6-3 decision, the minority was adamant about the need for limiting tribal sovereign immunity:

> Why should an Indian tribe enjoy broader immunity than the States, the Federal Government, and foreign nations? [The Court] . . . does not even arguably present a legitimate basis for concluding that the Indian tribes retained or, indeed, ever had any sovereign immunity for off-reservation commercial conduct. . . . [This] rule is unjust. . . . Governments, like individuals, should pay their debts and should be held accountable for their unlawful, injurious conduct.[27]

Through *Kiowa*, the U.S. Supreme Court has in effect sent an open letter

to Congress asking them to correct the legal quagmire, confusion, and rank injustice of tribal sovereign immunity.

Minnesota Appeals Court Judge R. A. (Jim) Randall, in his eloquent and thoughtful dissent in *Sylvia Cohen v. Little Six, Inc. (Mystic Lake Casino)*, outlined the way Indian people are being wronged by current federal Indian policies and Indian laws, which give power to tribal governments at the expense of Indian people:

> Why here, are we tolerating segregating out the American Indians by race and allowing them to maintain a parallel court system and further, subjecting non-Indians to it? . . . The American Indian will never be fully integrated into this state, nor into this country, until we recognize this dual citizenship for what it really is, a pancake makeup coverup of *Plessy* which allowed separate but equal treatment. [*Plessy*, 163 U.S. at 551, 16 S. Ct at 1143 (holding that "equal but separate accommodations for the white and colored races" for railroad passengers was constitutional).] . . .
>
> We should have learned by now that this duality in America is so intrinsically evil, so intrinsically wrong, so intrinsically doomed for failure, that we must grit our teeth and work through it. . . .
>
> All bona fide residents of Minnesota, of all races and colors, enjoy identical opportunities for self-determination and self-governance. . . . Why is there this need to single out a class of people by race and give them a double dose of self-determination, and self-governance? . . . Are American Indians entitled to more self-determination than Minnesota gives to its other residents? . . . How can a state give more than it possesses? If this is deemed a federal issue, how does the federal government give more than it possesses? . . . Does that make Indians separate but equal? I suggest that *Brown v. Board of Education* will tell us this is a bad idea, a vicious and humiliating idea. Do we label Indians separate but more equal? . . . Do we label Indians separate but less equal? . . .
>
> [T]his issue, is about the future of the United States, and the future of the American Indian. This case is about whether we accept the American Indian as a full U.S. citizen, as a real American, or whether we will continue to sanctify tiny enclaves within a state and tell the individual Indian that if he or she stays there and does not come out and live with the rest of us, we will bless them with the gift of "sovereignty." . . .
>
> For some reason, we continue to insist that American Indians can be the

> last holdout, a race that is not entitled to be brought into the fold, can be left to shift for themselves as long as, from time to time, we pat them on the head like little children and call them sovereign. Sovereignty is just one more indignity, one more outright lie, that we continue to foist on American citizens, the American Indian.[28]

Conclusion: Preserving Our Cultural Past and Future

The nineteenth century view of "assimilation" envisioned that people would be accepted into mainstream American life only if they looked and acted like white Christians. That is quite different from the modern view of "integration," in which people are allowed into mainstream culture even as they maintain their own cultural traditions and identity within racial, ethnic, or religious groups.

The U.S. Constitution provides the greatest opportunity in the world for groups of people to preserve their cultures, religions, and identities, through its protections of speech, assembly, press, and religion. Ironically, the only place Indian people are *not* guaranteed these rights is on an Indian reservation. By denying Indian citizens basic civil rights, tribal governments' claims to sovereign immunity have done more to destroy tribal culture than to preserve it.

Preserving and living one's culture is one's own business. There are many unique groups within the United States, all preserving their own beliefs and cultures as they wish, and our government bends over backwards to protect their right to be different, whether it's the Amish, Mormons, Italians, Moonies, Pagans, Irish, Baptists, Roman Catholics, Greeks, Hassidic Jews, Nation of Islam, Swedes, or any manner of extremist, fundamentalist, traditionalist, or nonconformist. As Americans, we have the right to identify with a group and maintain a unique culture, to greater or lesser degrees, as we wish. Why would Indians and tribes be entitled to anything different?

As Judge Randall wrote in his dissent in *Cohen*:

> There is nothing that Indian people are entitled to as human beings that cannot be afforded them through the normal process of accepting them as brother and sister citizens. . . .
>
> The truly important goals of protecting Indian culture, Indian spirituality, self-determination, their freedom, and their way of life can be done within the same framework and the same system, by which we treat all other Minnesotans of all colors. The real issue is, do we have the will?"[29]

It is time to end the Noble Savage Mentality that keeps tribes in the ambiguous, inconsistent, and untenable position of being simultaneously wards of the federal government, domestic dependent nations, and supposedly sovereign nations. Indian people, whether tribal members or not, should be recognized as full U.S. citizens with all the rights, responsibilities, and protections thereof, nothing more and nothing less.

Notes

Julie Shortridge, managing editor of the *Native American Press/Ojibwe News*, contributed to this essay.

1. Bureau of the Census, U.S. Dept. of Commerce, *American Indian and Alaska Native Areas: 1990* (1991).
2. Ibid.
3. U.S. Supreme Court, *U.S. v. Kagama*, 118 U.S., at 375 (1886).
4. Vine Deloria Jr., *Custer Died for Your Sins* (New York: Macmillan, 1969), p. 32.
5. Francis P. Prucha, *American Indian Treaties: A History of a Political Anomaly* (Los Angeles: University of California Press, 1994), p. 153.
6. Charles Kappler, ed., *Indian Treaties 1778–1883* (New York: Interland Publishing, 1972), Wyandot Treaty of 1855, art. 1, p. 677.
7. Helen Addison Howard and Dan L. McGrath, *War Chief Joseph* (Lincoln: University of Nebraska Press, 1941), pp. 298–99.
8. *Board of Indian Commissioners: Annual Report*, 1887.
9. *Commission of Indian Affairs: Annual Report*, 1890.
10. *Editorial Research Reports*, April 15, 1977.
11. John Collier, *From Every Zenith* (Denver: Sage Books, 1963).
12. J. P. Kinney, *A Continent Lost—A Civilization Won: Indian Land Tenure in America* (Baltimore: Johns Hopkins Press, 1937), p. 351.

13. "Federal Lands: Information on the Acreage, Management, and Use of Federal and Other Lands," *Letter Report* (GAO-RCED-96-104, 1996).

14. Ruth Packwood Scofield, *Americans Behind the Buckskin Curtain* (New York: Carlton Press, 1992), House Concurrent Resolution 108, p. 93.

15. Theodore W. Taylor, *American Indian Policy* (Mt. Airy, Md.: Lomond Publications, 1983), p.106.

16. John R. Wunder, *Retained by the People: A History of American Indians and the Bill of Rights* (New York: Oxford University Press, 1994), p. 100.

17. Congress of the United States, *American Indian Policy Review Commission: Final Report* (Washington, D.C.: U.S. Government Printing Office, 1977), p. 451.

18. Congress of the United States, *Indian Claims Commission: Final Report* (Washington, D.C.: U.S. Government Printing Office, 1977), p. 21.

19. Michael Loyd Chadwick, ed., *The Federalist* (Washington, D.C.: Global Affairs, 1987), p. 260; James Madison, paper no. 47, "Separation of Power Essential for the Preservation of Liberty."

20. Fareed Zakaria, "The Rise of Illiberal Democracy," *Foreign Affairs*, November–December, 1997.

21. Lloyd Meeds, dissent, Congress of the United States, *American Indian Policy Review Commission: Final Report.* Meeds was vice chairman of the commission.

22. Debra Weyermann, "And Then There Were None," *Harper's*, April 1998.

23. Craig Greenberg, oral testimony, U.S. Senate, Indian Affairs Committee, April 7, 1998.

24. See, e.g., Pat Doyle, "Sovereign and Immune, Tribes Often Can't be Touched in Court," *Minneapolis Star Tribune*, July 24, 1995; Alice Sherren Brommer, "Should You Become Tribally Licensed?" *Minnesota Lawyer*, November 1, 1999; Bill Lawrence, "Tribal Injustice: The Red Lake Court of Indian Offenses," *North Dakota Law Review* 48, no. 4 (summer 1972): 639–59.

25. Hubert H. Humphrey, speech on civil rights at the 1948 Democratic Convention, as reprinted in the *St. Paul Pioneer Press*, June 14, 1998.

26. U.S. Supreme Court, *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, majority opinion, May 26, 1998.

27. Ibid., minority opinion, May 26, 1998.

28. Minnesota Court of Appeals, *Sylvia Cohen v. Little Six, Inc., d/b/a/ Mystic Lake Casino*, file no. C9501701, February 13, 1995, pp. D47–D62.

29. Ibid., pp. D42–D62.

EXHIBIT C

Gardebring's resignation from MN Supreme Court will impact Native community

The resignation of Sandra Gardebring from the Minnesota Supreme Court will likely result in the gradual end of the state court/tribal court committee initiative, and we will be glad to see it go. The initiative, which was strictly her idea, had as its main objective, to reach an agreement whereby each court system -- state and tribal -- would recognize and enforce each other's decisions and orders. Sounds reasonable and fair, until you realize what's at stake.

A number of us in the Native community, especially those who have had the misfortune of experiencing tribal courts in action, have been concerned about Gardebring's state court/tribal court initiative. We are concerned because of the lack of tribal courts' independence from tribal council influence, lack of competency, lack of judicial review, lack of public defenders or representation of one's choice, lack of court rules, lack of documentation, lack of *due process*, conflicts of interest, and of course, the ever-present tribal use of the sovereign immunity defense in actions against them.

We became even more concerned when all three of the state court/tribal court committee meetings that were held on reservations were closed to the public -- an arrangement Justice Gardebring agreed to, apparently without qualm. Closed meetings are a fact of life on reservations.

Another matter that bothered many of us was the composition of the committee. All of the lawers and Native members of the committee were from the tribal establishment i.e. either employees of the tribes or in some other way on the tribal payroll. And the committee appeared to be hand-picked by Gardebring.

No public input was permitted, although several people with concerns rose to express their opposition to the work of the committee at one meeting. At both of the off-reservation tribal court/state court committee meetings that this publisher was allowed to attend there were security guards present, creating an air of intimidation to those who would dare ask questions.

When one person in attendance asked, "How can you recognize and legitimize courts that don't even abide by their own laws and constitutions? These are not real judges or real courts," Justice Gardebring responded, "That's an internal tribal matter."

So that makes it okay, or at least none of her concern? It's not an "internal tribal matter" when the state is seriously talking about giving full recognition to all tribal court actions and rulings.

Gardebring's position as the Minnesota Supreme Court's chief proponent of the state court/tribal court committee, with its lack of public involvement, clandestine meetings, and apparent lack of concern for *due process* and judicial fairness, seems to be out of step with her positions on other social justice issues with which she has associated herself.

She may have been the "handy-woman" of the Perpich Administration, and the "darling of the state DFL," as described in recent newspaper reports, but many of us in the Native community felt Justice Gardebring was out of touch with reality when it comes to Indian affairs. But hers was a common mind-set of those afflicted with the "noble savage" mentality, where Indians are viewed as more honorable than other human life forms, and can do no intentional harm to Nature or Man. We'd laugh, except that the resulting laws, policies, and court decisions that have grown out of this mindset aren't funny.

In writing the majority opinion in the case of *Gavle v. Little Six, Inc.*, in which she denied a young woman the right to take action against Mystic Lake Casino for the sexual abuse, intimidation and severe harassment its three top managers inflicted on her, Justice Gardebring has taken a position against civil rights for Minnesota citizens. The landmark opinion in that case has been used as precedent to deny Minnesota citizens the right to sue tribal casinos in many other cases, including the case of Sylvia Cohen, the 80-year-old woman who suffered broken bones and permanent reduction in mobility when a swivel chair threw her to the floor at Mystic Lake Casino. For others who feel their rights have been violated at a tribal casino, the state Department of Human Rights now says "Sorry, we can't help you here," citing Justice Gardebring's ruling in the *Gavle* case. Even the U.S. Supreme Court, while refusing to overrule Justice Gardebring in the *Gavle* case, is calling this situation of tribal justice "unreasonable," "harmful," and "unjust."

They say everyone likes to leave a legacy, and Gardebring certainly has. The only sad thing about Justice Gardebring leaving is it will be nearly impossible to make her answer for her actions on Indian issues now that she is leaving her judges seat. wjl

Honor all veterans of ongoing cultural war

Commentary

that is plaguing the "Indian communities with violence." News

the Native healers, herbalist spiritualists) that came into contac

NO. CT-89-1863

STATE OF MINNESOTA
IN SUPREME COURT

IN RE: RULES OF PROCEDURE
FOR THE RECOGNITION OF TRIAL
COURT ORDERS AND JUDGMENTS

REQUEST TO MAKE AN ORAL PRESENTATION

MINNESOTA TRIBAL COURT STATE COURT FORUM

The undersigned hereby requests to make an oral presentation at the hearing on the Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments which is scheduled for 2:00 P.M. on October 29, 2002. A copy of the materials to be presented is attached to this request.

DATED: October 15, 2002

Clara Niiska
500 North Robert Street, Suite 205
St. Paul, Minnesota 55101
Telephone 651-224-6656

No. Cx-89-1863

STATE OF MINNESOTA
IN SUPREME COURT

IN RE: RULES OF PROCEDURE
FOR THE RECOGNITION OF TRIBAL
COURT ORDERS AND JUDGMENTS

AFFIDAVIT OF CLARA NIISKA

1. I am currently completing a Ph.D. in the Anthropology Department at the University of Minnesota in Minneapolis. My research is focused on certain aspects of language at the interfaces between Red Lake and European-American society.

2. I also write for the *Native American Press/Ojibwe News*, and have been a regular contributing writer for that newspaper for more than a year. My deceased husband, of Red Lake, wrote regularly for that newspaper from its inception in 1988 until his death in 1997.

3. I lived at Red Lake for more than eighteen years, from 1979 and until after my husband's death.

4. Although I was never personally involved with the tribal court – technically a Court of Indian Offenses – at Red Lake until after my husband's death, I was cognizant of the general community understanding of that court: that it is fundamentally unjust.

5. Because of publisher Bill Lawrence's willingness to print news stories addressing difficult issues, the *Native American Press/Ojibwe News* sometimes serves as a 'court of last resort' for Indian people in Minnesota. As a writer for that newspaper, I have listened at length to a number of people who have suffered from abuses by tribal courts, and in several instances has done in-depth research to verify their accounts. Some of those stories have been printed. There are a number of reasons that others of those stories have not been printed, including people coming to the paper and then withdrawing for fear of retaliation should they 'go public.' Just as one illustration, I quote from an unsolicited email received at the newspaper on the evening of May 21, 2002, from one individual whose rights were trampled on by a tribal court:

> i would love to tell the world whats going on and i agree that shining the light of truth on the corruption would, in the end, force them to be more accountable. the problem is that things won't turn around right away and in the mean time i am very afraid of my kids and i not being able to see each other at all and that would just be unbearable for us. i am not ussually the type of person that let's bullies push me around but they hold my heart in their hands in this case.

6. I have personally witnessed efforts at retaliation from the tribal establishment, including death threats made to my husband in an attempt to 'persuade' him to stop writing for publication, and threats of prosecution on wholly false charges made by now-deceased tribal court judges George "Dumpy" Sumner and Kenneth "Buddy Bosh" Stateley.

7. My personal experience with the Indian court at Red Lake is illustrative of some of the problems with that "tribal court":

a. My deceased husband, Wub-e-ke-niew (a.k.a. Francis [no middle name] Blake, Jr., a.k.a. Francis George Blake, Sr.) renounced his tribal enrollment in 1990. It was his understanding that the legal definition of "Indian" is "enrolled member of a federally-recognized tribe," and that his renunciation of tribal membership thus made him legally non-Indian. The alternative is a "racial" definition that would invalidate the entire tribal court system. *Brown* v. *Board*, 347 U.S. 483 (1954).

b. After Wub-e-ke-niew's death on October 15, 1997, tribal chairman Bobby Whitefeather's sister Donna Whitefeather produced falsified enrollment certification, apparently by changing the birthdate on Wub-e-ke-niew's son, Francis George Blake, Jr.'s enrollment, alleging that Wub-e-ke-niew was enrolled at Red Lake at the time of his death.

c. That fraudulent 'enrollment' document was used to assert the probate jurisdiction of the Red Lake Court of Indian Offenses. Probate jurisdiction at the Red Lake Indian court is limited to "a deceased Indian," both under the tribal code adopted by the tribal council in 1990, Title IX, Probate and Commitment, § 900.01, subd. 2, and the Code of Federal Regulations, 25 CFR § 11.700, which is supposed to govern that court, 25 CFR §11.100 (a) (1).

d. Despite the fact that they demonstrably had both my address and that of my attorney, the Red Lake Indian court did not notify me of either their appointment of a personal representative, nor of the pending probate hearing.

e. I learned of said hearing fourth-hand, and made a special appearance [pro se, since my attorney was not among the few licensed by the tribal council to practice at the Red Lake Indian court] at that scheduled hearing in order to object to the Red Lake Indian court's assertion of probate jurisdiction. The hearing was delayed for more than an hour, which time the petitioner and alleged personal representative apparently spent consulting with court personnel about my unanticipated appearance and objections.

f. The chief judge, Wanda Lyons, then briefly convened court, at which time she continued the hearing until the Tuesday following Memorial Day weekend, 1998, and recused herself on the grounds that she had helped the petitioner prepare the case.

g. The hearing resumed – after a delay of more than an hour – before judge Bruce Graves. Shortly after court was convened, a tribal police officer served me with an ex parte executive order of removal signed by tribal chairman Bobby Whitefeather, banishing me from the reservation. I objected. I was removed, and escorted by tribal police to the reservation line. The order of removal is still in effect.

h. I attempted to file objections by certified mail. The return receipts were signed and returned, but there was no other acknowledgment.

i. I made several unsuccessful attempts to obtain a copy of the judgment, both from the Red Lake Indian court and with Freedom of Information Act requests to the Department of the Interior.

j. I did not see a copy of the Indian court order for judgment until about six months after judge Bruce Graves filed it, when I discovered that it had been filed with the Ninth District Court in Beltrami County in an effort to claim off-reservation property owned by Wub-e-ke-niew and myself.

k. That order, headed "Red Lake Nation Tribal Court," had a different case number than the petition for probate filed with the "Red Lake Court of Indian Offenses." In that order, judge Graves stripped me of almost everything that I had owned, including my interests in a sweat-equity home built by Wub-e-ke-niew and myself and motor vehicles titled in the state of Minnesota. Although not specifically itemized in the petition for probate, the Indian court's probate was construed to include my family photographs, academic papers, and other clearly personal property including my underwear.

l. Judge Graves's order ex post facto applied the 1990 tribal code's requirements for marriages contracted after the Red Lake tribal council's adoption of that code to Wub-e-ke-niew's and my 1984 marriage, ruling that the marriage was not valid

and that I had no legal interest in any of the property Wub-e-ke-niew and I had accumulated during thirteen and a half years of marriage.

m. The Ninth District Court, influenced by the trend toward "comity" recognition of tribal court judgments as well as by a non-adjudicated "preliminary determination" made by a Department of the Interior Administrative Law Judge under the limited (and unique) legal standards in the White Earth Reservation Land Settlement Act (WELSA) pertaining solely to heirship of certain White Earth Reservation allotments based on a 1947 General Council resolution which was overturned in 1958, found that Wub-e-ke-niew's and my marriage was not valid, despite my having filed timely objections to the WELSA preliminary determination and the flagrant abuses of due process and other constitutionally-protected rights – documented in the State court record – by the Red Lake Indian court. The Ninth District Court also found that my "equitable share" interest in Wub-e-ke-niew's estate was ½. My interests in my own personal property was not an issue before the State court.

n. Despite the State court's "equitable share" ruling, I have not yet been able to obtain so much as a list detailing the disposition of my property at Red Lake, nor have I been able to regain any of that property.

o. I appealed the Ninth District Court's ruling purporting to invalidate Wub-e-ke-niew's and my marriage, but, by that time pro se, I apparently did not adequately

clarify jurisdictional and other legal issues. The Court of Appeals upheld both the Red Lake Indian court's ex parte judgment and the WELSA preliminary determination. The state and federal Supreme Courts declined to review the case, *In Re: Application of Paul Bunyan Rural Telephone Cooperative Under Rule 67.02 MRCP.* The documents substantiating what I have written here are part of the trial court record in that case, and I will provide copies to the General Rules Advisory Committee on request.

8. Under the rule proposed by the Minnesota Tribal Court State Court Forum's "Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments," filed April 11, 2002, I would not have even been *notified* of the taking of my property – in Minnesota – based on the Red Lake Indian court's judgment. That of my property clearly under Minnesota jurisdiction would have disappeared irretrievably into Red Lake Indian jurisdiction before I ever saw a copy of the tribal court order.

9. At least with respect to Red Lake, there is a "one way street" with reference to recognition of court orders. The Red Lake court does not recognize state court orders as a matter of course, and there is almost no potential avenue for redress against tribal court orders obtained through processes unconstitutional under both the Minnesota and U.S. Constitutions.

10. There is no appeal process beyond the tribal courts. Because of a relatively recent legal trend toward upholding "tribal sovereignty," there is often no avenue for redress at all.

11. In early 2001, I went to a public meeting in St. Paul and asked Red Lake tribal council chairman Bobby Whitefeather about his ex parte order of banishment, served to remove me from the Red Lake Indian court's probate hearing. Whitefeather responded that he had to "stand up for tribal members," and referred to an alleged complaint made by the tribal member who was awarded all of my property by the Red Lake Indian court. I did not learn of the alleged complaint until more than two years after I had been banished, and still do not know what charges might have been made, ex parte, against me.

12. Tribal courts are not courts of record. With the exception of the tribal court at Mille Lacs, tribal codes are not publicly archived in Minnesota, and – as indicated by *U.S.* v. *Red Lake* 827 F.2d 380 (1987) and related cases arising from a Freedom of Information Act request for Red Lake court records made by the Minneapolis *Star Tribune*, court records are extremely difficult to obtain. With reference to the circumstances of those cases, the tribal archives were burned shortly after the Red Lake Band was ordered to turn the court records over to the U.S. Government. My personal experience with the Red Lake Indian court is illustrative of ongoing problems in obtaining tribal court records.

13. The Red Lake Indian court has a long history of civil rights abuses. I invite Judicial Notice of the Preliminary Report of the U.S. Commission on Civil Rights. [Exhibit A.]

14. The process used by the Minnesota Tribal Court State Court Forum has excluded those people who would have strong objections to the presently proposed Rule. *Native American Press/Ojibwe News* publisher Bill Lawrence has been involved in trying to cover the proceedings of the Forum since its inception, and upon his return from Bemidji after his only son's funeral, may testify in much greater detail than I could with respect to those efforts at press coverage of what should be fully public proceedings. I recall my discussions with Mr. Lawrence about my covering one of the Forum's meetings as a reporter for the *Native American Press/Ojibwe News*. The Forum meeting was held at Red Lake, and the tribal council chairman's ex parte order exiling me is still in effect. After some discussion, I concluded that the risks of my attending a public meeting of a State Forum at Red Lake – including possible arrest for violating the banishment order and / or serious injury for allegedly 'resisting arrest' – were too great.

15. Although it is alleged that the legitimacy of Indian courts rests on residual aboriginal sovereignty, these courts do not in fact have any resemblance to the traditional legal systems of the autochthonous peoples. Wub-e-ke-niew's published book, *We Have The Right To Exist*, includes a chapter (Chapter 13, pp. 181 – 193, endnotes pp. 348 - 350) presenting his understanding of the Red Lake Indian court [Exhibit B], and his writing also rebuts claims that the present system at Red Lake derives from any known aboriginal indigenous system. A compilation of his writing is included in the court record of *In re*:

Paul Bunyan and was included in the appendix to my appeal in that case, and I incorporate that material here by reference.

16. I urge that State of Minnesota Rules of Court concerning the procedure for all State Courts' acceptance of tribal court judgments place the burden of proof firmly on the party filing such orders with any State Court. There are alternative legal mechanisms to deal with the emergencies referred to by the Forum in their "Petition for Adoption of a Rule for the Recognition of Tribal Court Orders and Judgments," pp. 4-5, and the potential for Minnesota Courts violating the constitutional rights of citizens of Minnesota – in Minnesota – through rubber-stamp acceptance of tribal court decisions is an extremely serious one.

17. I further urge that the State of Minnesota investigate the interfaces between tribal courts and State Courts fully and completely, including:

a. A thorough scrutiny of a large sample tribal court records, including in-depth interviews with the parties involved – as well as with any parties excluded due to lack of notice or other absence of due process.

b. Full public hearings both statewide and on every reservation in the State, including ample opportunity – in a safe and culturally acceptable environment – for individuals potentially subject to retaliation to testify in camera.

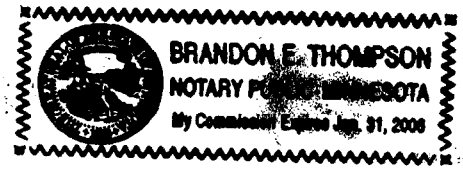
c. Careful legal examination of all tribal codes and other material which might be applied as "law" in a tribal court, for example tribal council resolutions, and assurance that all such "Indian law" which might come into the State's courts

through recognition of a tribal court order be maintained as public records in the State Law Library system.

Clara NiiSka

Subscribed to and sworn to before me
this 22nd day of May, 2002.

Notary Public, _____County, MN.
My commission expires on _____.



7.

EXHIBIT A

UNITED STATES
COMMISSION ON
CIVIL RIGHTS

1121 Vermont Avenue, N.W.
Washington, D.C. 20425

May 30, 1990

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Chairman Roger A. Jourdain
Red Lake Band of Chippewa Indians
P.O. Box 550
Red Lake, Minnesota 56671

Dear Chairman Jourdain:

The United States Commission on Civil Rights is preparing a report on enforcement of the Indian Civil Rights Act of 1968.

Enclosed, for your review is a portion of the confidential draft report in which your tribe is discussed. This material is being forwarded to you in order to give your tribe an opportunity to file a response. Should your tribe wish to do so, a verified written response must be received by the Commission within twenty days of your receipt of this correspondence. Official responses must be attested to by a notary public or other person with legal authority to administer oaths.

For your benefit, a copy of the Commission's statute and applicable regulations are enclosed. Should you have any questions concerning this matter, please feel free to call Attorney-Advisor Susan Muskett at 202-376-8351.

Sincerely,

William T. Bowerfind
General Counsel

Enclosures: Chapter 3, pages 35-47
Table 1, pages 27-28
Commission's statute and applicable regulations

Offenses as required by the Indian Civil Rights Act.[35] The district court found that the Department had not promulgated a model code, but dismissed the suit based upon *Martinez*.

Red Lake Court of Indian Offenses

To understand more clearly the Department of Interior's role with respect to the rights of reservation residents vis-'a-vis tribal governments, the Commission hearing continued to draw upon the Bureau's recent handling of matters involving the Red Lake Tribe.[36] As

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[35] The plaintiffs had originally complained that their rights under the ICRA had been violated but, when defendants moved to dismiss based upon *Martinez*, they amended their complaint to substitute the Fifth Amendment claim against the Secretary of the Interior for the ICRA claim.

[36] As early as 1977, the Interior Department was aware of resistance to the ICRA by the Red Lake Tribe. A Departmental memorandum states:

> There is still a fundamental problem with the tribal council's negative stance on the applicability of the Indian Civil Rights Act . . . .
>
> The court is in a perilous position since it may violate the rights of defendants when it observes the rules set out in the present code. Without tribal legislative action in the nature of a major revision of the code, the court feels it cannot conform to the Act's requirements. A specific example of court-tribal council interplay is the serious problem of defense counsel. Since only one person is presently admitted to practice as lay counsel before the court, the court is faced with a dilemma when a defendant requests counsel and the person is either unavailable, unacceptable to the accused, or refuses to represent the accused.

(continued...)

background for the ensuing discussion, the following summary of the relevant events at Red Lake was presented to the panelists:

> 1972: A law review article appeared criticizing the tribal courts at Red Lake;[37]

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[36](...continued)
Memorandum to the files, Office of the Solicitor, U.S. Department of the Interior (May 20, 1977).

Another Interior Department memorandum mentions "[c]omplaints about the refusal of the tribe to permit legal counsel to represent individuals before the court in defiance of the mandate of the Indian Civil Rights Act, 25 U.S.C. § 1302(6), were documented as early as 1972 in a law review article, Note, *Tribal Injustice: The Red Lake Court of Indian Offenses*, 48 N.D.L. Rev. 638, 654-655 (1972)." Memorandum to Assistant Secretary -- Indian Affairs from Acting Associate Solicitor, Division of Indian Affairs (Nov. 13, 1987), *reprinted as* Exhibit 2, *Portland Hearing*, *supra* note 25, at 119-122.

[37] This article, Note, *Tribal Injustice: The Red Lake Court of Indian Offenses*, 48 N.D.L. Rev. 639 (1972), was mentioned by Commission staff to show that the BIA was put on notice of alleged problems at the Red Lake Court of Indian Offenses as early as 1972. This type of public criticism of the BIA court in 1972 provides the background for understanding what the BIA and Assistant Secretary Swimmer knew concerning the Red Lake Court of Indian Offenses, a court under the BIA's control. *Washington, D.C., Hearing*, *supra* note 4, at 21. Concerning this court, Assistant Secretary Swimmer admitted that he had heard some general things about the situation at Red Lake, *id.* at 21, and he "certainly did not condone the actions" of the court, *id.* at 25, and that he and others agreed "no, that's not the way to operate a judicial system out there." *Id.* Assistant Secretary Swimmer also admitted that some in the Department believed that the ICRA was being violated at the Red Lake Court of Indian Offenses, *id.*, but he failed to explain how the BIA attempted to resolve the public allegations of civil rights abuses. Instead, he explained how the BIA in November 1987 entered into a contract for judicial services with the tribe for a tribally operated court. *Id.* Swimmer's rejection of (continued...)

1977: The Department of Justice prepared to sue the Red Lake Tribe regarding the tribal law requiring attorneys to be members of the tribe. The suit was dropped when the *Martinez* decision came down.[28]

1979: The council removed the tribal treasurer. . . . This sparked an uprising which resulted in the

[28](...continued)
language in the contract requiring compliance with the ICRA was then discussed. *Id.* at 28-31; *cf.* 61 (Testimony of U.S. Attorney Jerome G. Arnold). On the issue of the Red Lake Tribal Court contract, *see* Memorandum to Assistant Secretary – Indian Affairs from Acting Associate Solicitor, Division of Indian Affairs, U.S. Department of the Interior (Nov. 13, 1987), *reprinted as* Exhibit 2, *Portland Hearing*, *supra* note 25, at 119-122 (hereinafter "Solicitor's Memorandum") ("In summary, it is clear that the Red Lake Tribe has no intention of operating its court in accordance with the requirements of the Indian Civil Rights Act. . . . Given the past record of the Red Lake Tribe, it is unlikely that it will operate the court in compliance with the Indian Civil Rights Act unless compelled to do so. We recommend that the problem be addressed at the outset by insisting on specific language in the contract rather than waiting until individual Indians seek to hold us accountable for the foreseeable actions of the tribal court. . . . By taking a firm position *in this instance where a serious civil rights problem clearly exists*, we can substantially reduce the risk that federal courts will force us to become routinely involved in internal tribal disputes." (Emphasis added)).

For a critical analysis of this article, see Testimony of the Red Lake Band of Chippewa Indians for the Record of the Hearing on Enforcement of the Indian Civil Rights Act Conducted by the Civil Rights Commission in Washington, D.C., on January 28, 1988, *reprinted as Exhibit 18, Washington, D.C., Hearing*, *supra* note 4, at 321 (hereinafter cited as *Red Lake Tribe Statement*). The article was mentioned by Commission staff for the above reasons and not necessarily as a general endorsement of its contents.

[29] *United States v. Red Lake Band of Chippewa Indians*, CIV 6-78-125 (D. Minn., filed March 20, 1978, voluntarily dismissed after *Martinez*, May 19, 1978).

burning of Red Lake Chairman Roger Jourdain's house along with other property. I believe about 13 buildings were burned and, unfortunately, two deaths occurred.[39]

1980: The Red Lake Council passed a resolution barring the news media from the reservation.[40]

1982: Another resolution barring the news media was passed.[41] Also in 1982, a BIA consultant reported, "The Red Lake court has never had a jury trial and juries were not being provided even when requested by parties."[42] Around that time, an

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[39] *See* Reply of Superintendent, Red Lake Agency to Commission Inquiry, *reprinted as* Exhibit 5 to the *Portland Hearing*, *supra* note 25, at 139-43. A federal court hearing claims arising from these incidents describes in detail what it calls "the events on the day of the uprising" in *Red Lake Band of Chippewa Indians v. United States*, 800 F.2d 1167, 1188-91 (D.C. Cir. 1986). *See also* Testimony of the Red Lake Band of Chippewa Indians, *printed in Washington, D.C. Hearing*, *supra* note 4 at 321, 327, where the tribe takes issue with this characterization.

[40] Red Lake Band of Chippewa Indians Resolution No. 36-80, *reprinted* as Exhibit 6 to the *Portland Hearing*, *supra* note 25, at 151.

[41] *Referred to* in the letter to Chairman Roger Jourdain, from Dennis Whiteman, Superintendent, Red Lake Agency, May 27, 1982, *reprinted as* Exhibit 4, *Portland Hearing*, *supra* note 25, at 126.

[42] Schmickle & Bucen, *Indians' rights are often denied in tribal courts*, Minneapolis Star and Tribune, Jan. 5, 1986, at 1A, *reprinted at* Exhibit 4 in the *Washington, D.C., Hearing*, *supra* note 4, at 159; Nat'l. Center for State Courts, Red Lake Court of Indian Offenses[:] Management Audit Technical Assistance Report 13 (1982) (prepared by James Farrar and Priscilla Wilfahrt) (on file with the Commission). The *Solicitor's Memorandum*, *supra* note 38, mentions the denial of jury trials at the Red Lake court. *See* Testimony of the Red Lake (continued...)

Interior Department attorney advised BIA officials that the court's practice of not providing a jury trial violated rights secured by the Indian Civil Rights Act.[43]

1985: Senator Boschwitz and Representative Stangeland requested the U.S. Comptroller General to investigate the Red Lake system, which they never did, as I understand it.[44]

May 1985: Two prisoners were released by a Federal district judge on the grounds that they had

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[43](...continued)
Band of Chippewa Indians, *printed in Washington, D.C. Hearing, supra* note 4, at 321, 329, where the tribe defends its lack of jury trials:

> In fact, in 1982 the budget of the Red Lake Court, funded solely by the BIA, was grossly inadequate, and included no funds for jury trials. It is unreasonable to expect people who have low paying jobs by the day to refrain from working and serve on a jury without pay, especially to participate in a system which in many ways is not a part of their cultural understanding. Today jury trials are held upon request.

The above *Minneapolis Star and Tribune* article points out that in 1984 the tribe "paid law firms in Duluth and Washington, D.C., more than $140,000 in fees and expenses." Schmickle & Bucen, *supra, reprinted as* Exhibit 4 in the *Washington, D.C. Hearing, supra* note 4, at 159.

[44] Schmickle and Bucen, *supra* note 43, *reprinted as* Exhibit 4 in the *Washington, D.C. Hearing, supra* note 4, at 159.

[45] *See* Schmickle and Bucen, *U.S. reluctant to curb tribal court abuses*, Minneapolis Star and Tribune, Jan. 7, 1986, at 1A, *reprinted as* Exhibit 4, *Washington, D.C., Hearing, supra* note 4, at 186.

been denied counsel, bail, and the right to a trial by jury.[43]

August 1985: The Red Lake Council began requiring that attorneys be members of the Red Lake Tribe, understand Chippewa, and be a resident of the reservation.[44] In 1985 also, the

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[43] *See Good v. Graves*, Civil No. 6-85-508 (D. Minn. May 20, 1985). The court noted:

> The evidence in this case leads this court to the inescapable conclusion that the rights guaranteed petitioners by the Indian Civil Rights Act were trampled upon by the officials of the Red Lake Court of Indian Offenses.

Id. at 5. *See also*, Memorandum to Assistant Secretary - - Indian Affairs from Acting Associate Solicitor, Division of Indian Affairs, U.S. Department of the Interior (Nov. 13, 1987), *reprinted as* Exhibit 2, *Portland Hearing*, *supra* note 25, at 119-22 ("The federal court ordered the prisoners in one such case released because they had not been given a right to counsel, were told they would have to pay for a jury trial if they wanted one, and were denied the right to post bail – *all in violation of the Indian Civil Rights Act.* (Emphasis added; citation to *Good v. Graves* deleted.).

[44] Red Lake Tribal Resolution No. 237-85 (Aug. 29, 1985). Area Director Earl Barlow wrote to the field superintendent:

> Although Tribal Resolution No. 237-85 has established criteria for purposes of admission to practice before the court, the criteria are so restrictive that it is a virtual certainty that no professional attorney could qualify for admission to practice. Imposition of those criteria would have the effect of denying the right to counsel and, accordingly, the Bureau of Indian Affairs can neither approve nor recognize the criteria in Resolution No. 237-85. The existing Tribal Code provision (Chapter 1, §4(1)) is equally restrictive because it limits licensing to Band members."

(continued...)

Minneapolis Star and Tribune brought a Freedom of Information action against the Department of the Interior seeking the Red Lake court records.[47]

August 1985: The court records were seized by the Red Lake Tribe. Suit had been brought by the U.S. Government to recover those records on the grounds that the records are "Agency records" of the BIA. The U.S. District Court for Minnesota and the Eighth Circuit have ruled in favor of the

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[46](...continued)
Exhibit 4, *Portland Hearing*, *supra* note 25, at 137. *See also* Testimony of the Red Lake Band of Chippewa Indians, Exhibit 18, *Washington, D.C., Hearing*, *supra* note 4, at 330 ("Yet, that there are today no Red Lake members who are professional attorneys does mean that defendants must be represented by lay counsel."). In 1977, an Interior Department memorandum noted a problem with lay counsel: "Since only one person is presently admitted to practice as lay counsel before the court, the court is faced with a dilemma when a defendant requests counsel and the person is either unavailable, unacceptable to the accused, or refuses to represent the accused." Memorandum to the files, Office of the Solicitor, U.S. Department of the Interior (May 20, 1977). For a response of the Red Lake Band of Chippewa Indians, *see* Testimony of the Red Lake Band of Chippewa Indians, Exhibit 18, *Washington, D.C., Hearing*, *supra* note 4, at 329-34.

[47] Oberdorfer, *Paper Gets OK to See Court Files, but Red Lake Officials Withhold Them*, Minneapolis Star and Tribune, Jan. 7, 1986, at 9A (*reprinted in Washington, D.C. Hearing*, *supra* note 4, at 195-196); *Minneapolis Star and Tribune Company v. United States Dep't of Interior*, Civ. No. 4-85-1255 (D. Minn. Apr. 30, 1986). The United States also had to rely on the courts to recover the records of the BIA court at Red Lake. *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380 (8th Cir. 1987), *cert. den.*, 99 L.Ed. 2d 270 (1988).

U.S. Government. The tribe has petitioned the U.S. Supreme Court for *certiorari* review.[46]

September 1985: Suit was filed in the federal district court against the Department of the Interior on behalf of three Indians seeking termination of Federal funds to the Red Lake court until court reforms are achieved. The suit was dismissed on the grounds that the federal court does not have the authority under the Indian Civil Rights Act in light of the *Martinez* decision.[47]

November 1985: The BIA issued a directive requiring the court to allow retained counsel into court.[48]

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[46] *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380 (8th Cir. 1987), *cert. den.*, 99 L.Ed. 2d 270 (1988). See Exhibit 18, *Washington, D.C., Hearing, supra* note 4, at 336, for the petition for certiorari.

[47] *Cook v. Moran*, CIV No. 6-85-1513 (D. Minn. Feb. 13, 1986), *reprinted as* Exhibit 5, *Washington, D.C., Hearing, supra* note 4, at 197.

[48] Memorandum to all area directors from Hazel Elbert, Acting Deputy Assistant Secretary - Indian Affairs, U.S. Department of the Interior (Nov. 12, 1985), *reprinted in the Portland Hearing, supra* note 25, Exhibit 4, at 128-29. The right to counsel became an issue at Red Lake, *see* Memorandum to Earl Barlow, Area Director, from Red Lake Chairman Roger Jourdain, (Nov. 23, 1985), *id.*, at 133-34, and Mr. Barlow's response, *id.*, at 135-38. Specifically, Mr. Barlow refers to the intention of one attorney, Richard Mashbesher, to appear on behalf of criminal defendants:

> Next, I am also aware that the Red Lake Band has issued an order that Mr. Mashbesher be removed from the Reservation by Law Enforcement Services personnel. Bureau personnel are hereby

(continued...)

November 1987: The Red Lake CFR court was changed from a CFR court to a tribal court under a contract with the Bureau for judicial services.[8]

Right to Counsel at Red Lake

The hearing turned to allegations that the Red Lake Tribe was denying persons their right to counsel. As noted above, these allegations were the subject of a suit brought by the Department of Justice against the tribe, dismissed when the Supreme Court decided *Martinez*. Under a tribal resolution adopted in 1985, criteria for

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[8](...continued)
directed not to enforce that removal order. *Doing so would implicate the BIA in a denial of right to counsel.* . . . Bureau Law Enforcement personnel are to be available to protect Mr. Meshbesher's person and property while he is on the Reservation representing his clients.

Id. at 138 (Emphasis added). *See also* Schmickle and Buoen, *U.S. reluctant to curb tribal court abuses*, Minneapolis Star and Tribune, Jan. 7, 1986, at 1A, *reprinted as* Exhibit 4, *Washington, D.C., Hearing, supra* note 4, at 187:

> In November -- after three Red Lake Indians sued the Interior Department in an attempt to shut down the Red Lake court because of rights abuses -- the BIA issued a directive from Washington to Indian court officials, including those at Red Lake, saying civil rights laws must be enforced and defendants must be allowed to have lawyers represent them.
>
> The Red Lake tribe responded by ordering two BIA officials who said they would enforce the Washington directive off the reservation. But the BIA officials have remained there.
>
> Meanwhile, the Red Lake court continues to operate. A lawyer has yet to appear there.

Id.

[8] *Washington, D.C., Hearing, supra* note 4, at 20-21.

admission to the Red Lake Tribal Bar mandate that candidates be 21 years of age or older, have good moral character, be a law-abiding citizen without a felony conviction, schooled in tribal law and knowledgeable about the tribe's laws, customs, court rules and procedures, understand Chippewa, be a member of the Red Lake Band of Chippewa Indians, and be a resident of the Red Lake Indian Reservation for at least a year.[32]

In its statement to the Commission, the Red Lake Tribe defended these criteria, arguing that *while the applicant must understand Chippewa, he need not be able to speak it.*[33] Moreover, the tribe claimed, "It is a fact that outside, non-Indian, professional attorneys frequently disrupt tribal court proceedings and attempt to bamboozle lay Indian judges, prosecutors, clerks, jurors, and witnesses."[34] Interesting in this regard is that in its proposed Model Code for the Administration of Justice by Courts of Indian Offenses, the Department of Interior

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[32] Red Lake Band of Chippewa Indians Tribal Council Resolution No. 237-85 (Aug. 29, 1985); *see also Washington, D.C. Hearing*, *supra* note 4, at 329. United States Attorney Jerome Arnold told the Commission that a new resolution was passed and went to Chairman Jourdain for signature, but that instead of signing the resolution "it went into a drawer and hasn't been seen since." *Washington, D.C. Hearing*, *supra* note 4, at 62-63. Mr. Arnold did, however, note that since October 1986 "there has been some improvement" concerning the right to counsel. *Id.*, at 62.

[33] Testimony of the Red Lake Band of Chippewa Indians, *printed in Washington, D.C. Hearing*, *supra* note 4, at 321, 329 (emphasis added) ("Note that the applicant is not required to speak the Chippewa language, but rather, to understand it.")

[34] *Id.* at 330. The Tribe's written statement also stresses the importance of understanding the tribe's customs, culture, history, and attitudes about land. *Id.* at 329-330.

specifically addressed the question of whether the tribe could impose language requirements on nonmember attorneys:

> Although a tribal court is required by the Indian Bill of Rights to allow representation by a professional attorney it does not follow that the court cannot impose certain regulations or qualifications on the appearance of such an attorney. In formulating such regulations, however, a tribe should be careful that it does not so restrict an attorney's appearance that his representation is effectively nullified. For example, although the tribe may conduct the proceedings in the tribal language (assuming that the defendant speaks the language or is furnished an interpreter) it probably could not require that the attorney demonstrate a knowledge of the language before he is allowed to make an appearance. Because of the extreme rarity of attorneys with a knowledge of an Indian language, such a requirement would effectively bar all professional attorneys from appearing in tribal court. A reviewing federal court would almost certainly conclude that such a requirement is unreasonable and violative of the defendant's right to counsel.[25]

In its Statement for the Commission, the Tribe cited two cases to support its policy on use of counsel. In the

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[25] *Model Code for Administration of Justice by Courts of Indian Offenses*, 40 Fed. Reg. 16,689, 16,696 (1975).

first, *Red Fox v. Red Fox*,[36] the Oregon Court of Appeals was confronted with whether to recognize a tribal court judgment claimed to be void because the tribal court refused to allow one of the parties to be represented by an attorney. The court of appeals recognized the tribal court judgment, saying that:

> [W]hile husband was advised that his retained counsel—a member of the Oregon and federal bars—would not be permitted to appear before the Tribal Court, the record shows that he was also informed that he might be represented by a "spokesman" certified to make such an appearance . . . . [O]ne is not deprived of a "right" to representation because a court will not permit a specific individual to appear before it. No constitutional claim arises from the limitation of representation to those satisfying specific qualifications where those so qualified are, in fact, available to a litigant.[37]

The court of appeals refrained from addressing whether an ICRA due process claim was to be interpreted consistently with a constitutional due process claim. That issue was before a federal district court.[38] That suit, later

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[36] 542 P.2d 918 (Or. Ct. App. 1975).

[37] *Id.* at 922 (footnote omitted).

[38] *Id.* at 922 n.3 ("A federal cause of action is available to parties alleging a deprivation of rights created by the [Indian] Civil Rights Act. Indeed, we were informed at oral argument that such an "appeal" from the Tribal Court decree is now pending in the federal district court, (continued...)

dismissed as having been already adjudicated, was affirmed by the ninth circuit[39] with a finding that due process under the ICRA and Constitution have the same meaning. Moreover, said the ninth circuit:

> We view the enactment of the Indian Civil Rights Act as evidence of this continuing congressional solicitude for the welfare of the American Indian. The courts of the United States must be correspondingly more available to adjudicate, enforce, and protect the civil rights specifically granted to the Indian peoples by the Congress. Consequently, if a state court determination of a claim under the Indian Civil Rights Act is transparently erroneous, the District Court, in order to prevent a miscarriage of justice, need not accord full adjudicatory effect to the state court decision.[40]

The second case cited by the Red Lake Tribe is *United States v. E.K.*[41] The court there cited the language quoted above to the effect that there was no indication in the record that parties were unable to secure a duly certified advocate or spokesman before the tribal court.[42]

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[39](...continued)
held in suspended status awaiting the termination of this appeal.") (citations omitted)

[40] *Red Fox v. Red Fox*, 564 F.2d 361 (9th Cir. 1977).

[41] *Id.* (footnotes omitted).

[42] 471 F. Supp. 924 (D. Or. 1979).

[43] *Id.* at 933.

In 1985, allegations that the right to counsel had been violated by Red Lake surfaced in the form of a habeas corpus petition to a federal court.[43] In response, the U.S. District Court for the District of Minnesota ordered the release of two prisoners on the grounds that the Red Lake Court of Indian Offenses had denied them the right to counsel, the right to bail, and the right to a jury trial.[44] The decision read, in part:

> The evidence in this case leads this court to the inescapable conclusion that the rights guaranteed petitioners by the Indian Civil Rights Act were trampled upon by the officials of the Red Lake Court of Indian Offenses. Whether the actions of the Red Lake Court of Indian Offenses were intentional or simply the result of unfamiliarity with the obligations incident to running a court is of no concern to this court at this time. It is sufficient to state that Greg Good and Douglas Neadeau did not receive the minimum procedural protections required by the Indian Civil Rights Act and the U.S. Constitution.[45]

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[43] *Good v. Graves*, Civ. No. 6-85-508, (D.Minn. May 20, 1985).

[44] *Id.* In 1982, the denial of jury trials by the Red Lake Court of Indian Offenses had been previously documented in a report on the Red Lake Court by the National Center for State Courts. According to the report: "Interviews with the Chief Magistrate and the Agency Special Officer indicated that the Red Lake court has never had a jury trial and juries were not being provided even when requested by parties." National Center for State Courts, Red Lake Court of Indian Offenses[:] Management Audit Technical Assistance Report 13 (1982).

[45] *Good v. Graves*, Civ. No. 6-85-508, slip op. at 3-5 (D.Minn. May 20, 1985).

BIA Attempts to Rectify Problems at Red Lake

The Bureau of Indian Affairs attempted to address the right to counsel along with other problems in the CFR courts by issuing a memorandum to its Area directors on November 12, 1985. The memorandum, by Hazel E. Elbert, Acting Deputy Assistant Secretary for Indian Affairs, stated that:

> It has come to our attention that courts of Indian offenses may be violating mandates set forth in the Constitution of the United States; the Indian Civil Rights Act . . . .
>
> . . . Therefore, you are directed to take immediate steps to have reviewed the conduct and responsibility of court personnel and their operations to ensure violations are not occurring and will not occur in the courts of Indian offenses under your administrative responsibility[.][46]

The memorandum then listed the following items which CFR personnel were required to support and abide by:

> 1. Employees in courts of Indian offenses are prohibited from willfully and unlawfully removing, concealing, destroying or falsifying public records (i.e. court proceedings, maps, books, papers, court documents, ...

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[46] U.S. Department of the Interior, Bureau of Indian Affairs, Memorandum from Hazel E. Elbert, Acting Deputy Assistant Secretary-Indian Affairs to All Area Directors (Nov. 12, 1985), *reprinted in Portland Hearing*, *supra* note 25, at 128-129.

2. Federal employees in courts of Indian offenses are prohibited from supplementing their salaries from the money accumulated through criminal fines, court fees and from other sources. . . . .

3. Courts of Indian offenses personnel must comply with a request for court records made in accordance with the Freedom of Information Act . . . .

4. The Indian Civil Rights Act and the Constitution of the United States guarantee that individuals appearing before courts of Indian offenses will be afforded all of those rights guaranteed by the Constitution to all citizens of the United States in any federal court.

5. An indigent criminal defendant facing imprisonment must be afforded a court appointed attorney if he/she so desires. . . .

6. A criminal defendant facing possible imprisonment has the right to a trial by jury of not less than six persons. . . .

7. Professional attorneys can not be denied the right to practice before courts of Indian offenses. . . .

8. In locations where CFR courts have been established tribal and BIA law enforcement officers

> *are required to comply with both the Constitution of the United States and the Indian Civil Rights Act in making arrests and in conducting search and seizures.*
>
> 9. Courts of Indian offenses shall not enforce any tribal resolution or ordinance which is in conflict with any of the foregoing provisions. . . .[47]

Eleven days later, Roger A. Jourdain, the Chairman of the Red Lake Band of Chippewa Indians, responded with a memorandum to Bureau of Indian Affairs personnel, stating:

> You are hereby directed to withdraw your order to B.I.A. personnel enforcing the Hazel Elbert memorandum. Failure to do so constitutes a crime against the Red Lake Band of Chippewas. . . .
>
> . . . .
>
> . . . if personnel of the Red Lake B.I.A. Agency choose to arbitrarily enforce the memorandum of Hazel Elbert in the Red Lake Court of Indian Offenses, the Red Lake Tribal Council, as the duly elected government of the Red Lake Band of Chippewa Indians, has no alternative but to order the removal of all individuals who enforce said memorandum.[48]

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[47] *Id.* (emphasis added).

[48] Red Lake Band of Chippewa Indians Memorandum From Roger A. Jourdain, Chairman, to Rex Mayotte, Superintendent, Rob Moran, Agency Special Officer, and Earl Barlow, Area Director (Nov. 23, 1985).

A little more than a month later, BIA Area Director Earl J. Barlow wrote to Chairman Jourdain and advised him that he could not disregard the directives contained in the Elbert memorandum.[69] He then sent a memorandum to the Superintendent of the Red Lake Agency,[70] advising him that private attorney Richard Meshbesher intended to enter an appearance before the Red Lake Court.[71] With respect to the tribal order to remove Meshbesher from the reservation, Barlow instructed the Red Lake superintendent to ignore the order:

> As indicated in my December 27, 1985, letter to Chairman Jourdain, it is the position of the Bureau of Indian Affairs that defendants have a right to counsel, including attorneys, in the Red Lake Court. Although Tribal Resolution No. 237-85 has established criteria for purposes of admission to practice before the court, the criteria are so restrictive that it is a virtual certainty that no professional attorney could qualify for admission to practice. Imposition of those criteria would have the effect of denying the right to counsel and,

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[69] Letter from Earl J. Barlow, Area Director, Bureau of Indian Affairs, U.S. Department of the Interior, to Roger A. Jourdain, Chairman, Red Lake Tribal Council (Dec. 27, 1985).

[70] U.S. Department of the Interior, Bureau of Indian Affairs, Memorandum from Earl J. Barlow, Area Director, Office of the Area Director, to Superintendent, Red Lake Agency (Jan. 10, 1986).

[71] Meshbesher had previously brought suit in Federal court to terminate Federal funding of the Red Lake Court as a means of instituting reforms.

> accordingly, the Bureau of Indian Affairs can neither approve nor recognize the criteria in Resolution No. 237-85. The existing Tribal Code provision (Chapter 1, § 4(1)[]) is equally restrictive because it limits licensing to Band members. In these circumstances - where there is no specifically approved tribal ordinance governing admission to practice and the present code effectively prevents attorneys from appearing in the Court - attorneys appearing in the Red Lake Court of Indian Offenses will be required to meet the standards for practice before the Department of Interior. . . .
>
> Next, I am also aware that the Red Lake Band has issued an order that Mr. Meshbesher be removed from the Reservation by Law Enforcement Services personnel. Bureau personnel are hereby directed not to enforce that removal order.[72]

Nevertheless, in a case brought in 1987, Attorney Meshbesher was forced to bring a habeas corpus petition in Federal court, alleging denials of the right to counsel, the right to a jury trial and right to a speedy public trial.[73] With respect to the right to counsel, the petition alleged:

> Each of the Petitioners has retained the services of Richard Meshbesher, licensed attorney at law, to

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[72] U.S. Department of the Interior, Bureau of Indian Affairs, Memorandum from Earl J. Barlow, Area Director, to Superintendent, Red Lake Agency (Jan. 10, 1986).

[73] Petition for Writ of Habeas Corpus, *Anderson v. Schoenborne*, File No. 6-87-3 (D.Minn. petition filed Jan. 5, 1987).

> represent them in the pending criminal cases before the Red Lake Court of Indian Offenses. . . . Mr. Meshbesher has been informed by Ms. Marilyn J. Johnson, the Clerk of Court of the Red Lake Court of Indian Offenses, that he will not be allowed to practice in the Red Lake Court of Indian Offenses until and unless he is licensed by the Red Lake Tribe. However, Mr. Meshbesher has contacted Mr. Royce Graves, Sr., the official secretary of the Red Lake Indian Tribe, to obtain information and procedures to become licensed to practice before the Red Lake Court of Indian Offenses. The Tribal Secretary has informed Mr. Meshbesher that there are no procedures available by which he could become licensed to practice before the Red Lake Court of Indian Offenses, and further, that the Red Lake Indian Tribe has no plan or intention of developing or putting in place procedures by which he, or any other attorney, could become licensed to practice before the Red Lake Court of Indian Offenses.[74]

In its statement for the Commission, the Red Lake Tribe acknowledged that "there are today no Red Lake

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[74] *Id.* at 3-4. *See also* supporting affidavit of Richard Meshbesher, *Anderson v. Schoenborne*, File No. 6-87-3 (D.Minn. filed Jan. 5, 1987). The district court dismissed the case without prejudice on Mar. 5, 1987, based upon a magistrate's report finding that defendants were no longer in custody, *et alia*. Report and Recommendation of J. Earl Cudd, United States Magistrate, February 12, 1987.

members who are professional attorneys . . ."[75] and that "defendants must be represented by lay counsel."[76]

Red Lake Tribe Seizes Federal Records

In January 1986, the *Minneapolis Star and Tribune* published a series on problems in tribal courts entitled, "Indian Courts[:] Islands of Injustice".[77] The Red Lake Court was among the tribal courts examined. In an attempt to gain access to Red Lake Tribal Court records, the *Minneapolis Star and Tribune* filed a Freedom of Information Act request and subsequently brought suit against the Department of the Interior to obtain the records requested.[78] The tribe, however, seized the records and refused to turn them over to either the newspaper or the federal government. According to an account by the *Minneapolis Star and Tribune*:

> [O]n the evening of Aug. 29, 1985, one day before the government was required to act on [newspaper reporter] Schmickle's request, Red Lake's tribal

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[75] Testimony of the Red Lake Band of Chippewa Indians, *reprinted as* Exhibit 18, *Washington, D.C. Hearing*, *supra* note 4, at 330.

[76] *Id.*

[77] Schmickle & Bucen, *Indian Courts[:] Islands of Injustice*, Minneapolis Star and Tribune, Jan. 5, 1986, at 1A; Jan. 6, 1986, at 1A, and Jan. 7, 1986, at 1A.

[78] Oberdorfer, *Paper Gets OK to See Court Files, but Red Lake Officials Withhold Them*, Minneapolis Star and Tribune, Jan. 7, 1986, at 9A, *reprinted in Washington, D.C. Hearing*, *supra* note 4, at 195-196; *Minneapolis Star and Tribune Company v. United States Dep't of Interior*, Civ. No. 4-85-1255 (D. Minn. Apr. 30, 1986).

> council adopted measures declaring the records to be tribal property, ordering them moved to tribal archives and declaring the records confidential.[79]

The federal government subsequently brought suit in federal court to recover the records and prevailed against the tribe.[80] After about two and a half years of unsuccessful litigation including an unsuccessful appeal to the United States Supreme Court, the tribe returned the court records to the BIA.[81]

BIA Transfers CFR Court Operations to Red Lake Tribe

As noted previously, the Bureau's failure to promulgate a model code for CFR courts served as the basis for *Cook v. Moran*, a suit brought in federal district court that alleged a violation of the Fifth Amendment right to due process. The opinion in *Moran* is sharply critical of the CFR court. This is all the more troubling since in November 1987 the Bureau abolished the CFR court and permitted the Red Lake Tribe to establish its own court under a 93-638 contract.[82] The Bureau, in

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[79] Oberdorfer, *Paper Gets OK to See Court Files, but Red Lake Officials Withhold Them*, Minneapolis Star and Tribune, Jan. 7, 1986, at 9A, *reprinted in Washington, D.C. Hearing*, *supra* note 4, at 195-196.

[80] *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380 (8th Cir. 1987), *cert. den.*, 99 L.Ed. 2d 270 (Mar. 7, 1988).

[81] The records were recovered shortly after the Supreme Court denied certiorari on the case on March 7, 1988.

[82] *Washington, D.C. Hearing*, *supra* note 4, at 28. The United States Congress appropriated approximately $11.2 million dollars in (continued...)

other words, surrendered control over the administration of justice on the Red Lake Reservation.[88] Said the court in *Moran*:

> Plaintiffs' claim . . . . is an indictment of the Court of Indian Offenses on the Red Lake Indian Reservation. It is a claim which charges that the Red Lake Court of Indian Offenses denies the fundamental rights provided under the [ICRA] to its own people more often and with greater fervor than it protects them . . . . [and] charges that the Red Lake Court of Indian Offenses has established *de facto* the denial of fundamental rights as the norm rather than the exception in the administration of justice on the Reservation . . . . The claim raises great concern in this court and should raise even greater concern in the court of

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(...continued)
fiscal year 1987 to fund tribal court systems. *Tribal Court Systems and Indian Civil Rights Act: Hearing Before the Senate Select Comm. on Indian Affairs*, 100th Cong., 2d Sess. 40-41 (1988). The BIA distributes this money largely through contracts with the tribes under Public Law 93-638, the Indian Self-Determination and Education Assistance Act (thus these funds are often referred to as "638 contract" monies). Under the Indian Self-Determination and Education Assistance Act, the Secretary of the Interior is authorized to rescind a contract with a tribe whenever the "Secretary determines that the tribal organization's performance under such contract or grant agreement involves . . . *the violation of the rights or endangerment of the health, safety or welfare of any persons* . . . ." (emphasis added). 25 U.S.C. § 450m (1988).

[88] The Bureau has greater control over CFR courts than it does over tribal courts. *Washington, D.C. Hearing*, *supra* note 4, at 24.

> Indian offenses on the Red Lake Indian Reservation.[84]

Plaintiffs, the court said, had chosen the wrong means to complain of the failures of the CFR court to accord them their rights:

> The injustices which plaintiffs allege occur in the Red Lake Court of Indian Offenses are likely real and distressingly so. But, given the unique and complex character of Indian tribes as quasi-sovereign nations and the extraordinarily broad authority of Congress over Indian matters, the role of the courts in matters between tribes and their members, even where redress of violations of rights under § 1302 of the Act is sought, is quite restrained. Claims for redress of the injustices of the Red Lake Court of Indian Offenses which plaintiffs allege are today best directed to Congress. Unless and until Congress states otherwise, this court is constrained to offer only the remedy of habeas corpus for injustices in the Red Lake Court of Indian Offenses and is forced to stand as an idle observer of those injustices which habeas corpus will not remedy.[85]

Of particular importance is that in contracting with the Red Lake Tribe to provide funds for a tribal court, the

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[84] *Washington, D.C. Hearing*, *supra* note 4, at 204-05 (citation omitted).

[85] *Id.* at 206-07 (citation omited).

Bureau chose not to follow a recommendation by its own counsel and by U.S. Attorney Jerome Arnold that a clause be inserted in the contract specifying that the tribe was to adhere to the ICRA as a condition of fulfilling the contract.[*] In a Departmental memorandum, the Acting Associate Solicitor of the Department's Division of Indian Affairs explained his position:

> Our Twin Cities Field Office recently drafted language for inclusion in the proposed Public Law 93-638 contract with the Red Lake Chippewa Tribe for the operation of a tribal court on the Red Lake Reservation. The draft language would commit the tribe to compliance with the Indian Civil Rights Act. . . .
>
> The BIA Minneapolis Area Office sent this language to the Central Office Division of Tribal Government Services for review and that office recommended against its inclusion in the contract. . . .
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> . . . .
>
> Given the past record of the Red Lake Tribe, it is unlikely that it will operate the court in

[*] This recommendation was supported by U.S. Attorney Jerome G. Arnold of Minnesota, attorney Mark A. Anderson of the Interior Department's Office of the Field Solicitor, and C. Hughes, Acting Associate Solicitor of the Department's Division of Indian Affairs. Letter from Mark A. Anderson, Office of the Field Solicitor, U.S. Department of the Interior, to Earl J. Barlow, Area Director, Minneapolis Area Office (Apr. 16, 1987); U.S. Department of the Interior Memorandum from C. Hughes, Acting Associate Solicitor, Division of Indian Affairs, to Assistant Secretary–Indian Affairs (Nov. 13, 1987).

compliance with the Indian Civil Rights Act unless compelled to do so. We recommend that the problem be addressed at the outset by insisting on specific language in the contract rather than waiting until individual Indians seek to hold us accountable for the foreseeable actions of the tribal court.

If the tribe agrees to the conditions recommended by our field office, the Department will be in a stronger legal position to insist that the tribal court be operated in compliance with the Indian Civil Rights Act and to persuade a federal court that we are exercising our authority under 25 U.S.C. § 450m in a responsible manner. Conversely, if the Department declines to contract with the tribe because it refuses to agree to comply with the Act, the tribe will be in a weak legal position should it attempt to persuade a federal court to order us to contract with the tribe without explicit civil rights safeguards in the contract. By taking a firm position in this instance where a serious civil rights problem clearly exists, we can substantially reduce the risk that federal courts will force us to become routinely involved in internal tribal disputes.[27]

[27] U.S. Department of the Interior Memorandum From C. Hughes, Acting Associate Solicitor, Division of Indian Affairs, to Assistant Secretary--Indian Affairs (Nov. 13, 1987), *reprinted in Portland Hearing*, *supra* note 25, at 119-122.

The Bureau's decision not to include ICRA language in the tribal court contract is memoralized in a memorandum dated December 23, 1987:

> Based on my staff's recommendations I will decline, at this time, from attempting to insert any draft language to the Public Law 93-638 Tribal Court Contract with the Red Lake Chippewa Tribe as proposed by your Twin Cities field office.[98]

In an exchange with Commission Deputy General Counsel Brian D. Miller and General Counsel William J. Howard, Secretary Swimmer explained that he believed that inclusion of ICRA language in the Red Lake contract was unnecessary since the contract already required compliance with all federal laws:

> MR. MILLER: In that contract there was no reference to the Indian Civil Rights Act; is that correct?
> MR. SWIMMER: That is correct. Indirectly, of course, there is, and that is that the tribe must comply with all Federal statutes. I did not feel personally that it was necessary to point that out to a tribal chairman, either there or anyplace else. And I believe that that tribal chairman, as well as many others, knows that he has to follow Federal

[98] U.S. Department of the Interior Memorandum From Hazel E. Elbert, Acting Assistant Secretary - Indian Affairs to Acting Associate Solicitor, Division of Indian Affairs (Dec. 23, 1987), *reprinted as* Exhibit 3, *Portland Hearing*, *supra* note 25, at 123.

law and that the Indian Civil Rights Act is among those.

My concern was that if we put in the contract, "By the way, you must comply with ICRA," I might as well go ahead and list the whole U.S. Code. And maybe I should in that case.[28]

MR. HOWARD: The crux of the problem, as I see it, is that there are some tribal officials who maintain that the Indian Civil Rights Act is not applicable Federal law, and we've heard testimony to that effect . . . .[29]

Later in the hearing, U.S. Attorney Jerome G. Arnold expressed disagreement with Secretary Swimmer's analysis:

Assuming he's accurate, legalese has never bothered anybody in adding something additional. It's kind of like when we charge someone, "he knowingly, willfully, and wantonly." Assuming he is correct, there was nothing wrong with adding the language that we asked for. I suspect that that is just reasoning to not add the language as opposed to the fact that it is sufficient. We don't feel it's sufficient. Frankly, neither did the Department of the Interior Solicitor's Office.

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[28] *Washington, D.C. Hearing*, *supra* note 4, at 28.

[29] *Id.* at 29.

> This was a joint request for inserting this language so that we had something to enforce it with, and I believe the failure to do so has seriously shortened any possibility of using that as an enforcement tool, assuming ongoing violations.[91]

Asked why the Bureau had deemed it appropriate to turn administration of the court over to the tribe, Secretary Swimmer indicated that "[i]t is the intent of the Bureau to withdraw from all CFR courts as soon as practicable."[92] He later explained:

> Our position is that we wish to get the tribe in a position of operating its court system as quickly as possible and begin working with the tribe to try to have a quality court system as soon as possible out

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[91] *Id.* at 61. Asked to comment on the feasibility of pursuing a contract action based upon the theory that the ICRA is applicable Federal law under the language of the contract, Mr. Arnold responded:

> The question is—we are really not talking about an enforcement provision per se. We're talking about a cancellation provision. In other words, we're going at it where it hurts, with money.
>
> . . . .
>
> I can get a lot of things accomplished by not giving people money. In other words, if I've got $308 million, which is what I think the Federal Government will give to Indian allotments this year under the Entitlement Act, believe me, I can do a lot with that in terms of contractual language, language that would be agreeable both to the tribal governments and to the Federal attorneys.

Id.

[92] *Id.* at 26.

> there. And certainly as long as they have an alien court on their reservation, if they believe that that court is under our control, I think the chances of continued poor relations are as good if not better than they will be if the tribe has its own court and we are working again from a resource base to try to improve it.[92]

"I might add," he later told the Commission, "that there is no one living on a reservation today that has to live there. There is no law that says anyone must live under the constraints of the Red Lake Tribal Council. They are free to move about anyplace in this country. And once they leave the jurisdiction of that tribe, they have no more responsibility to it nor the tribe to them, in most cases."[93] U.S. Attorney Arnold disagreed, calling the suggestion "horrendous".[94]

> It is the type of thing wherein if in Minnesota we decided to deny everyone constitutional rights, they could move over to Wisconsin. And I suppose that I, as a lawyer, could do such, but most of these people have grown up in that area. They are impoverished. They have no ability to move, nor should they have to.[95]

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[92] *Id.* at 26.

[93] *Id.* at 40.

[94] *Id.* at 56; *see also* Testimony of Stephen L. Pevar, Regional Counsel, American Civil Liberties Union, *id.*, at 87 (calling the statement "a horrible suggestion or comment" and "an embarrassment").

[95] *Id.* at 56.

Absent Congressional action to provide meaningful enforcement of the ICRA, it may be that the final paragraph of the Red Lake statement submitted for the Commission's record will provide the final word:

> The Tribe deeply resents the intrusion by the United States Civil [R]ights Commission and the Congress into Red Lake affairs through the passage of the 1968 Civil Rights Act. It is not that the Tribe does not provide fair government. Rather, it does so because the Tribe has the governmental authority and responsibility to do so, not because of federal law. The Tribe believes so deeply that the Congress lacks the power to pass laws intruding upon its governmental authority that it commissioned a legal opinion analyzing the legality of the exercise by Congress of its so-called "plenary power". The opinion concludes that the exercise of that power is without Constitutional basis. A copy of the opinion is attached, and the Tribe requests that it be made a part of the record."[*]

In a similar vein, the Tribal Council Resolution submitted for the Commission's hearing record states:

> THEREFORE, BE IT RESOLVED, that the Red Lake Tribal Council does hereby go on record as opposing and objecting to any attempt to enforce

[*] Testimony of the Red Lake Band of Chippewa Indians, *printed as* Exhibit 18, *Washington, D.C. Hearing*, *supra* note 4, at 321, 334-35.

application of the ICRA on the Red Lake Band of Chippewa Indians which would be in direct contradiction to and violation of prior agreement, policies and treaties between the Red Lake Band of Chippewa Indians and the United States Government; and as such agreements, policies and agreements were considered and recognized when the Red Lake Band was excepted from P.L. 280; and it is hereby requested that the Red Lake Band of Chippewa Indians be excepted from any proposal which it deems detrimental to the best interests of the Red Lake Band of Chippewa Indians; . . . .[98]

III. TESTIMONY OF R. DENNIS ICKES

Following the testimony by Assistant Secretary Swimmer and other Interior Department officials, the Commission heard from R. Dennis Ickes. Mr. Ickes was Deputy Under Secretary at the Interior Department in 1976 and 1977. Before that, he served at the Department of Justice for five years, where he was Deputy Director and then Director of the Office of Indian Rights in the Civil Rights Division, the Office charged with federal enforcement of the ICRA prior to *Martinez*. Not long after, the Office was closed.

Ickes testified that the ICRA is not being uniformly enforced by the tribes in the wake of *Martinez*:

[98] Resolution of the Red Lake Band of Chippewa Indians Tribal Council, No. 53-88 at 3-4, *reprinted in Washington, D.C. Hearing, supra* note 4, at 318-319.

EXHIBIT B

CHAPTER XIII

INDIAN TRIBAL COURTS

The Geneva Convention of 1864 began formal codification of the Europeans' Laws of War. This body of Common Law of Western Civilization[1] includes the understanding that "it is customary for the military government set up by the occupying power to maintain law and order [in an occupied territory]."[2] The European perspective is based on the world-view that there is such a thing as a "just" war, and that violently appropriating another Nation's property can be considered "Civilized" behavior. The brutal war of extermination conducted by Western Europeans against the Aboriginal Indigenous people of this Continent—who have never been Indians—was justified by the derogatory and all-inclusive unilateral definition by the Euro-Americans, of Aboriginal Indigenous peoples as "Indians." It was supported by the actions of patrilineally Lislakh people, including many who were full-blooded Whites,[3] who took on the European identity of "Indian" and did in fact attack other Whites and Indians, as well as Aboriginal Indigenous people. The Western Europeans' self-justifications were also bolstered by the precedent set by Pope Alexander III, in the year 1179, that "outsiders" and "infidels" were not subject to the same protections as "equals" when vanquished. No matter how such concepts have become entrenched in Western civilization's International Law, such violent codes of war and peace have no business being applied to fundamentally non-violent Aboriginal Indigenous peoples. Mitigating circumstances for engaging in war have never been a part of *Ahnishinahbæó·jibway* religion, values, and culture.

The 1864 Red Lake and Pembina Métis' Indian Treaty Amendment was unilaterally enacted by the U.S. Congress shortly before the end of the United States Civil War. Contemplating the surrender of the Confederacy, policy-makers in Washington,

D.C. weighed the various strategies under which peace might be waged. The philosophy finally adopted by Congress was that those the U.S. termed the "Southern States" had " 'deprived themselves of all civil government' and had forfeited their rights of self-government."[4] The spirit of the times was peace in the sense of Reconstruction by the conqueror, and in 1865 the United States Government began contracting with Christian missionary societies "for the purpose of preparing Indians to adopt Anglo-American culture,"[5] under similar concepts of peace.

In the first year and a half after the end of the Civil War, a million volunteer troops were mustered out of the Union Army. Many of them were paid off with land Scrip redeemable for homesteads on "public lands," usually in the West. Construction of the transcontinental railway was begun in earnest.[6] Between the years 1864 and 1871, about 2,276,000 documented immigrants[7] entered the United States, putting intentional pressure on the western frontier of European settlement, and creating public support for the sentiment expressed by General Grant during his Presidential Campaign of 1868, "The settlers and immigrants must be protected, even if the extermination of every Indian tribe was necessary to secure such a result."[8]

Ulysses Grant's presidency is described by *The Encyclopedia Americana* as characterized by "his peaceful Indian policy."[9] The same source remarks that the "Indian wars" of that era were "some of the bitterest fighting of American military history, interspersed with massacres . . . the inadequacy of troops available for the ugly job of pacification was not its worst feature."[10]

By 1871, the land designated as "Indian Reservations" was less than 7% of the total land area, all of which was claimed by the Euro-Americans' foreign concept of eminent domain. The population designated by the U.S. as "Indian"[11] was 326,468—probably less than half of whom were Aboriginal Indigenous people. On March 3, 1871, the U.S. Congress passed an Act providing "hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States

may contract by treaty."[12] Later in 1871, the Peace Policy was summarized by General Sherman in an endorsement to the recommendations of the Secretary of the Interior,[13] "to fix and determine (usually with the assent expressed or implied of the Indians concerned) the reservations within which they may live and be protected by all branches of the executive Government; but if they wander outside they at once become objects of suspicion liable to be attacked by the troops as hostile." Agitation had begun by 1871 to create military tribunals in the P.O.W. camps called Reservations, and to once again use Indians to try to claim jurisdiction over the Aboriginal Indigenous people, under the Rules of War for occupied people. As Thomas S. Williamson wrote on June 2, 1871 from St. Peter, Minnesota,[14] "I hasten to send you my views as to civilizing the aborigines of our country . . . The hostility between the white and red men of our country is chiefly owing to the fact that the [Indians] are, in our country, everywhere outlaws. If we would strike from our statutes the words *'except Indians not taxed,'* and punish them for their crimes . . . they would very rarely molest us. . . ."

In the General Meeting of Friends of the Indians, on January, 1872,[15] the Honorable Chairman Philip Williams remarked, ". . . I say that our Indian policy is no more a policy than the intercourse laws are a code. The latter constitute a slim bundle of fragments. They only pretend to punish one or two infractions of Indian rights . . ." Williams advocated setting up Indian Courts as a means of maintaining law and order among the occupied Indians. After twelve more years of agitation by "Friends of Indians" and other parties, the U.S. established military tribunals using the status of Indians as occupied peoples to gain unwarranted jurisdiction over Aboriginal Indigenous peoples, who had not gone to war with the immigrant Euro-Americans. As the Commissioner of Indian Affairs reported:[16]

> Under the date of April 10, 1883, the then Secretary of the Interior gave his official approval to certain rules prepared in this office for the establishment of a court of Indian offenses at each

of the Indian agencies, except the agency for the five civilized tribes in the Indian Territory. It was found that the longer continuance of certain old heathen and barbarous customs, such as the sun-dance, scalp-dance, war-dance, polygamy, &c., were operating as a serious hindrance to the efforts of the Government for the civilization of the Indians. It was believed that in all the tribes Indians would be found who could be relied upon to aid the Government in its efforts to abolish rites and customs so injurious and so contrary to civilization; hence these rules were formulated, looking towards the ultimate abolishment of the pernicious practices mentioned.

There is no special law authorizing the establishment of such a court, but authority is exercised under the general provisions of law giving this Department supervision of the Indians. The policy of the Government for many years past has been to destroy the tribal relations as fast as possible, and to use every endeavor to bring the Indians under the influence of [Roman] law. To do this the agents have been accustomed to punish for minor offenses, by imprisonment in the guard-house and by withholding rations; but by the present system the Indians themselves, through their judges, decide who are guilty of offenses under the rules, and pass judgement in accordance with the provisions thereof. Neither the section in the last Indian appropriations bill above quoted nor any other enactment of Congress reaches any of the crimes or offenses provided for in the Department rules, and without such a court many Indian reservations would be without law or order, and the laws of civilized life would be utterly disregarded.

The United States Government continues to maintain what they call the Indian C.F.R. (Code of Federal Regulations) Courts to bring Aboriginal Indigenous peoples under the jurisdiction of the apartheid structure which the U.S.A. calls Indian law. The European concept of law as a means of maintaining social order has nothing to do with the *Ahnishinahbæó*^{t}*jibway* philosophy of each person holding their own Sovereignty, and each individual having personal responsibility for the consequences of their actions. There was not one jail, prison, padlock, nor gallows on this Continent until the Europeans brought them as a part of their

material culture, along with their Indians. The European ideas of law depend on what Minneapolis Police Chief Tony Bouza called "a legal monopoly on violence."[17] Euro-American laws, as applied to Aboriginal Indigenous people under the aegis of Indians, are illegally dictated by foreign jurisdiction, under what we are told comprises a democratic nation-state, and are used to force Aboriginal Indigenous people to conform to externally imposed values.

In the *Ahnishinahbæó^{t}jibway* world-view, every human being is put on this earth for a purpose, and every human being is born with the capability of understanding through their own personal relationship with the Universe what the meaning of their own life is, and living in harmony. Every person comes to this world for a purpose, and according to *Ahnishinahbæó^{t}jibway* philosophy, is untainted by what the Judeo-Christians call "original sin." Turning away from the responsibilities for which each person is born, and getting manipulated by other human beings, is where the sin is. *Ahnishinahbæó^{t}jibway* and other Aboriginal Indigenous people have been telling the immigrants since they got here that each one of them has a personal responsibility, and it's not to be somebody else's slave, sycophant, or henchman. These Continents were kept a beautiful paradise because each and every one of the Aboriginal Indigenous people here took our responsibility seriously, and we lived in harmony.

An *Ahnishinahbæó^{t}jibway* elder who was a highly decorated World War II veteran wrote in 1986,

> To [*Ahnishinahbæó^{t}jibway*] people, the B.I.A. police are highly political. As Commissioner of Indian Affairs Price described the just-established B.I.A. police and courts systems in 1881, '. . . a power entirely independent of the Chief [*sic*]. It weakens and will finally destroy the power of tribes and bands.' The structure, function, and organization of these 'non-political' agencies hasn't changed since 1881.[18]

Ahnishinahbæó^{t}jibway oral history is filled with cases chronicling derailment of what might be considered justice:[19]

> In one case a young Chippewa Indian was brought before the C.F.R. Tribal Court, and the judge asked him, "how do you bleed?" What the judge meant, was "how do you plead," but the judge was a French Métis and he didn't speak English very well. The person who came up before the court thought the judge was implying that they were going to take him into the back room and administer some justice that would make his blood flow. So, he said, "Fuck you, I don't bleed."
>
> Another example of justice in the Red Lake C.F.R. Courts, concerns somebody who was picked up for drunk driving. The defendant pleaded "not guilty," and he had a witness. The judge sentenced the defendant to 90 days, and he sentenced the witness to 30 days. The Clerk of Court said, "you can't do that, Judge, he's the witness."

This is how these stories are told in *Ahnishinahbæó^{t}jibway*, and to an *Ahnishinahbæó^{t}jibway* they are redundant but still funny, and an ironic characterization of the "make-up-any-law-on-the-spot" B.I.A. Tribal Court system. In our egalitarian language, it is rude to tell people things that they already know.[20] Our stories might seem abbreviated and incomplete to somebody outside of our culture.

The C.F.R. Courts remain specifically designed to destroy Aboriginal Indigenous Sovereignty, traditions, culture, and people, using the facade of U.S. subject Indian people to unjustifiably presume jurisdiction.

In 1985, the U.S. Department of the Interior, Tribal Government Services, wrote:[21]

> It has come to our attention that courts of Indian Offenses may be violating mandates set forth in The Constitution of the United States; the Indian Civil Rights Act, 25 U.S.C. §1301-1303; the Freedom of Information Act, 5 U.S.C. §552; 18 U.S.C. §2071; 43 C.F.R. §20.735-15; and 18 U.S.C. §209.... Courts of Indian offenses are federal instrumentalities that are required to comply with federal statutes as well as the Constitution of the United States. Therefore, you [will ensure]:
>
> 1. Employees in courts of Indian offenses are prohibited from willfully and unlawfully removing, concealing, destroying or fal-

> sifying public records (i.e. court proceedings, . . . court documents, etc.) . . .
>
> 2. Federal employees in courts of Indian offenses are prohibited from supplementing their salaries from the money accumulated through criminal fines, court fees, and from other sources. . . .
>
> 3. Courts of Indian offenses personnel must comply with a request for court records made in accordance with the Freedom of Information Act, 5 U.S.C. §552.

In January of 1986, the *Minneapolis Star Tribune* published a series of articles entitled "Indian Courts, Islands of Injustice."[22] The series concluded:

> Civil rights abuses are occurring virtually unchecked on many of the nation's reservations with Indian courts. A half-million Indians live on those reservations and could find themselves in courts without rights to bail, jury trials, lawyers, and decisions untainted by politics.
>
> Why isn't the federal government, which spends more than $8 million a year to finance courts for about 150 reservations, doing something to curb the abuses? . . .
>
> Congress gave Indians most of the protections of the Bill of Rights in the 1868 Indian Civil Rights Act. But 10 years later the U.S. Supreme Court sharply limited the impact of this legislation. . . .

The *Star Tribune* writers attributed much of the problem to "the way tribes operate their courts."[23] But, if they understood the legal structure set up by the United States—using the quasi Sovereignty attributed to the I.R.A. councils as a front behind which the U.S. Government uses Indian trusties to assert P.O.W. control over those defined as Indians, and illegally harasses Aboriginal Indigenous people—it did not reach print.

I.R.A. Tribal Chairman Roger Jourdain responded to journalists' concerns about the lack of civil rights in the C.F.R. Courts in 1986 by rubber-stamping a Tribal Council Resolution that lawyers in the C.F.R. Court at Red Lake had to be enrolled Red Lake Indians and had to be able to speak the Chippewa

language. There were no such lawyers. The irony is that no judges then spoke Chippewa, and Roger Jourdain is only able to give one broken-record all-purpose speech in Chippewa, which he has given at every appropriate occasion over his thirty-year tenure as Chairman-for-Life. The laws are all in English, although they are called "Indian Law." The B.I.A. which administers the courts doesn't speak Chippewa. The Miranda Rights aren't read in any language, even broken English, and there isn't a B.I.A. policeman on the Reservation who would understand the Miranda Rights in either Chippewa or *Ahnishinahbæó^{t}jibway*. Roger Jourdain's proposal that lawyers be able to speak Chippewa was prompted by the Bureau of Indian Affairs. The issue of who speaks this hierarchical European Creole language is a diversionary tactic, and has nothing to do with the bureaucratic regulations under which the so-called Indian Tribal Courts operate.

The Indian Tribal Courts are operated under the Code of Federal Regulations,[24] using what the B.I.A. calls the "general authority"[25] of the Secretary of the Interior—although fines and imprisonment can be imposed by the C.F.R. Courts, they have no statutory basis except that in (Roman Imperial) International Law under the Rules of War. The Indian Tribal Court is described:[26]

> (b) It is the purpose of the regulations in this part to provide adequate machinery of law enforcement for those Indian tribes in which traditional agencies for the enforcement of tribal law and custom have broken down for which no adequate substitute has been provided under Federal or State law.

Jurisdiction of the C.F.R. Courts is demarcated to certain Indian Reservations including Red Lake,[27] and is limited to "offenses enumerated... when committed by any Indian, within the reservation ..."[28] The United States Supreme Court has ruled that the apartheid bureaucratic administration of Jim Crow criminal penalties exercised by the B.I.A. on Indian Reservations, cannot be extended either to Whites, or to *Ahnishinahbæó^{t}jibway*.

The Red Lake Court of Indian Offenses' Law and Order provisions in effect prior to September 11, 1990, contained provisions which would have been in explicit violation of the Bill of Rights, if the rights guaranteed by this part of the U.S. Constitution applied to Indians.[29] Other sections of the Red Lake Indian Code make explicit the United States' intent to use their jurisdiction over Indians to destroy *Ahnishinahbæó^{t}jibway* traditional economics and control our subsistence:[30]

> Section 72 - Vagrancy
>
> Any employable Indian who shall wander about in idleness, . . . or loafs or loiters in any village or town on the Red Lake Indian Reservation without any attempt to obtain regular employment, shall be deemed guilty of an offense, and upon conviction thereof, shall be sentenced to imprisonment for a period not to exceed thirty days or to a fine not to exceed $60.00 or to both such imprisonment and fine with cost. . . .
>
> Game and Fish, Section 1
>
> No Indian shall at any time take, transport, or possess any protected wild animal on the Red Lake Indian Reservation, except as permitted by the provisions of this Chapter. As used herein, "protected wild animal" shall mean any animal commonly taken for food or for its pelt, and shall also be taken to include all upland game and migratory water fowl.

Jackie White successfully challenged Euro-American jurisdiction over *Ahnishinahbæó^{t}jibway*, in a case relating to "endangered species" which he took to the U.S. Supreme Court.

That the C.F.R. game and fish regulations were never intended to protect the ecosystem which the *Ahnishinahbæó^{t}jibway* have maintained under our ancient traditions, is made clear by the long-range economic development plan currently being followed by the U.S. Government on Red Lake Reservation. This plan, written under contract with the B.I.A., and endorsed by the I.R.A. Tribal Council, recommends degradation of our environment, noting for example that their rice paddies appear "to have contributed significant amounts of dissolved solids and sulfates to the river . . . [and] contributed significant amounts of biochemical

oxygen demand and oxygen deficient water to the river system. Violations of the agency standard . . . could seemingly occur."[31] The plan endorses blasting duck nesting sites "with ammonia nitrate,"[32] and recommends clearcut "land clearing" with mechanical shearing blades,[33] along with "machine scalping" of the land, application of 2-4D, 2-4-5T and other poisons,[34] and elimination of "mature stands,"[35] meaning wholesale destruction of balanced *Ahnishinahbæó^{t}jibway* forests, in order to make "tree farms." The Bureau of Indian Affairs writes, "Despite conflicting opinions, stand conversion [*i.e.*, demolishing intact forests] will occur."[36] The White planners also note that "such a program will necessitate changes in certain activities and attitudes that may not be entirely acceptable to tribal members [*Ahnishinahbæó^{t}jibway*]."[37] It may need to be reiterated here that the B.I.A.'s Indians are not the *Ahnishinahbæó^{t}jibway*, and in fact that the Bureau's Indian élite expects to make money from this ecological devastation.

DISPENSING INDIAN JUSTICE

The United States Code of Federal Regulations under which Department of Interior Regulations are administered to Indians, provides in Chapter 11, §11.12:[38]

> (b) Whenever the court is in doubt as to the meaning of any law, treaty or regulation it may request the superintendent to furnish an opinion on the point in question.

Before court is held, the Indian Agent goes over the cases to be heard with the judge and tells him how much of a fine to levy, and how many days the defendant should spend in jail. The B.I.A. Indian Agent has the power to decide what the outcome of the trial will be, before it goes to court. The Euro-Americans say that they want to "acculturate" Indians, but as a conquered people they are kept separate from the mainstream, and the finer points of the Euro-Americans' English and Roman legal system (like fair trials) are ignored. As long as I can remember, even the

Métis have called the courts set up for Indians, "kangaroo courts."

INDIAN MAJOR CRIMES

Under the paternalistic guidelines and trusteeship of the United States Government, two years after the C.F.R. Courts were created, the United States acted the role of "Indian giver," and reclaimed jurisdiction over the major crimes of murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. What later became known as the Major Crimes Act was enacted by the U.S. Congress as Section 9 of the Indian Appropriations Bill of March 3, 1885.[39] The Major Crimes Act is another part of the overall U.S. strategy of using the Indians to gain jurisdiction over the Aboriginal Indigenous people. The specific incident used by the United States to justify the Major Crimes Act was the death of Spotted Tail, allegedly at the hands of Crow Dog.

The Major Crimes Act has not been, however, used in most cases to prosecute murders of Aboriginal Indigenous people. I saw documents which came from the Bureau of Indian Affairs, and circulated in the community during the early 1970's, which included stacks and stacks of case files on murdered Aboriginal Indigenous people, as well as Indians, whose deaths were neither investigated nor prosecuted. One of the reasons that Indian murderers of Aboriginal Indigenous people were frequently not prosecuted was because the Bureau could use the threat of prosecution for murder to control the Indian: "you either do what we tell you or go to jail." The identity of the people who committed many of these crimes was known in the community, but there was nothing done by the Law and Order agencies under the control of the B.I.A. The Bureau claimed that they did not want to spend the time or money investigating these crimes, but they had several reasons for sitting on them, including the theory that the "only good Indian is a dead Indian," and the use of community violence as a cover for the United States Government's violence against certain individuals. Such condi-

tions were worse when we were kept isolated and could not speak English.

REVISING THE INDIAN LAW AND ORDER CODE

On September 11, 1990, the Red Lake Band of Chippewa Indians unanimously adopted the "recommended changes to the Tribal Law and Order Code."[40] These changes did not change the U.S. jurisdiction, including that enumerated in the Indian Major Crimes Act, but expanded the detailed regulation of the Department of Interior over their Indians' affairs tenfold. The Revised Code makes undefined reference to the "Red Lake Band of Chippewa Indians in its sovereign [*sic*] capacity," using this misleading appellation to claim, for example, "the ownership and legal title to all wild animals, and all of the wild rice and other aquatic vegetation growing in the waters of the Red Lake Indian Reservation."[41] What the I.R.A. Tribal Councilmen who endorsed this law and order code apparently did not understand is that the "Indian Sovereignty" about which they hear so much and are informed so little, is United States Government trusteeship, illegally applied to *Ahnishinahbæó^{t}jibway* property. Their Revised Code refers to "Indians" as non-persons,[42] in accordance with the precedent set in the U.S. Constitution.

Subsequent to the adoption of revisions to the Law and Order Code, the Minnesota Clergy and Laity Concerned distributed a position paper on the proposed Duro legislation (S.962,963; H.R. 972),[43] describing Indian Courts in which "justice has been meted along the same lines as patronage," and describing the I.R.A. Tribal Government as "with a few important exceptions, . . . function[ing] like corrupt, dynastic, political machines. And they are set up constitutionally to function as such." In 1993, during the course of "Treaty Rights" negotiations presumably arising out of the Chippewa Indian Treaty of July 29, 1937, a high-level employee of the Mille Lacs Band of this artificially-created Indian Tribe explained,[44] "The treaty rights belong to the tribal government, not the individual. That tribal person doesn't have any more rights than what the tribal government

authorizes them to have." It is not usually explained that the "Tribal Governments" are in fact instruments of the United States Department of the Interior, operating under the Laws of War with regard to those caught in the occupied-people identity of "Indian," and operating without jurisdiction with regard to Aboriginal Indigenous people and our property. The Chippewa Indians who are a part of the B.I.A.'s clique refer to the Red Lake C.F.R. Court as a part of the "Red Lake Nation." It is beyond me, how the relocated occupants of a P.O.W. camp can be a "Nation."

STATE OF MINNESOTA
IN SUPREME COURT

In re Rules of Procedure for the Recognition of Tribal Court Orders and Judgments.

No. CX-89-1863

STATEMENT OF BRIAN MELENDEZ[1]

When an order or judgment from a tribal court is relevant before a Minnesota state court, one of two facts is true: *either*

- the state court *must* recognize the tribal court's order or judgment,

or

- the state court *may* recognize the tribal court's order or judgment.

Regardless of whether the state court *must* recognize the tribal court's action, or simply *may* do so, the proposed rule clarifies the existing law and offers salutary guidance for state-court judges who may otherwise be unfamiliar with tribal law and the effect of tribal-court orders and judgments in the state courts.

A state court sometimes *must* recognize a tribal court's order or judgment under Federal law. Several Federal statutes require such recognition in certain cases. The proposed rule was drafted with those statutes in mind, is consistent with

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[1]Pursuant to the Order for Hearing to Consider Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments, ¶ 1 (Aug. 29, 2002). I do not wish to make an oral presentation at the hearing.

them, and will therefore afford guidance to a state-court judge who is unfamiliar with Indian law, with the tribal courts, or with the applicable statutes.

Whenever Federal law does not require that a state court recognize a tribal court's order or judgment, the state court *may* do so under principles of comity or equity. The proposed rule codifies the applicable principles.

There is no case where a state court *may not* recognize a tribal court's order or judgment. Of course, where a state court *may* recognize a tribal court's order or judgment, the court may likewise decline to do so, in the exercise of the state's sovereign authority and the court's equitable discretion. The proposed rule codifies the principles that a state court ought to consider when exercising, or declining the exercise of, that authority and discretion.

The proposed rule is thus useful in every case where an order or judgment from a tribal court is relevant before a Minnesota state court.

The principal objection that I have heard[2] to the Tribal Court–State Court Forum's petition is that the proposed rule is not entirely procedural and encroaches upon the legislative sphere. I disagree. The Legislature has not entered this sphere—although it is free to do so and, if it does, this rule will not impede its entry. The Legislature may enact legislation, as Congress has already done, that

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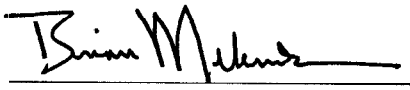
[2]I serve on the Advisory Committee on the General Rules of Practice, in which capacity I attended the two public hearings that the Advisory Committee held on the Tribal Court–State Court Forum's petition; I was absent from the third and final meeting where the Advisory Committee considered the petition. I also serve as a member of the Minnesota State Bar Association's Board of Governors, and the MSBA Court Rules & Administration Committee, which both have considered the petition.

requires recognition of a tribal court's order or judgment in certain cases—in which case the rule will be consonant with the legislation, and may be redundant at worst, but more likely will offer meaningful guidance that the state-court judge may otherwise lack. Or the Legislature may enact legislation to the effect that a state court may not recognize certain tribal-court orders or judgments, in which case the statute will trump the rule in the cases to which it applies, but the rule will remain vital and useful in all other cases.

I therefore recommend that this Court grant the petition and adopt the proposed rule.

October 15, 2002.

BRIAN MELENDEZ



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October 14, 2002

Frederick Grittner,
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"State of Minnesota in Supreme Court CX-89-1863, October 29, 2002 – Hearing to Consider Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments"

~ and ~

"Request to be Heard"

RE:
1) Saginaw Chippewa Indian Tribe of Michigan - "Tribal Court" - Mt. Pleasant, MI.
2) Prairie Island Indian Community - "Tribal Council" - Red Wing, MN.

Dear Mr. Grittner:

My name is Kevin E. Shephard. I am non-Native American. Over the past 4 years, I have been employed at two large Native American gaming properties as a senior resort executive director.

The "Tribal Council" is the sole governing body on the reservation that controls all government, Tribal Court judicial appointments, and business-related issues for the reservation and resort. In essence, the Council has supreme control over all issues and appointments on the reservation. With that in mind, I would like to respectfully advise the Minnesota Supreme Court of encounters I have personally witnessed.

Saginaw Chippewa Indian Tribe of Michigan d/b/a Soaring Eagle Casino & Resort:
While employed as VP of Facilities & Construction at this resort, I personally witnessed the armed takeover of tribal government from renegade tribal members. Armed tribal members physically removed the duly elected and seated Tribal Council. I watched loyal tribal police members help the seated Tribal Council members jump from the Council's chamber windows to avoid being attacked or possibly shot by the renegade (self-appointed)

Tribal Council who were attempting to break down the door. This occurred in the *summer* of 1999. The next morning both Councils went to Tribal Court to remedy this coup d'état The two Tribal judges stated that they did not recognize the self-appointed renegade Council as the elected lawful Council and that they should withdraw from Council Chambers. The self-appointed Council did not withdraw and in fact fired both Tribal Court judges who were immediately escorted off the reservation. "Don't Like the Verdict – Fire the Judge" was the headlines in the local newspaper.

What is the logic of appointing Tribal Court judges when their rulings are summarily ignored or blocked by those who appointed them?

Prairie Island Indian Community d/b/a Treasure Island Casino & Resort– Red Wing, MN
While employed as Director of Support Services & Construction (an executive committee member) I fell victim to fabricated accusations that ultimately cost me my job. I followed the grievance procedures outlined in the resort's Human Resource Department manual. The HR dept. is headed up by a tribal member who had relatives on the Tribal Council. In order to activate the Tribal Court in wrongful termination cases one must follow the grievance procedures. The procedures call for a series of written testimonials that will be answered in writing to the terminated employee. This includes a review by Tribal Council and their response before Tribal Court will accept the case. I submitted numerous documents to the HR dept. and to Tribal Council and after repeated attempts to contact the Council, I never heard back from them. This eliminated my chance to be heard in front of Tribal Court. The Council's power to control what will or will not be heard in Tribal Court leaves the door open to all varieties of injustice.

Problems and injustices on the reservation are numerous and frequent but for the sake of this inquiry please know that modifying the Tribal Court is only part of the end solution. It is not the *cause* of this problem. The root problem with Tribal Court lies in part with Tribal Council's heavy-handed jurisdiction over the court, political favoritism and nepotism.

Granting "Full Faith and Credit" to the Tribal Court actually endorses self-serving decisions made by Tribal Council and validates damaging practices that are based on hostile takeover aspirations, political favoritism and denial of due process. I urge the Minnesota Supreme Court **not** to pass this Petition.

I welcome the opportunity to address the Minnesota Supreme Court on this issue should my participation be requested. Thank you for your time.

Kevin E. Shephard, CPE
Certified Plant Engineer

ANISHINABE LEGAL SERVICES

Serving Leech Lake, Red Lake & White Earth Reservations

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October 14, 2002

OFFICE APPELLATE COURTS

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Frederick Grittner, Clerk of the Appellate Courts
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

RE: Rules of Procedure for the Recognition of Tribal Court Orders and Judgements

Dear Clerk Frederick Grittner:

Anishinabe Legal Services (ALS) wishes to submit an opinion on the proposed rules of procedure for the recognition of Tribal Court orders and judgements ("full faith and credit rule"), in accordance with Order CX-89-1863. This opinion is based on ALS history of serving indigent clients on the Leech Lake, White Earth, and Red Lake reservations. ALS supports the proposed as originally drafted, as later explained in this document.

Anishinabe Legal Services was established in 1967 as one of the original "War on Poverty" Legal Services programs. We provide legal services to low-income people living on or near the White Earth, Red Lake and Leech Lake Reservations. ALS attorneys and lay advocates practice in the Tribal courts at Red lake, White Earth and Leech Lake on a daily basis in a wide variety of cases, including divorce, adoption, guardianship, child support, child protection, housing, employment, juvenile delinquency, criminal, torts, contract disputes, debt collection, traffic and conservation matters. In 2001, our office directly handled approximately 102 Tribal court cases in addition to providing pro se assistance in another 195 Tribal court matters. We also serve as a resource for other legal practitioners and agencies by providing training programs and guidance in such diverse

areas as the Indian Child Welfare Act, Public Law 280, the White Earth Land Settlement Act, and methods of Tribal court practice.

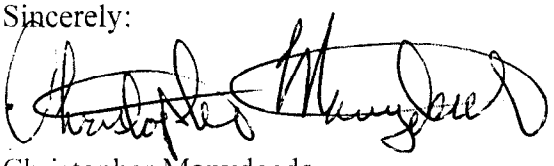
ALS gives the highest priority to legal issues which arise within the intersection of poverty and Indian law and to the development of service delivery methods which promote equal justice and respect for Indian people. Pursuant to those priorities, ALS supports the expansive jurisdiction of tribal courts as an exercise of community empowerment. Most of our clients have had negative, alienating contacts with state courts. Our experience over the last 35 years has shown that tribal courts offer our clients the best chance for local, accessible, innovative and timely justice in a culturally relevant, informal and non-intimidating court environment. As the scope of Tribal courts expands, our clients have been increasingly able to get a wide range of legal conflicts addressed through the tribal court system. If it were not for these unique legal forums, these legal issues would too often go unresolved, allowing the spread of conflict and mistrust within tribal communities.

ALS remains committed to the development and enhancement of tribal courts. ALS believes that the Minnesota courts should grant full faith and credit to tribal court orders. Granting full faith and credit to these orders will provide the Tribal court orders with added strength and credibility. Both the Federal Legislature and the State of Minnesota have taken some initial steps in ensuring that tribal court orders are given full recognition and enforcement. As cited by the Minnesota Supreme Court Advisory Committee, the U.S. Congress has declared that state courts must grant full faith and credit to tribal court orders for protection, child support orders and child custody orders. We believe that such actions by the U.S. Congress militate for -- not against -- acceptance of Tribal court orders. The U.S. Congress has demonstrated confidence in the ability of Tribal courts to adequately dispense justice in these areas. Indeed, these types of court orders are some of the most important areas of law used to protect and support families both on and off the Reservation.

Likewise, the State of Minnesota has recognized that Tribal courts within the state are the appropriate forums for adjudicating certain disputes within Indian Country. Recent cases, such as *State v. Stone* and *State v. Johnson,* have found that the state courts lacked jurisdiction over a broad array of issues arising on Reservations and among Tribal enrollees, notwithstanding the fact that at the time these decisions were made, most of the Tribal courts within the state were not even equipped to accept jurisdiction over these matters. Even when the Tribal court does not have exclusive jurisdiction over an issue, chances are that the issue will involve one of the many areas of law over which state and Tribal courts share concurrent jurisdiction. In many cases, the state courts defer to Tribal court jurisdiction. It is then disingenuous to assert that in a particular case a state court will give deference to Tribal court jurisdiction, but then fail to grant full faith and credit to Tribal court orders.

ALS supports the Proposed Rule as originally drafted. This rule would give added force to the hundreds of orders issued by Tribal courts on a daily basis while providing a process for individuals who feel aggrieved by a particular Tribal court or its procedures. The Committee should not rely on "anecdotal" evidence provided by a few individuals to disregard the importance of providing a procedure for the many legitimate court orders which are issued by Tribal courts every day. Indeed, failure to adopt state procedures for recognizing and giving full faith and credit to Tribal court orders will only serve to undermine the continuing efforts being made by many Tribal, Federal and state governments to strengthen Tribal courts and allow them to meet the ever-changing needs of their people. Instead of ignoring this growing need and weakening the reach of Tribal courts, Minnesota should follow in the steps of many of its sister states and give full faith and credit to Tribal court orders.

Sincerely:



Christopher Manydeeds
Executive Director,
on behalf of the Anishinabe Legal Services staff.

OCT 11.02

State of Minnesota in Supreme court,
CX-89-1863, October 29th 2002
Hearing to conside Petition for
Adoption of a Rule of Procedure for
the Recognition of tribal court orders and
Judgements

OFFICE APPELLATE COURTS

OCT 15 2002

FILED

The Mdewakanton Turmoil

They got cold feet!

In the past few months, the Federal Government has initiated a Investigation into the enrollment process of the Shakopee Mdewakanton Dakota Community.

I feel it is a shame that it has come down to that sort of action. I belong to a group here at Lower Sioux Community called the Minnesota Mdewakanton Kinship group, and our main focus is to advocate for Mdewakanton Dakota's who are being denied their basic civil rights for membership. The views that I express in this Article are my own personal views.

First of all, this land that was put in trust for the Lower Sioux, Shakopee and Prairie Island Mdewakanton's was meant to be utilized by any Mdewakanton that needed a place that he or she could call home.

The word that pops up quite often is the word "Sovereignty." I believe our Minnesota Dakota Tribal Councils are missing the boat on the true meaning of that word. Sovereignty that was issued by the Federal Government allowed Indian tribes to regulate and handle their own tribal affairs as they see fit to benefit their tribal members. Sovereignty was never meant to work against their own people. A good example of Sovereignty working against their people, is the Shakopee Enrollment process. The first step in their process, is that they require you to relinquish your enrollment. Now, who in their right mind would give up probably the only thing they have as a Native American? After you relinquish and the enrollment committee determines you are eligible to be voted on, then your name is put on a ballot before a group of 134 adult members who have no intention of allowing you to be voted in. The relinquish request is totally unconstitutional, and absurd, and as we all know, the voting system is nothing but a popularity vote.

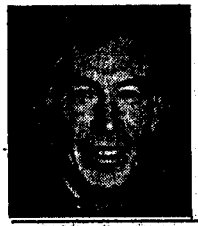
The Shakopee business counsel has initiated enrollment ordinances that have been declared illegal by the Bureau of Indian Affairs, but the Bureau has not enforced their declaration. If the Bureau continues to allow the tribes to act in this illegal manner, then I guess tribes will continue to deny the people their Civil Rights. The Minnesota Indian Tribal Governments have got to understand that these lands that were purchased for specific Indian Tribes have got to remain open to Native Americans who can prove they are a member of that particular tribe.

I believe in the Ancestral way of proving your right as a member of your tribe, and that is to go back to tribal rolls that were established in the 1800's... I really don't know the reasoning behind the one quarter blood quantum, I guess it was just another Wasicu way of weeding out the Indians.

I sincerely hope the Mdewakanton's can start thinking of all of their people and, not just a select few. The trust Responsibility of the Bureau of Indian Affairs has been severely lacking, and the law firms that represent the tribes, are nothing more than a conspiracy. The lawyers that represent us, sit as legal counsel on one reservation, and, sit as a judge on another reservation. They really don't care if the Mdewakanton's come together or not. It's all about MONEY.

Lower Sioux Member

Robert Pendleton
Scott Adolphson



Bill Lawrence
Publisher
Native American Press/Ojibwe News

Shakopee Mdewakanton enrollment problems, IIM problems endemic to BIA

COMMENTARY

By Bill Lawrence

We have printed Barbara Buttes letter addressing problems of Shakopee Mdewakanton enrollment in full because Dr. Buttes deals thoughtfully and in carefully documented detail with an issue that deeply affects the lives of Indian people. As this newspaper has documented by publishing case after case over the years, a lot of Indian people are being cheated out of their enrollments, denied recognition of their heritage, their identity, and the benefits of tribal membership.

Dr. Buttes addresses enrollment problems at Shakopee, but there are equally disturbing enrollment problems at Prairie Island and Lower Sioux. The similarity in enrollment problems across these communities is not accidental: the Dakota tribal governments in Minnesota are all using the same law firms to maintain their authority. Certain unscrupulous, self-interested attorneys have set up a cartel controlling the "Indian law" hegemonic in the Dakota communities, where the two or three same law firms that serve as tribal attorneys for some tribal governments and gambling enterprises *also* provide "tribal courts" for other reservations. If any state judges were participating in this kind of scheme in Minnesota, they would be disbarred and censured.

The problem of enrollment has been plaguing us ever since the BIA took control of Indian people and forced, exiled and concentrated us on reservations. Generation after generation, the problems with enrollments have gotten worse.

The history of the Mdewakanton Sioux, who were all but annihilated due to historical events after 1862, is just one of many in the sordid chronicles of US-Indian relations. Despite the fact that there is a pretty clear definition detailing the criteria of who is entitled to be a member at Shakopee, the BIA has chosen to ignore the very "tribal constitution" that the BIA wrote for the Shakopee Mdewakanton, along with standards of "blood quantum" (which were also created by the BIA).

The BIA's failure to deal with enrollment inequities, like the overwhelming mess of the IIM accounts, is symptomatic of their incompetence and ineptitude. It's not that there aren't qualified people working at the BIA, but somehow there systemic with the organization and nothing ever seems to get better, although in many cases it seems to get worse.

Enrollment issues are just as important to Indian people as the IIM problems still being unraveled in federal courts.

Enrollment problems are currently even more intractable than the IIM mess, because through a unique series of legal decisions, maneuvers, and blunders, tribal enrollment questions are generally heard in tribal courts, where the same group creating the problems is in charge of the courts, and there has been absolutely no accountability because both the BIA and the tribal governments keep hiding behind "tribal sovereignty."

It's time that Congress amended the Indian Civil Rights Act, ensuring that impartial federal courts have jurisdiction over these thorny issues. We must get beyond the malevolent charade that the tribal courts are anything more than kangaroo courts supporting the tribal establishment, perpetrated by the tribal governments, their enabling lawyers, and those who benefit from the present corrupt system.

If the BIA had dealt with the problems forthwith, as they arose (or refrained from creating them in the first place), Indian people wouldn't have to spin our wheels contending with the morass of problems brought to us by the BIA. These problems are the same across the country, reservation after reservation: basic problems of enrollment, money, crime, injustice, and despair.

Indian people, and in fact American people, have lost confidence in the BIA and in the "tribal government" system which the BIA has established and supported under "Indian self government."

Without access to federal courts to deal with issues like tribal enrollment, they will *never* be resolved. Until we have separation of powers, and we can take these problems to an independent tribunal, they will always be there, and will continue to persist and to grow.

The problems confronting Indian people are not just "Indian problems." As more and more non-Indian Americans are realizing, they have become national problems: tribal recognition, perpetuation of extinct tribes made up of a few people who have minute or nonexistent blood quantums, and the broad-ranging social costs which are engendered by the system.

Presently, there are a number of small communities of government-made Indians with lucrative casinos who are able to buy substantial influence Washington and in state governments. The situation at Shakopee is just one case in point.

Dr. Buttes letter includes extensive research, and if a private person can such extensive research and writing, there is no reason that the government could not carefully re-examine the system it's created.

Note – The Law firms of Jacobson, Buffalo, Schoessler, and Bluedog, Olson, Small. Sit as counsel on one Reservation and Judge on the other and vice-versa for Lower Sioux, Prairie Island, Shakopee, To keep Legitimate mdewakanton People out of there own Tribe because the tribal govt pays these firms to deny our people there Rights so they will die off! The Law firm's Lawyers Should be disbarred + Jailed under the RICO Act

VOICE OF THE PEOPLE

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Shakopee Mdewakanton Sioux community enrollment problems

Editor's note: Ever since the Minnesota Sioux War of 1862, the Mdewakanton Sioux people of Minnesota have had identity problems. Since 1969, the Mdewakanton community has also had enrollment problems. *Press/ON* recently received a copy of a letter sent to former Assistant Secretary of the Interior for Indian Affairs Kevin Gover from Barbara Feezer Buttes, a Mdewakanton descendant, dated March 6, 2000. The letter addressed enrollment and identity problems of the Minnesota Mdewakanton Sioux of Prior Lake. According to Ms. Buttes, neither Gover nor anyone else from the Department of the Interior or the Bureau of Indian Affairs ever responded to her letter. Ms. Buttes told *Press/ON* that shortly after Gover received the letter, he resigned from the Department and went to work for the law firm of Leonard, Street and Deinert, the firm that represents the current tribal government of the Mdewakanton Shakopee Sioux Community.

The letter has also been sent to U.S. House Committee on Resources and the U.S. Justice Department.

Because of its meticulous research going back to the organic documents founding the Minnesota Dakota communities, in-depth documentation and analysis, and historical importance to the Minnesota Sioux/Dakota community and the issues it covers, *Press/ON* decided to reprint the letter in its entirety.

Mr. Kevin Gover, Assistant Secretary – Indian Affairs
United States Department of the Interior, Office of the Secretary
1849 C Street NW, MS 4140-MIB
Washington, DC 20240

Subject: The Shakopee Mdewakanton Sioux Community Enrollment Problems and the Minnesota Mdewakanton Sioux Identity

Dear Mr. Gover:

I write to you as a professional anthropologist who has for decades observed and studied the ongoing, corrupt and illegal situation in Prior Lake, Minnesota. For your information, I enclosed a copy of the American Anthropological Association *Code of Ethics*, to which I am professionally bound as a researcher. As you know, the compelling political situation involving the Minnesota Mdewakanton Sioux in Prior Lake likely represents the most momentous set of issues facing modern American Indians. In my April 26, 1999, letter to you, I outlined some of the fundamental problems at Prior Lake and I stated my overall bias with regard to the issues.

In the legal, federal documents, an already complex history of Mdewakanton Sioux political identity grew more complicated with the events that occurred after the 1862 Minnesota Sioux War. The federal government helped Minnesotans exile most Mdewakanton people from the State in 1863. The exiles eventually became part of a collective political entity known as the Santee Sioux of Nebraska. The Mdewakanton people who remained in Minnesota after the 1862 War were redefined during the 1880s by a series of Congres-

SHAKOPEE to page 6

Since the beginning, an obvious and thorough lack of legitimacy has plagued the Shakopee Mdewakanton Sioux Community (SMSC)

SHAKOPEE *from page 1*

sional Acts. The latter group of Mdewakanton people became the Minnesota Mdewakanton Sioux. In 1886, the federal government conducted a census of the Mdewakanton Sioux and then, a separate census of the Santee Sioux. The Minnesota Mdewakanton Sioux and the Santee Sioux Tribe of Nebraska are two distinctly separate political entities. They have two distinctly separate histories. Federal agents who use "Santee" as a synonym for "Mdewakanton" have added further confusion to the current situation at Prior Lake.

Here, I closely examine two of the principle reasons why problems have escalated at Prior Lake. First, federal agents ignored their fiduciary responsibilities to protect Minnesota Mdewakanton Sioux land and rights, when they sponsored unqualified individuals, who illegally established an illegitimate government-to-government relationship with the United States on Minnesota Mdewakanton Sioux land. Secondly, by favoring vague and false assumptions in making decisions crucial to the integrity of their trust responsibilities, federal agents have ignored the legal, political history of the Minnesota Mdewakanton Sioux vis-à-vis the United States government.

Mr. Gover, you now must make a critical determination with your final decision on Docket No. D95-182. The information here unquestionably shows that the Mdewakanton Sioux and the Santee Sioux are distinct and separate political entities and that the Department has perpetuated unnecessary confusion about Minnesota Mdewakanton Sioux identity. Your final decision must be based upon an assessment of accurate records regarding the relationship between the United States and the Minnesota Mdewakanton Sioux. Federal agents must withdraw recognition from the illegitimate sovereign that now claims Mdewakanton land, rights, and identity at Prior Lake.

Since the beginning, an obvious and thorough lack of legitimacy has plagued the Shakopee Mdewakanton Sioux Community (SMSC). That illegitimacy has robbed legitimate Minnesota Mdewakanton Sioux people of their rights, their land, and even their name. According to Bureau and Department records, the US Title lands that the SMSC initially used to develop their current operations were, at the time, restricted to the use of legally identifiable Minnesota Mdewakanton Sioux. In a July 24, 1950, Memorandum for the Record, Minneapolis Area Land Officer, Rex H. Barnes wrote,

> In view of the provisions of the Acts of Congress cited above [July 29, 1888; March 2, 1889; and August 19, 1890], [Prior Lake] lands may be assigned only to members of the Mdewakanton Band of Sioux Indians residing in Minnesota, and such assignee must have been a resident of Minnesota on May 20, 1886, or be a legal descentant [sic] of such resident Indian.[1]

The Congressionally mandated restrictions on the Prior Lake Mdewakanton lands (1886 lands) obviously placed the trust responsibility for that land with the Bureau and the Department.

The Bureau and the Department violated that trust responsibility in 1964, when they issued a Prior Lake land assignment to the late Norman M. Crooks.[2] To this day, no reliable, legal verification exists, which connects Norman M. Crooks to the Minnesota Mdewakanton before 1969. He could produce no credible record of his identity and, unlike Mdewakanton people in his age group; he had no legal birth record. Crooks was never proven eligible to live on 1886 lands. The only document Crooks presented was a dubious Winnebago Agency 1940 Census Certificate. That certificate makes no mention of "Norman Crooks" having Mdewakanton Sioux blood. In fact, that census certificate 1) identifies Crooks's mother as Ellen F. Crooks and 2) shows no blood degree for her; 3) indicates father "not given"; and suspiciously 4) shows "Norman Crooks" as 4/4 degree Santee Sioux.[3] The obvious inconsistency on this record remains in the foreground of a discussion on policy and procedure for establishing blood quantum for the purposes of determining tribal membership because *no reliable documentation exists that conclusively identifies Norman (Melvin) Crooks as possessing any degree of Indian blood.* Nevertheless, March 14, 1969, Minneapolis Field Solicitor Daniel S. Boos wrote a letter to the Area Director indicating that Crooks could use the provisions in the 1934 Indian Reorganization Act to organize the SMSC on 1886 lands.[4]

August 18, 1969, Superintendent Paul A. Krause submitted to the Minneapolis Area Director a proposed constitution with a census roll of people living on the 1886 lands.[5] Of the people listed, only one childless elder had documents tracing her lineal descendancy from a Mdewakanton ancestor living in Minnesota on May 20, 1886. Both of her parents, as well as her paternal grandfather were documented as residing in Minnesota on May 20, 1886. Living on land originally assigned to her grandfather and reassigned to her father in 1904, she represented the only family that had continuously occupied an original 1886 land assignment. Neither the Bureau nor the Department requested proof of hers or anyone else's Mdewakanton descendancy. Federal agents flagrantly ignored their congressionally mandated responsibilities to verify that the people met the necessary qualifications to live on 1886 lands. In doing so, the Bureau and the Department assisted a group of impostors in divesting legitimate Minnesota Mdewakanton people of their land and rights.

Superintendent Krause recommended that the "constitution proposal be approved as it is presented and the Secretary call a special election of the Prior Lake residents for the purpose of adopting the constitution."[3] He mailed constitutional election notices only to the people on the census roll, which they had generated for themselves. Neither Krause nor any other federal agent conducted an official census for the SMSC constitutional election held on November 4, 1969. The Assistant Secretary of the Interior approved it on November 28, 1969. Since that time, the federal government has carried on a bogus government-to-government relationship with the Shakopee Mdewakanton Sioux Community.

The SMSC has used the name and federally recognized status of the Minnesota Mdewakanton to establish their own government on 1886 lands. A passing glance at the available documentation of the 1969 SMSC constitutional organization clearly shows that official policy and procedure were repeatedly ignored during the process. Today, the documents unquestionably reveal that, of the individuals who voted to adopt the 1969 SMSC constitution, only two met the SMSC constitutional requirements for membership.[6] At least two (2) of the people who voted to adopt that constitution were then enrolled members of another tribe.[7] Another five (5) of the individuals who voted in that constitutional election are to this day unable to establish any relationship with the Minnesota Mdewakanton before 1969.[8] Almost all of the 1969 voters are now deceased. Their legacy of fraud continues through their children and grandchildren, who also cannot meet the SMSC constitutional membership requirements. Unable to document their own legitimacy with verifiable proof of their blood quanta and lineal descendancies, they have circumvented their meaningless constitution by enrolling each other with "recognition tests" and illegal adoption ordinances.[9] Since these people totally control the "government" and SMSC voting membership, they now decide who can participate in SMSC affairs.

I know that the Bureau and the Department both possess definite knowledge of the parody of membership at Prior Lake because I have often brought it to the attention of the Secretary, the Assistant Secretary, the Area Director, and numerous other federal officials. In most instances, those officials have indicated they know about the SMSC membership problem. They have also indicated that they are constrained from doing anything to correct the situation because the Department has made a commitment to staying out of "intratribal affairs," which includes a tribe making its own membership determinations. Such a response to criminal violations of federal law is nonsense—the Bureau and the Department, ultimately the Secretary, November 28, 1969, made the initial determination of this "tribe's" membership, when he approved the SMSC constitution and census roll.

Properly calculating the blood quantum with records of lineal descendancy for each individual who participates in tribal affairs is essential to the unique government-to-government relationship between federally recognized Indian tribes or communities and the federal government. In each situation, those blood quanta and records of lineal descendancy must reconcile with the tribe's own constitution. In 1969, for the Minnesota Mdewakanton, blood degree and lineal descendancy additionally were paramount in determining eligibility for land as-

The Bureau and the Department violated that trust responsibility in 1964, when they issued a Prior Lake land assignment to the late Norman M. Crooks

signments. The Department and the Bureau clearly hold responsibility for the membership and land problems that the bogus SMSC "tribal" government has created. Soon after its organization, some federal agencies properly began to question the SMSC's legitimacy.

A memorandum dated August 17, 1971, from William A. Gurshuny, Acting Associate Solicitor, Indian Affairs, Washington, DC, addressed to the Field Solicitor, Twin Cities, Minnesota, enumerates important reasons for positively identifying as legitimate Mdewakanton the individuals, who participate in SMSC tribal affairs. Apparently, the Solicitor's Office had received "various memoranda...in June and July [1971] concerning the membership and land problems of the Shakopee Mdewakanton Sioux Community of Minnesota."[10] The Associate Solicitor writes,

...the only lands available for assignment at Shakopee [Prior Lake] now are lands purchased under the authority of the Act of June 29, 1888...the Act of March 2, 1889...and the Act of August 28, 1890...all of which appropriated funds for..."Indians in Minnesota heretofore belonging to the Mdewakanton band of Sioux Indians, who have resided in said State since the twentieth day of May, eighteen hundred and eighty-six..."[11]

Gurshuny clearly states, "Thus, only descendants of Mdewakantons [sic] who resided in Minnesota on May 20, 1886, are eligible for land assignments at Shakopee." Furthermore, he writes,

The question [of lineal descendancy] is additionally important because...[u]nder Article II, Section 1(C) of the Shakopee Constitution "all descendants of at least one-fourth * * * degree Mdewakanton Sioux Indian blood who can trace their * * * blood to the Mdewakanton Sioux Indians who resided in Minnesota on May 20, 1886" are eligible for membership provided they are not enrolled in another tribe.[12]

The SMSC constitution required members to comply with the regulations governing 1886 lands. Associate Solicitor Gershuny minces no words in reiterating the importance of confirming the lineal descendancy for any one occupying Mdewakanton land:

[If] a particular lessee cannot verify his ancestry, he would have no claim to occupy the land. The purported conveyance of an interest to such a person [through a lease] cannot be the basis for thwarting the intent of Congress as contained in the Acts of 1888, 1889, and 1890...Any person in possession of land under an assignment or residential lease who cannot verify his ancestry has no right to continued possession of the property.[13]

Gurshuny clearly states, "Thus, only descendants of Mdewakantons [sic] who resided in Minnesota on May 20, 1886, are eligible for land assignments at Shakopee

Gershuny's memorandum is stamped received by the Field Solicitor, Minneapolis, August 19, 1971. In response, Field Solicitor Elmer T. Nitzschke advised the Area Director Raymond P. Lightfoot to "proceed as rapidly as possible with the verification of eligibility of all persons [living on 1886 lands]."[14] For over a decade, despite repeated reminders and directives from Washington, DC, the Minneapolis Area Office never revoked land assignments and continued to sponsor the masquerade at Prior Lake. Although it may appear that the Washington United States. In a letter dated February 13, 1986, the Director of the Office of Indian Services in Washington, DC, Hazel E. Elbert referred to information that she apparently found in the *Handbook of American Indians* to answer then SMSC Chair Susan Totenhagen's questions concerning ongoing SMSC enrollment problems.[15] Ms. Elbert wrote,

According to the "Handbook of American Indians," the Santee Indians were the eastern division of the Dakota, comprising the Mdewakanton and Wahpekute, sometimes also the Sisseton and Wahpeton.[16]

In using the scholarly account of the Minnesota Sioux that she found in the *Handbook of American Indians*, Ms. Elbert demonstrated her willingness to ignore passages in the volume that seem obviously inconsistent with her moment's agenda. For example, the *Handbook of American Indians* also mentions the use of the word officials tried to exercise their fiduciary responsibilities to protect Mdewakanton land and rights, their failure to force the Area Office into compliance with federal law enabled the SMSC to continue its masquerade. With full knowledge that the SMSC operated on 1886 lands without the mandatory proof of eligibility to do so, federal agents did nothing. They had a fiduciary responsibility to protect those trust assets for Minnesota Mdewakanton Sioux.

Federal agents have contributed confusing, conflicting accounts of the membership and land problems at Prior Lake in order to shift the focus off of their failure to carry out their fiduciary responsibilities. The federal government has a political history with the Mdewakanton Dakota Sioux, which dates back to the early 1800s. Yet, federal officials have ignored that history and have instead relied upon incredulous historical narratives amassed by the SMSC since 1969 or upon scholarly accounts that are little more than convenient, often contrived, thumbnail sketches of the long-standing political relationship between the Mdewakanton and the Santee as a reference to the *Wahpekutewan*:

McGee (15th Rep. B. A. E., 160, 1897) includes only the Wahpekute, which has been the usual application of the term [Santee] since 1862, when the two tribes were gathered on the Santee res. in Knox co. [sic], Neb.[17]

After studying all the details of this passage, a reader could only speculate about an identity for "the two tribes...gathered" on the Santee reservation. The obvious fact remains clear: The *Handbook* offered Ms. Elbert a conflicting account for applying the term "Santee" to a political division of the Sioux nation, which she ignored.

In an apparent effort to deflect attention from their irresponsible handling of Mdewakanton trust assets, Ms. Elbert and other federal officials have and continue to promote the erroneous and devastating idea that "Santee" is synonymous with "Mdewakanton." The illegitimate SMSC has also embraced that incorrect notion, which is understandable because it serves their purposes. Ms. Elbert introduces several more interesting problems in her February 13, 1986, letter. Following her sentence that quotes the *Handbook of American Indians*, she writes,

We were advised by the Minneapolis Area staff that Rose Prescott was at one time enrolled with the Santee Tribe of Nebraska. In effect, she could be considered as a Mdewakanton-Wahpekute.[18]

In addition to being patently wrong about discrete tribal entities, Ms. Elbert acknowledges that the Area Office knew that Ms. Prescott belonged to the Santee Tribe of Nebraska. The record clearly shows that Rose (Ross) Prescott retained her membership in the Santee Sioux Tribe of Nebraska in 1980, while she also served as the Enrollment Committee Chair and the Election Judge for the SMSC.[19]

The fact that Rose Ross Prescott does not, did not, and can not meet the definition of a Minnesota Mdewakanton Sioux Indian is well documented by the federal records. In a letter dated May 12, 1982, the Minneapolis Area Acting Director addresses to the Minneapolis Sioux Field Representative information concerning Ms. Prescott's history of ineligibility:

(3)

For over a decade, despite repeated reminders and directives from Washington, DC, the Minneapolis Area Office never revoked land assignments and continued to sponsor the masquerade at Prior Lake

> Our records indicate that Ms. Prescott has never been able to establish that she meets the tribes [sic] "written criteria for membership". That is, she has never been able to find documentary proof that her ancestor's [sic] were residing in Minnesota in 1886 as required by Article II, Section I (c) of the Shakopee Mdewakanton Sioux Community Constitution and Bylaws. She first made an attempt to establish this fact in connection with trying to establish eligibility for a land assignment at Shakopee before the so-called 1886 lands were taken into trust by the United States for the Community.[20]

If, as the Area Director states in his 1982 letter, Ms. Prescott so clearly can not meet the SMSC membership requirements, how could she qualify in 1980 to serve as the SMSC Enrollment Committee Chair or as the SMSC Election Judge? Because she was ineligible to be an enrolled member of the SMSC and, anyway, was enrolled in another tribe, she had no right to participate in the SMSC governing affairs, even if the SMSC *were* a legitimate government.

The Department and the Bureau can not view Ms. Prescott's decisions on behalf of the SMSC as valid. During her "term as Election Judge," the Secretary approved an amendment to the SMSC constitution. The fact that Ms. Prescott oversaw a portion of this process taints the entire outcome. The US Department of Justice should and must carefully consider the Bureau's and the Interior Department's roles in creating the bogus SMSC "tribal government" on Minnesota Mdewakanton land. Ms. Prescott can show no Mdewakanton blood lineage and neither can her siblings Edith Ross Crooks and Lanny Axel Ross, who were both listed on the 1969 SMSC census roll and voter list. The Ross family can not trace their descendancy from a Mdewakanton Sioux who lived in Minnesota on May 20, 1886, yet they have held 1886 land assignments and have fully participated in SMSC affairs since 1969—even holding elected office.[21]

The illegitimacy of the SMSC is often highlighted in federal correspondence concerning the Ross family's involvement in SMSC affairs. In her February 16, 1986 letter to Ms. Totenhagen about the Rose Prescott membership problem, Ms. Elbert wrote,

> You [Ms. Totenhagen] did not indicate how she acquired membership in your community. If she is named on the 1969 census roll, there is no requirement in your constitution that she possess 1886-1889 Sioux blood. If she was adopted into membership by the general council and her adoption was approved by the Secretary, she is a lawful community member.[22]

Ms. Elbert correctly questioned Ms. Prescott's entitlement to SMSC membership, but she incorrectly stated the rules that governed the situation. As a matter of federal law, anyone living on 1886 lands in 1969 must be able to prove lineal descendancy from a Mdewakanton ancestor living in Minnesota on May 20, 1886. As a matter of fact, individuals listed on the 1969 census roll were unqualified to live on 1886 lands and all but two of those individuals could not meet the membership requirements as established by the very constitution they had voted to adopt. The SMSC constitution requires members to prove ¼ Mdewakanton Sioux blood that can be traced to an ancestor living in Minnesota on May 20, 1886. Neither federal statutes restricting the use of 1886 lands nor the SMSC constitution mention the 1889 census of the Minnesota Mdewakanton Sioux, and even if the "general council" had voted to adopt Rose Prescott, that vote should and must be scrutinized in light of the bogus SMSC government.

April 1, 1987, Ms. Elbert, who was by then Deputy to the Assistant Secretary-Indian Affairs, Tribal Services, wrote to the Minneapolis Area Director regarding "Shakopee Mdewakanton enrollment." She indicated that she was confused about the identity of the Mdewakanton Sioux. In her regrettable disdain for the legal, political history of the Mdewakanton, Ms. Elbert again illustrated her preference for the historical thumbnail sketches when she wrote,

> The constitution refers to Mdewakanton Sioux and does not specifically define what the tribe had in mind when it used that terminology. Although one faction has a strict definition which would exclude all but Minnesota Mdewakanton Sioux Indians, the historical definition is obviously different.[23]

If Ms. Elbert had consulted the federal legal documents concerning the Minnesota Mdewakanton Sioux, she could have quickly discerned the meaning of "that terminology." The political relationship between the United States and the Mdewakanton Sioux began when the two sovereign nations signed a legal treaty. Today, after a century of federal agents, such as Ms. Elbert commingling shoddy scholarly definitions with federal policy and procedures and congressional mandates, one can understandably seem confused about the political identity of the Minnesota Mdewakanton Sioux.

Ms. Elbert continued in her confusion about the identity of the Minnesota Mdewakanton with another reference from the *Handbook of American Indians*:

> According to the Handbook of American Indians, the Mdewakantons [sic] were one of the subtribes composing the Santee division of the Dakota, the other three being the Sisseton, Wahpeton and Wahpekute.[24]

This paraphrase from the *Handbook* only slightly differs from the one Ms. Elbert offered Ms. Totenhagen the year before.

In her confusion, the "scholarly" definition of the Mdewakanton Sioux likely seemed a convenient substitute for having to examine the legal documents that could have truthfully clarified terms for Ms. Elbert. She continued with another paraphrase of her *Handbook*,

> During the "outbreak of 1862" some of the Mdewakanton groups took an active part and after their defeat by the United States, they and the Winnebago were removed to the Crow Creek Reservation and then the Mdewakanton and Wahpekute were transferred to the Santee Reservation in Nebraska.[25]

Ms. Elbert had access to a far more precise explanation of Mdewakanton warfare and the consequences of that warfare than she could expect to gain from the *Handbook of American Indians*. Federal legal documents clearly define the political history of the Dakota-speaking Sioux tribes both before and after the Minnesota Sioux war in 1862. The

Dakota Sioux consisted of four distinct tribes: 1) the *Mdewakantonwan*, 2) the *Wahpetonwan*, 3) the *Sisitonwan*, and 4) the *Wahpekutewan* and these tribes individually signed several treaties with the United States between 1815 and 1858. Each treaty recognized the individual and distinct political sovereignty of the four (4) Dakota Sioux tribes who entered into government-to-government relationships with the United States. In no instance did the Santee represent the political interests of the Mdewakanton, nor did the Mdewakanton purport to represent Santee interests.

Scholars have routinely ignored the obvious historical and political distinction between the Mdewakanton Sioux and the Santee Sioux. The 1862 Minnesota Sioux War marks a pivotal change in Sioux history. Its aftermath drastically altered political and social relationships among Sioux people. The failure of scholars to accurately interpret those changes has had particularly devastating effect on the Minnesota Mdewakanton Sioux. The documented history and identity of Minnesota Mdewakanton Sioux after 1862 is fairly obscure in scholarly literature. Scholars have most often described the Dakota-speaking Sioux tribes collectively as either the Eastern Sioux or the Santee Sioux. Until now, scholars have placed little significance on particular tribal identities or their interrelationships. In the 1800s, the United States government considered them individual, sovereign nations and signed treaties with each tribe.

The *Handbook of American Indians* (1975, c.1907), upon which Ms. Elbert frequently relies, characterizes the Mdewakanton as uninteresting:

> The whites came into more intimate relation with this tribe [the Mdewakanton] than with any other of the Dakota group, but the history—which is not of general interest except in so far as it relates to the outbreak of 1862, in which some of them took an active part—is chiefly that of the different bands and not of the tribe as a whole.[26]

By authoritatively suggesting that Mdewakanton history is inconsequential, this passage serves to justify the author's frequent use of phrases such as, "appears to be, is possible that, is probable that, and is apparently" in his erstwhile flawed discussion on the history and identity of the Mdewakanton Sioux.[27] Ms. Elbert chose to rely on this sort of "scholarship" to make critical decisions concerning Minnesota Mdewakanton rights and heritage. She had available every federal document to ensure that the Department could carry out its fiduciary responsibilities and she rejected them for a convenient thumbnail sketch as the basis for her understanding of the situation at Prior Lake.

Federal agents have used other scholarly narratives to expand their knowledge of the Minnesota Mdewakanton. One is the promisingly titled *History of the Santee Sioux* (1967), by Minnesota historian Roy W. Meyer. He begins his narrative with a stock explanation of his title characters. This explanation provides an example of sloppy scholarship in the first paragraph, which tells of "French explorers Pierre Esprit Radisson and Médard Chouart, Sieur des Groseilliers" meeting "chiefs and braves of the Santee Sioux" in the early spring of 1660.[28] The two French explorers at that meeting each had two names. Médard Chouart was more commonly known as Sieur des Groseilliers. Pierre d'Esprit was also known as Sieur de Radisson.[29] Meyer blends Radisson's two names to get Pierre Esprit Radisson. He also blends elements of the chronicle provided by the French explorers. Groseilliers recorded having met "30 yong men of ye nation of the beefe" at or near a place in Minnesota called Knife Lake.[30] Meyer's imaginative narration of the French explorers' meeting asks the reader to believe that they recorded the existence of a Santee Sioux tribe in 1660. *Isanti* (·s´t–) means "Knife Lodge" in the Sioux language.

Scholars have routinely ignored the obvious historical and political distinction between the Mdewakanton Sioux and the Santee Sioux

In the 1830s, Congress recognized in two (2) treaties a group called the Santee Sioux. In the July 15, 1830 and the October 15, 1836 treaties, the United States dealt with the Santee as an entity separate from the Dakota-speaking Mdewakanton, Sisseton, Wahpeton, and Wahpekute. The Santee Sioux Tribe mentioned in the 1830s treaties clearly distinguishes itself from the Santee Sioux Tribe of Nebraska, which only came into existence *thirty years after the treaties were signed*. In its entirety, the July 15, 1830, treaty Proclamation reads:

> Articles of a treaty made and concluded by William Clark Superintendent of Indian Affairs and Willoughby Morgan, Col. Of the United States 1st Regt. Infantry, Commissioners on behalf of the United States on the one part, and the undersigned Deputations of the Confederated Tribes of the Sacs and Foxes; the Medawah-kanton, Wahpacoota, Wahpeton and Sissetong Bands or Tribes of Sioux; the Omahas, Ioways, Ottoes and Missourias on the other part.[31]

The Proclamation clearly identifies the parties negotiating the treaty, which was signed July 15, 1830, and the Santee Sioux Tribe was absent. However, this treaty also included specific provisions regarding the Yankton Sioux and the Santee Sioux.[32] Article III of that 1830 treaty recognizes land cessions by "The Medawah-Kanton, Wahpa-coota, Wahpeton and Sisseton Bands of the Sioux" and, elsewhere in the treaty, jointly gives the "Yancton [sic] and Santie [sic] Bands" consideration. Article VI of that 1830 treaty shows,

> The Yanckton [sic] and Santie [sic] Bands of the Sioux not being fully represented, it is agreed, that if they shall sign this Treaty, they shall be considered as parties thereto, and bound by all its stipulations.

Meyer acknowledges that "the signers of the treaty included twenty-six Mdewakantons [sic], nine Wahpekutes [sic], and two Sissetons [sic]" and that "no Wahpetons [sic] signed."[33] Weakening Meyer's assertion, the treaty identifies *Mazamani* as having signed the 1830 treaty. His name appears under the *Wahpekutewan* on that treaty, but *Mazamani* is otherwise widely regarded as a *Wahpetonwan* chief. According to the treaty, the Santee Sioux were not even present to negotiate. Article X of the treaty states,

> The Omahas, Ioways, and Ottoes, for themselves, and in behalf of the Yancton [sic] and Santie [sic] Bands of Sioux, having earnestly requested that they might be permitted to make some provision for their half-breeds…

The Yankton and Santee agreed to the July 15 treaty three months later, on October 13,1830. Since no historical records clarify the identity of this Santee tribe and no traditional narratives offer an explanation for an eighth political division of the Sioux nation, it remains unclear as to exactly who the sovereign documented on the 1830 treaty as the Santee represented. In comparing the names of the signers on that treaty with names on other federal records, it seems likely, even probable, that the *Ihankatonai* Sioux represented the Santee at that treaty council.

At the same time, there remained a small group of Dakota-speaking people who had escaped exile, hiding in their Minnesota homelands. Mostly Mdewakanton, these people had outwitted the bounty hunters, who received $200 from the state of Minnesota for each Sioux scalp they presented

Negotiated six (6) years later, a second treaty with the Yankton and the Santee makes no reference to the Mdewakanton or the other three tribes. Dated October 15, 1836, this land cession treaty mentions only the Yankton and Santee. The records indicate that the Mdewakanton and others entered into separate treaties to cede the same land on September 10 and November 30, 1836. While the sovereign identified as the Santee remains vague, for the purposes of negotiating the 1830 and 1836 treaties, the federal government clearly recognized this group called the Santee as a sovereign entity, distinctly separate from the Mdewakanton.

In his August 4, 1841, letter to Secretary of War John Bell, treaty commissioner James Duane Doty writes regarding the "Articles of a Treaty made" between the United States and "the Seeseeahto, Wofpato and Wofpakoota Bands of the Dakota (Sioux) nation of Indians."[34] Doty states,

> The nation is divided into five bands which occupy distinct portions of the territory, as much so as though they were independent tribes. Their names are Mindawaukanto, Wofpakooto, Wofpato, Seeseeahto & Eyankto [*Ihanktonwan* or Yankton]. I do not find that the bands ever meet in general council as a nation, though they are regarded as one nation in all the wars which are prosecuted with them.[35]

Doty includes the Nakota-speaking *Inhanktonwan* in his description of the Dakota Sioux and further confuses the issues with his use of the word "bands" to describe the political units of the Sioux nation, yet he describes these units as distinctly separate. His letter included no mention of a Santee group.

Following the 1862 war, the Mdewakanton political position altered as a result of the federal government's abrogation of all treaties previously signed with the Minnesota Sioux. Minnesotans demanded an Indian-free state and, with the help of the United States Army, they exiled the Dakota people who had survived the war's aftermath. Most of the exiles were eventually sent to Nebraska, where they became known as the Santee Sioux. At this time, both scholars and bureaucrats begin to routinely misapply the word "Santee" in their references to the Minnesota Sioux people. By 1868, the Santee Sioux of Nebraska had signed a treaty with the United States. In doing so, they had established their political identity as the Santee Sioux Tribe. While an unknown number of Santee Sioux clearly held biological ties to the Minnesota Mdewakanton, equally important is that fact that an unknown number of Santee were biologically unconnected to the Mdewakanton. The Santee Sioux Tribe of Nebraska also clearly differed from the Santee Sioux who had signed treaties with the United States in the 1830s. Coalescing with other tribes and collectively surviving as a single political unit, no federal census clarifies the former tribal affiliation of the remnants from several formerly sovereign political entities, which reconstituted as the Santee Sioux Tribe of Nebraska.

At the same time, there remained a small group of Dakota-speaking people who had escaped exile, hiding in their Minnesota homelands. Mostly Mdewakanton, these people had outwitted the bounty hunters, who received $200 from the state of Minnesota for each Sioux scalp they presented. The Mdewakanton refugees survived by staying out of sight from the non-Indian Minnesotans, constructing makeshift shelters along the creek banks, and eating whatever they could find. The Mdewakanton signed no treaties with the United States after the 1862 war. As far as their relationship with the federal government was concerned, they were totally without political identity. In the early 1880s, the presence of the refugees became apparent to non-Indian Minnesotans and, in 1884, Congress formally recognized them as the Minnesota Mdewakanton Sioux. After a period of twenty-two years, the Mdewakanton who had remained in Minnesota clearly differed from the Santee Sioux of Nebraska. The Santee had received government rations, lived on reservation land, and signed additional treaties with the United States.

A census dated June 30, 1886, gives the names, relationships, sex, and ages of the Santee Sioux. Clearly delineating the political distinction between the Santee and the Mdewakanton, that same year, another census dated May 20, 1886, designates the individuals listed as the full-blood Minnesota Mdewakanton Sioux. A second Mdewakanton census was completed in 1889 and includes the Mdewakanton who had returned to Minnesota, as well as any half bloods who had been left off the 1886 census. Nevertheless, the Congressional Acts in 1888, 1889, and 1890 stipulate that appropriations were to benefit those Mdewakanton Sioux who resided in Minnesota on May 20, 1886.

After 1886, only the Mdewakanton who had remained in Minnesota could politically claim Mdewakanton identity. *These people are the Minnesota Mdewakanton Sioux.* Yet, Indian agents who base their opinions on careless scholarly narratives instead of the federal legal documents have helped destroy this community of people, who suffered beyond human understanding to maintain their identity as *Mdewakanton* Sioux. Federal agents have convinced themselves that the Mdewakanton and the Santee are one and the same people. To bolster their opinions, they quote flawed scholarly narratives. In the existing literature, characterizations of Sioux political identity depend upon whether scholarly renderings or legal and political documents have informed the narrative. For example, the scholarly *Handbook of American Indians* provides inaccurate, conflicting information on the identity of the Santee. Varying the spelling from Issati to Isanyati to Santee, the *Handbook* uses Santee as a gloss to provide patently false information about the Mdewakanton and other Dakota tribes:

> The tribes forming this group joined under the collective name [Santee] in the following treaties with the United States: Prairie du Chien, Wis., July 15, 1830; St Louis, Mo., October 13, 1830; Bellevue, Neb., Oct. 15, 1836; Washington, D. C., Feb. 19, 1867; Fort Laramie, Wyo., Apr. 29, 1868.[36]

Purportedly toward moving into compliance with the IGRA, in 1990, the SMSC hired genealogist John Schade to trace family histories and calculate Mdewakanton blood quantum for individuals to be included on a "tribal" roll and proceeds distribution list

As previously noted, the July 15, 1830 treaty clearly delineates the distinctions between and among the Mdewakanton, Sisitonwan, Wahpetonwan, Wahpekutewan, and the Santee tribes of Sioux. In fact, as previously stated here, that treaty more closely links the Santee with the Yankton, rather than with the four tribes of Dakota-speaking people.

The SMSC lineage and blood quantum determinations must be based upon the accurate history of dealings between the United States government and the Minnesota Mdewakanton Sioux. The 1988 Indian Gaming Regulatory Act (IGRA) created an additional reason for documenting the political legitimacy of the SMSC membership. The IGRA requires gaming tribes, such as the SMSC, to have an approved proceeds distribution list that coincides with the tribal membership roll. More than eleven years later, the majority of SMSC "members" still have no reliable documentation to prove their lineage as required by the SMSC constitution. Even though the IGRA also requires a valid membership roll with a corresponding proceeds distribution list to be approved by the Secretary of the Interior, federal agents refuse to fulfill their responsibilities to enforce the law.

Purportedly toward moving into compliance with the IGRA, in 1990, the SMSC hired genealogist John Schade to trace family histories and calculate Mdewakanton blood quantum for individuals to be included on a "tribal" roll and proceeds distribution list. In 1991, Mitchell Bush, BIA Enrollment Section, verified Schade's findings. The federal courts have since used the Bush and Schade determinations in efforts to determine SMSC voter eligibility. While these documents provide useful tools and a better idea about blood quanta than the SMSC has had either before or since 1991, the data also contain numerous flawed assumptions and absolute inaccuracies. Even with the assumptions and other inaccurate details that would otherwise prove qualifications for some of the SMSC "members," the Bush-Schade findings show that more than 75% of the purported SMSC membership could not meet the constitutional requirements for claiming that status in 1991. This fact has enormous consequences because genealogical rules are far less stringent than federal rules for determining blood quantum and family lineage.

Genealogical rules work well for creating a family coat-of-arms for clients to hang on a wall in the family room. Using those rules to decide issues crucial to tribal integrity, legitimate sovereignty and Congressionally monitored land assignments or proceeds distributions is disastrous. Such is the reason for the Department and the Bureau to have a well-defined set of rules for determining blood quantum. The Bureau has irresponsibly used genealogical documents collected and generated by a private contractor, who himself was hired by the illegal, fraudulent, and corrupt SMSC "tribal" government. In detail, federal rules outline the policy and procedures for making blood quantum determinations. By neglecting those rules governing their responsibilities for protecting Minnesota Mdewakanton rights, federal agents have sponsored a coup at Prior Lake.

To show how the Bush and Schade determinations distort the historical and political realities of the Minnesota Mdewakanton Sioux, the following analysis examines the Leonard Lewis Prescott genealogical findings. Crooks and Ross family members primarily comprise the SMSC. Former SMSC Chair Leonard Lewis Prescott and current SMSC Chair Stanley Richard Crooks are closely related because their mothers, Rose and Edith Ross are sisters. Therefore, they share the Ross lineage. In part, the findings discussed below were submitted, along with determinations from an opposing genealogist, in connection with the blood quantum determinations for ten (10) Crooks family members, who claim membership in the SMSC (Docket No. D95-182). The Office of Hearings and Appeals forwarded these determinations to the Assistant Secretary – Indian Affairs for a final decision. At this time, that decision is pending.

A purportedly duly enrolled voting member of the SMSC, Leonard is a son of Rose Blossom Ross Prescott and Herbert Prescott. Schade found Prescott's paternal grandfather David Prescott to possess ¾ Mdewakanton Sioux blood. Since the records are consistent and even though David Prescott does not trace from the May 20, 1886 census, he can be traced to the 1889 Minnesota Mdewakanton Sioux census. Therefore, we can legally assume that he possessed ¾ Minnesota Mdewakanton Sioux blood. David Prescott married Margaret Cecelia Campbell.

- Schade provides no solid reason for why he found Margaret Campbell to possess 7/16 Mdewakanton Sioux blood.
- Margaret Campbell descends from Hypolite Campbell on her father's side and from Gabriel Renville on her mother's.

As detailed in the following analysis, Margaret Cecelia Campbell possessed no Minnesota Mdewakanton Sioux blood. Margaret Cecelia Campbell's paternal grandfather Hypolite Campbell possessed no Mdewakanton Sioux blood. His name appears on no Mdewakanton census rolls, nor on any other census of Dakota-speaking people.

- Despite the complete lack of documentation, Schade found Hypolite to possess ¼ degree Mdewakanton Sioux blood.
- Bush found Hypolite to possess ½ Mdewakanton Sioux blood. In the absence of documentation, Bush reasons that Hypolite Campbell is the brother of Antoine Joseph Campbell and Bush reckons that Antoine's name appears on the 1886 Santee Census. Since he considers Antoine Joseph Campbell's "other Indian blood" to be Mdewakanton, Bush therefore attributes ½ degree Mdewakanton Sioux blood to his brother Hypolite. Bush neglects to mention the origin of Antoine's "other Indian blood" or where he found Mdewakanton blood in this lineage. In fact, no tribal affiliation appears, but Antoine himself is mentioned in the historical records simply as a "1/2 breed interpreter." Based upon the records Schade and Bush themselves used, Hypolite Campbell possessed no Mdewakanton blood. The mystery lies in why Schade and Bush would determine him to possess ¼ and ½ Mdewakanton Sioux blood.

Based upon the information contained in the records the genealogists used, Hypolite Campbell was ¼ Wahpeton and ¼ Menominee. He was the son of Antoine Scott Campbell and Margaret Menager. Neither Antoine Scott Campbell nor Margaret Menager possessed Mdewakanton Sioux blood.

- Again, despite the complete lack of documentation, Schade found Antoine Scott Campbell to possess ½ degree Mdewakanton Sioux blood and Bush determined Antoine Scott Campbell to possess ½ Wahpeton.

Since Leonard and Stanley share the same maternal lineage, neither can claim Mdewakanton Sioux blood from his mother. If Norman Melvin Crooks is Stanley's father, Stanley can claim no Mdewakanton blood from his father. Therefore, Stanley has no Mdewakanton blood. While Leonard has some Minnesota Mdewakanton blood from his father and can trace his lineal descendancy from May 20, 1886, he still cannot constitutionally qualify as a voting member of the SMSC

· Contradicting himself with regard to Margaret Menager, Schade found her to possess ½ degree Menominee blood in the Leonard Lewis Prescott lineage. Elsewhere (in his genealogy of Melvin D. Campbell) Schade states, "Marguerite is ½ Menominee Indian but she was enrolled at Santee, Nebraska and we will use her blood as Mdewakanton."

Hypolite Campbell married *Yugatewin*, who also possessed no Mdewakanton Sioux blood. *Yugatewin* was 4/4 Sisseton Sioux.

· Although she appears on no 1886 census, both Schade and Bush make the assumption that *Yugatewin* possessed 4/4 degree Mdewakanton Sioux blood. Bush admits that he has no record of her specific type of Sioux blood.

· In the Cecelia Campbell Stay narrative (*Through Dakota Eyes*, 1988), *Yugatewin* is identified as a cousin of the Sisseton leader Standing Buffalo and the wife of Stay's Uncle Hypolite Campbell.[37]

Hypolite and *Yugatewin* had a son, Benjamin John Campbell, who was Margaret Cecelia Campbell's father. Benjamin John Campbell possessed no Mdewakanton Sioux blood.

· Although Benjamin John Campbell appears on all the Sisseton-Wahpeton census rolls from 1886 through 1904, Schade recognizes him as possessing 5/8 degree Mdewakanton Sioux blood. Bush found him to possess ¾ degree Mdewakanton blood. Only by making unsubstantiated assumptions could Schade or Bush determine that Benjamin John Campbell possessed any Mdewakanton blood.

If assumptions must prevail, the more likely assumptions would be that Hypolite Campbell was ¼ Wahpeton and ¼ Menominee; that *Yugatewin* was 4/4 Sisseton-Wahpeton; and that Benjamin John Campbell was 5/8 Sisseton-Wahpeton and 1/8 Menominee. The glaring aspect of the Schade-Bush determinations is the fact that Margaret Campbell can document no Minnesota Mdewakanton blood in her paternal lineage.

The preceding discussion examined Leonard Lewis Prescott's paternal grandmother Margaret Cecelia Campbell's descendancy from her paternal grandfather Hypolite Campbell. The following discussion examines her descendancy from her maternal grandfather Gabriel Renville. Gabriel Renville was the son of Victor Renville, who was the brother of Joseph Renville, Sr. Gabriel Renville possessed 1/8 degree Mdewakanton Sioux blood.

· In 1838, French explorer Joseph N. Nicollet recorded Victor Renville as the younger brother of Joseph Renville, Sr., who was the son of French Canadian Joseph Renville. According to Nicollet, Joseph Renville married a "metis of the Mdewakantonwans" in Canada.[38] By this we know that Joseph Renville, Sr. and his younger brother Victor Renville were ¼ Mdewakanton.[39] Victor Renville married Winona Crawford, who was ½ Sisseton. Their son Gabriel Renville was 1/8 Mdewakanton Sioux.

· Nevertheless, according to Bush and Schade, Gabrielle Renville was "½ Mdewakanton Sioux." Their obviously flawed determination ignores the fact that this same Gabriel Renville appears as a signer on the 1867, 1872, and 1873 Sisseton-Wahpeton treaties with the United States. According to those treaties, Gabriel Renville was head chief of the Sisseton-Wahpeton Sioux. Gabriel Renville was 1/8 Mdewakanton Sioux, but he obviously identified politically, culturally, and socially with the Sisseton-Wahpeton Sioux. He also can not be identified as possessing any Minnesota Mdewakanton Sioux blood because his name does not appear on the May 20, 1886 census.

Additionally supporting the fact that he possessed no Mdewakanton Sioux blood, Gabriel Renville was the half-brother of Susan Frenier Brown, daughter of Narcisse Frenier and Winona Crawford. Susan Frenier Brown is widely documented as having saved her own life and the lives of some non-Indians by using the Dakota language to identify herself *as a Sisseton woman* when hostile Sioux started to attack them during the 1862 war.[40]

Gabriel Renville's third wife Sophia *Witecawin* was a full blood Sisseton-Wahpeton. Their daughter, Lydia Renville was the mother of Margaret Cecelia Campbell. Lydia Renville possessed no Minnesota Mdewakanton Sioux blood.

· Despite the fact that Lydia Renville's name appears on the Sisseton-Wahpeton rolls from 1886 through 1907, both Bush and Schade found her to possess ¼ degree Mdewakanton and ½ Sisseton-Wahpeton. While the genealogical evidence shows that Lydia Renville was 1/16 Mdewakanton and 5/8 Sisseton-Wahpeton, she is identified on the 1886 Sisseton-Wahpeton census and not on the 1886 Minnesota Mdewakanton roll. Her name appears on no Mdewakanton census.

Lydia Renville obviously considered herself Sisseton-Wahpeton. She married Benjamin John Campbell. Neither Lydia nor Benjamin John Campbell can be documented as possessing any degree of Minnesota Mdewakanton Sioux blood. Together, they had Leonard Lewis Prescott's paternal grandmother Margaret Cecelia Campbell.

· Although the genealogical evidence shows Margaret Cecelia Campbell possessing 1/32 degree Mdewakanton Sioux blood, she is listed on the 1886 Sisseton-Wahpeton census and cannot be considered as possessing any Minnesota Mdewakanton Sioux blood.

· Margaret is 5/8 Sisseton-Wahpeton, 1/16 Menominee, and despite the fact that her name appears on the Sisseton-Wahpeton Rolls from 1886 through 1907, she is 1/32 Mdewakanton. Schade found her as possessing 7/16 Mdewakanton, ¼ Sisseton, and 1/16 Menominee. Bush shows her as ½ Mdewakanton and ¼ Sisseton-Wahpeton.

David Prescott (3/4 Mdewakanton) and Margaret Campbell (1/32 Mdewakanton) are the parents of Herbert Prescott, the father of Leonard Lewis Prescott. Schade found Herbert Prescott to possess 19/32 Mdewakanton, 1/8 Sisseton-Wahpeton, and 1/32 Menominee. Bush found him to possess 5/8 Mdewakanton, 1/8 Sisseton-Wahpeton, and 1/32 Menominee. However, based on a critical assessment of the documents used by Schade and Bush, Herbert Prescott possesses 25/64 Mdewakanton, 5/16 Sisseton-Wahpeton, and 1/32 Menominee. Herbert Prescott married Rose Blossom Ross.

Leonard Lewis Prescott possesses 25/128 Mdewakanton (including the 1/32 degree that genealogical evidence shows from his grandmother Margaret), 5/32 Sisseton-Wahpeton, and 1/64 Menominee from his paternal lineage. The following analysis examines his maternal lineage. Rose Blossom Ross possesses no Mdewakanton Sioux blood.

Without confusion and in detail, all of Rose Blossom Ross's ancestors appear in the records as either Santee or Yankton, yet both Bush and Schade arbitrarily and erroneously count her Santee blood as Mdewakanton.

As previously outlined here, after the 1862 Sioux war, Minnesotans exiled the Sioux and others to Crow Creek, South Dakota. Those removed included Mdewakanton, Wahpekutewan, and Winnebago, but no one knows for sure how many people from other tribes were also removed from Minnesota at that time. Three years later, the Mdewakanton and Wahpekutewan were transferred from Crow Creek to Niobrara, Nebraska. They formed the nucleus of today's Santee Sioux Tribe of Nebraska. That tribe has since dealt with the United States government as a sovereign entity. They represent the Santee Sioux, not the Mdewakanton or *Wahpekutewan*. That Santee Sioux Tribe established a government-to-government relationship with the federal government when they signed a treaty in 1868. Despite the historical relationships they once had with the Minnesota Mdewakanton, their legal, political position is and has always been separate from the Minnesota Mdewakanton. When the government conducted one census for the Santee Sioux and a distinctly separate one for the Mdewakanton Sioux in the same year, they reiterated their already confirmed position that the Santee and the Mdewakanton are two entirely different and distinct entities.

Using the assumption that her Santee Sioux blood is the same as Minnesota Mdewakanton Sioux blood, Bush and Schade found Rose Ross to possess 7/16 Mdewakanton and 1/8 Yankton. She possesses 7/16 degree Santee Sioux and 1/8 Yankton. No documents have ever shown her ancestors as Mdewakanton Sioux. Rose Blossom Ross possesses no Mdewakanton Sioux blood.

Based on this analysis, Leonard Lewis Prescott possesses 25/128 Mdewakanton, 5/32 Sisseton-Wahpeton, 7/32 Santee, 1/16 Yankton, and 1/64 Menominee. If we subtract the non-Minnesota Mdewakanton 1/32 degree he received from his grandmother Margaret, Leonard would be 3/16 degree Minnesota Mdewakanton Sioux, 1/16 short of ¼. Even with the 1/32 degree from Margaret, Leonard Lewis Prescott is 7/128 short of the ¼ degree Mdewakanton Sioux blood constitutionally required for SMSC membership. He cannot meet the constitutional requirements to qualify as a voting member of the SMSC.

The Prescott administration hired Schade to document lineal descent for SMSC members. Schade's findings are based on the assumption that, like in the *Yugatewin* case, all unverifiable Indian blood can automatically convert to Mdewakanton blood. Such assumptions and other inaccuracies illegitimately qualified Leonard as an SMSC voting member. The Stanley Richard Crooks administration hired genealogist Paula Warren to refute Schade's findings. Warren obviously attempted to limit the eligibility of the Prescotts and still find the Crookses eligible SMSC members. Schade and Warren, as well as Bush arbitrarily used Santee blood as Mdewakanton blood. As outlined above, Santee and Mdewakanton are distinctly separate political entities and must be treated as such in making determinations of lineal descendancy crucial to the legitimate government-to-government relationship between the SMSC and the United States government.

Since Leonard and Stanley share the same maternal lineage, neither can claim Mdewakanton Sioux blood from his mother. If Norman Melvin Crooks is Stanley's father, Stanley can claim no Mdewakanton blood from his father. Therefore, Stanley has no Mdewakanton blood. While Leonard has some Minnesota Mdewakanton blood from his father and can trace his lineal descendancy from May 20, 1886, he still cannot constitutionally qualify as a voting member of the SMSC.

Leonard Prescott has three (3) sisters and two (2) brothers, who claim duly "enrolled" SMSC membership. The Prescott siblings each have children, who are even less qualified than the parents; yet, they too claim "enrolled" status and vote in SMSC affairs. The Prescotts cannot meet the SMSC constitutional requirements for membership and neither can their cousins, who are related through their Ross lineage. Edith Ross's children get no Mdewakanton blood from her and Norman Melvin Crooks also can prove no Mdewakanton blood. Nevertheless, their children, grandchildren, and great-grandchildren claim to be duly "enrolled" SMSC members. Like his sisters Rose and Edith, Lanny Axel Ross definitely has no Mdewakanton blood and his former wife was Minnesota Chippewa, yet his children and grandchildren all claim SMSC voting membership.

Blood quantum and lineal descendancy determinations should and must reconcile with the political history of the government-to-government relationship between the United States and the Minnesota Mdewakanton Sioux. In the SMSC situation, Federal agents have based determinations on erroneous and otherwise flawed interpretations of Mdewakanton history produced by scholars and the equally flawed and erroneous blood quantum determinations provided by paid genealogists.

Unable to document their own legitimacy with verifiable proof of their blood quanta and lineal descendancies, they have circumvented their meaningless constitution by enrolling each other with "recognition tests" and illegal adoption ordinances

Determinations for tribal membership and rights must be based upon reliable, verifiable documents that irrefutably determine blood quantum for individuals who participate in the government-to-government relationship between an Indian nation and the United States. The Department and the Bureau cannot rely upon unsubstantiated assumptions and falsehoods simply because those assumptions and falsehoods ostensibly fall within the rules applied by the American Genealogical Society. The Bureau is legally bound to specific, meticulously defined rules and regulations regarding blood quantum determinations. Since 1969, negligence on the part of the Department and the Bureau has both generated and compounded the SMSC enrollment problems. As things now stand, those federal agents have enabled impostors to thoroughly rob Mdewakanton people of their land, their rights, and their very name.

Very truly,
Barbara Feezor Buttes, Ph.D.
Anthropologist Consultant
Buttes@uswest.net

Enclosures: Chart comparing the Leonard Lewis Prescott genealogical findings
Chart of the Sioux Nation with details of language and political distinctions
AAA Code of Ethics
Attachment: Footnotes from the body of the letter

Footnotes
(Endnotes)

[1] Rex H. Barnes, Area Land Officer, 214 Federal Office Building, Minneapolis 1, Minnesota. (1950, July 24). MEMORANDUM FOR THE RECORD: Lands-Prior Lake.

[2] Acting Director, United States Department of the Interior. Bureau of Indian Affairs, Minneapolis Area Office. (1990, September 14). Response to Letter Concerning the Cancellation of the Norman Crooks Land Assignment.

[3] United States Department of the Interior, Bureau of Indian Affairs, Winnebago Agency, Winnebago, Nebraska. (1969, May 6) Census Certificate for Norman Crooks listed on the Official Santee Sioux Tribal Census Roll dated January 1, 1940.

[4] ORGANIZATION FILE: Shakopee Mdewakanton Sioux Community. United States Department of the Interior, Bureau of Indian Affairs, Minnesota-Sioux Area Field Office, 15 South Fifth Street, Minneapolis, Minnesota, 55402. Letter dated March 13, 1969, from Daniel S. Boos to Area Director regarding Opinion that Indians resideing [sic] on so-called "Mdewakanton lands" near Prior Lake...eligible to organize.

[5] Paul A. Krause. (1969, August 18). Superintendent Tribal Operations:ESRasmussen:rcg:8-18-69 to Mr. Owen D. Morken, Area Director, Minneapolis, Minnesota.

[6] Mamie Bluestone Gofus met the SMSC constitutional requirements and had the documents verifying her qualifications. Lois Pendleton Brewer later secured documents showing that she qualified, however, those documents raise other issues that must be resolved. For example, her documents indicate that her maternal grandfather had died two (2) years before her birth. Ms. Brewer's mother has a younger sister whose documents indicate that they have the same father. None of the other individuals listed on the 1969 SMSC census could constitutionally qualify for membership.

[7] Norman M. Crooks and Amos Crooks, who were the original SMSC chair and vice chair were enrolled in another tribe until at least 1975. See Lucy M. Bearing. Acting Enrollment Clerk, Enrollment Office, Santee Sioux Tribe of Nebraska, Rural Route #2, Niobrara, Nebraska, 68760. (1975, March 7). To Mr. Norman Crooks Enclosed please find the four (4) relinquishment forms that you requested during our conversation via telephone on March 6, 1975, for: Amos Crooks, Clarence Crooks, Harold Crooks, and your self (Norman Crooks) all to be sent in care of you.

[8] Edith Ross Crooks, her brother Lanny Axel Ross, and her eldest son Norman Woodrow Crooks are documented as ineligible to call themselves Minnesota Mdewakanton. John Cermack and his son Edward Cermack also can not verify a Minnesota Mdewakanton identity.

[9] Special General Council Meeting, Shakopee Mdewakanton Sioux Community, 2330 Sioux Trail NW, Prior Lake, Minnesota. (1994, August 30) Patricia Prescott: No, Cherie. The problem is you are posting a list of people who do not qualify by the constitution. Cherie Crooks-Bathel: Patti, I don't want to get into that right now. That is not the point. The constitution was thrown out a long time ago. Let's forget about that because your Enrollment Committee never followed it before ours was in. [At this SMSC Council meeting, thirty-one people were voted into SMSC membership. Twenty-six of those voted into membership "qualified" as a result of the "recognition test."]

[10] William A. Gurshuny. Acting Associate Solicitor, Indian Affairs, Washington, DC. (1971, August 17). Letter to Field Solicitor, Twin Cities, Minnesota regarding Mdewakanton Sioux Lands in Minnesota.

[11] Gurshuny, ibid.

[12] Gurshuny, ibid.

[13] Gurshuny, ibid.

[14] Elmer T. Nitzschke. Field Solicitor, Minneapolis Area Office (1971, August 19) Letter to Area Director Raymond P. Lightfoot, regarding Mdewakanton Sioux Lands in Minnesota

[15] Elbert, Hazel E. Department of the Interior, Bureau of Indian Affairs, Tribal Government Services, Washington, DC. (1986, February 10). Letter to Chairperson Susan Totenhagen in response to her letter dated October 9, 1985, which questions the eligibility of certain persons for enrollment as members of the Shakopee Mdewakanton Sioux Community (Bureau of Indian Affairs records).

[16] Elbert. (1986 February 10), ibid.

[17] Handbook of American Indians. Washington, DC: Bureau of American Ethnology. 1975 (c.1907), p.460.

[18] Elbert. (1986, February 10), ibid.

[19] Department of the Interior Office of Hearings and Appeals. (1996, March 30). Docket No. D 95-182, In the Matter of Shakopee Mdewakanton Sioux (Dakota) Community of Minnesota, Affidavit of Rose Blossom Ross Prescott (describes the details of affiant's active involvement in the SMSC affairs). Also, letter from Washington dated 1982 stating that Rose Prescott is enrolled in another tribe and is seeking to exercise her rights as an adopted member of the SMSC.

[20] United States Government, Office of the Area Director (1982, May 12). Memorandum to Minnesota Sioux Field Representative regarding Eligibility of Rose Prescott to Vote in Shakopee Mdewakanton Sioux Community Secretarial Election. [This letter confuses federal Indian rules and regulations concerning eligibility with the SMSC constitutional requirements for voting membership.]

[21] Ms. Prescott's sister, Edith Ross Crooks, who was the wife of Norman Melvin Crooks, held the original office of SMSC Secretary-Treasurer. In November 1993, I went to Fort Snelling and met with Minneapolis Field Solicitor Marianna Shulstad to question her about the Ross family and the problems with their SMSC membership. She frankly acknowledged that the Ross family can not qualify as Minnesota Mdewakanton Sioux Indians. When I specifically asked why she openly assisted Edith in obtaining a false Mdewakanton identity and yet, had remained so obviously against Rose, she simply said, "I liked Edith." Her voice contained a perceptible note of nostalgia. Ms. Shulstad remains a steadfast friend of the original members of the SMSC who are still alive. While she is no longer the Field Solicitor in Minneapolis, Ms. Shulstad has a position with the law firm now handling the SMSC legal problems with membership. In other words, Ms. Shulstad now works for the SMSC.

[22] Elbert. (1986, February 13), ibid.

[23] Hazel E. Elbert. Deputy to the Assistant Secretary – Indian Affairs (Tribal Services), United States Department of the Interior, Bureau of Indian Affairs, Washington, DC, 20245. (1987, April 1). Letter to Area Director regarding Shakopee Mdewakanton Enrollment.

[24] Elbert. (1987, April 1), ibid.

[25]

[26] Handbook of American Indians. ibid, p.827.

[27] See particularly page 826 in the Handbook of American Indians, ibid.

[28] Roy W. Meyer. History of the Santee Sioux. Lincoln: University of Nebraska Press, 1967, p.1.

[29] See William Watts Folwell. A History of Minnesota, Volume I. Saint Paul: Minnesota Historical Society Press, 1979 (c.1956), pp. 1-52.

[30] Folwell, ibid, p.10.

[31] Treaty With the Sauk and Foxes, etc., 1830. July 15, 1830. 7 Stat., 328. Proclamation, Feb. 24, 1831.

[32] The legal and historical documents variously spell the tribal names. Sometimes the same tribal name is spelled several different ways in the same document, however, any reader can readily discern the signification.

[33] Meyer, ibid, p. 51.

[34] Meyer, ibid, p. 377.

[35] Meyer, ibid, pp. 383-384.

[36] Handbook of American Indians. Ibid, p. 460.

[37] Spelled "Yuratwin" in Through Dakota Eyes: Narrative Accounts of the Minnesota Indian War of 1862. Gary Clayton Anderson/Alan R. Woolworth, eds. Saint Paul: Minnesota Historical Society Press, 1988, p. 51

[38] Joseph Nicollet. On the Plains and Prairies: The Expeditions of 1838-39 With Journals, Letters, and Notes on the Dakota Indians. Translated from the French and edited by Edmund C. Bray and Martha Coleman Bray. Saint Paul: Minnesota Historical Society Press, 1976, pp. 106-108

[39] Joseph Nicollet, ibid.

[40] "...she stood up in the wagon, and waving her shawl she cried in a loud voice that she was a Sisseton—a relative of Waanatan, Scarlet Plume, Sweetcorn, Ah-kee-pah [Akipa] and the friend of Standing Buffalo, that she had come down this way for pro-

MINNESOTA TRIBAL COURT/STATE COURT FORUM

October 15, 2002

VIA MESSENGER

Frederick Grittner
Clerk of Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155

Re: Request to Make an Oral Presentation at the Public Hearing on the Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments

Dear Mr. Grittner:

I am submitting this request on behalf of the Minnesota Tribal Court/State Court Forum. The Forum respectfully requests that the following individual be permitted to provide oral testimony to the Supreme Court at the Public Hearing on the Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments on October 29, 2002, at 2:00 p.m.:

Mr. George W. Soule, Managing Partner
Bowman & Brooke, LLP
150 South Fifth Street, Suite 2600
Minneapolis, Minnesota 55402

Mr. Soule will address the need for a uniform, state-wide procedural rule of this nature and the propriety of such an action by the Supreme Court to clarify tribal court order enforcement in state courts.

Please let me know if you need any further information.

Sincerely,

Andrew M. Small, Associate Judge
Prairie Island Mdewakanton Dakota Community Tribal Court
Lower Sioux Community in Minnesota Tribal Court

THE SUPREME COURT OF MINNESOTA
MINNESOTA JUDICIAL CENTER
25 REV. DR. MARTIN LUTHER KING BOULEVARD
SAINT PAUL, MINNESOTA 55155

Bridget Gernander, Project Specialist
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October 11, 2002

Mr. Fred Grittner
Clerk of the Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

RE: Comment on the Tribal Court/State Court Forum Petition

Dear Mr. Grittner:

The Implementation Committee on Multicultural Diversity and Racial Fairness in the Courts (Implementation Committee) has reviewed and considered the Tribal Court/State Court Forum's Amended Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments, and submits fourteen copies of this letter for consideration at the October 29, 2002 Supreme Court hearing on the Petition. The committee does not wish to make an oral presentation at the hearing, but does wish to express its support in writing for adoption of the Tribal Court/State Court Forum's Amended Petition.

The Minnesota Supreme Court Task Force on Racial Bias in the Judicial System released its report in May 1993. The Implementation Committee was created at that time to put the report recommendations into action, and has been working towards that goal for almost 10 years. Several recommendations in the Race Bias Report touch on the same issues raised by the Tribal Court/State Court Forum's Petition. The Race Bias Report found that tribal courts were often not recognized in court proceedings and that there was a general ignorance in the legal community about issues of tribal court jurisdiction, sovereignty and autonomy.[1] The Implementation Committee supports adoption of the Tribal Court/State Court Forum's Amended Petition because it would serve to educate judges and attorneys about the status of tribal courts as courts of competent jurisdiction, addressing a problem recognized in the 1993 Race Bias Report that continues to this day.

The 1993 Race Bias Report also specifically addressed the importance of recognizing tribal court jurisdiction in the area of child protection matters. The report outlines several recommendations regarding the Indian Child Welfare Act (ICWA), including training of judges, attorneys and Guardians

[1] Minnesota Supreme Court Task Force on Racial Bias in the Judicial System, Final Report 117, 122 (May 1993).

ad Litem on the provisions of ICWA and requiring the Department of Human Services to notify Native Americans of their right to have the tribe intervene and the right to have the matter brought to tribal court.[2] The Tribal Court/State Court Forum's Amended Petition provides examples of how failure to recognize a tribal court order has caused potentially dangerous situations for Native American children and teenagers.[3] No Native American child should be caught in limbo while a court order is questioned simply because it originated in a tribal court, particularly when Congress has mandated that such orders be given full faith and credit.[4] The Implementation Committee believes that adoption of the Tribal Court/State Court Forum's Amended Petition would improve the relationship between the state courts and tribal courts, and this improved relationship would increase protection and services for Native American children and teenagers.

In conclusion, the Implementation Committee voted overwhelmingly to support the Tribal Court/State Court Forum's Amended Petition because adoption of the proposed rule would move the judicial system forward in implementing the recommendations of the Minnesota Supreme Court Task Force on Racial Bias in the Judicial System.[5] The Implementation Committee believes that adoption of the proposed rule would serve to educate judges and attorneys on the status of tribal courts as courts of competent jurisdiction and would improve the relationship between the state courts and the tribal courts, thereby increasing protection for Native American children. These issues were clearly stated in the 1993 Race Bias Report and continue to this day. As a state with a significant Native American population, Minnesota needs to have a court rule providing the procedure for recognizing tribal court judgments.

Respectfully submitted on Behalf of the Implementation Committee on Multicultural Diversity and Racial Fairness in the Courts,

Bridget C. Gernander

Bridget C. Gernander
Implementation Committee Staff
120 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Boulevard
St. Paul, MN 55155
(651) 284-0248

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[2] Id. at 95-96.

[3] Tribal Court State Court Forum, Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments 4-5 (April 11, 2002).

[4] See 25 U.S.C. § 1911(d).

[5] Justice Page abstained from voting in this matter, and Justice Paul Anderson was not present at the Implementation Committee meeting at which the vote occurred.

MILLE LACS COUNTY

Board of Commissioners

635 - 2nd Street S.E.
Milaca, Minnesota 56353

Chairman of the Board

Telephone (320) 983-8218
FAX (320) 983-8382

October 15, 2002

Frederick Grittner
Clerk of the Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

RE: State of Minnesota in Supreme Court, CX-89-1863, October 29, 2002 Hearing to Consider Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgements

Dear Mr. Grittner:

We understand that a State Court/Tribal Court Forum Committee has petitioned the Minnesota Supreme Court to adopt a rule of procedure for the recognition of tribal court orders and judgements. We understand further that comments for the Court's consideration concerning the petition are to be directed to you no later than today.

Please be advised that Mille Lacs County is currently in federal litigation with the Mille Lacs Band of Ojibwe over whether 61,000 acres of northern Mille Lacs County is or isn't "Indian Country." The complaint the County brought earlier this year was in response to recent claims by the Mille Lacs Band and agencies of the federal government that the "old" 61,000 acre Mille Lacs Reservation – long off the maps and out of public consciousness as a reservation – still exists with the legal status of "Indian Country."

Material supplied along with the Committee's petition to the Court includes a description of the Court of Central Jurisdiction (Tribal Court) at Mille Lacs, including a reference to "broad civil jurisdiction" claimed by that court. Be advised the Mille Lacs Band has enacted statutes in recent years regarding environmental and natural resource matters that, as written, unequivocally asserts jurisdiction over "all lands within the exterior boundaries of the Mille Lacs Reservation (what is in dispute) ... "as established by the Treaty of 1855" (and over all "non-Indians, political subdivisions, and their officers and agents").

In light of the foregoing, and in the absence of clear consensus regarding the meaning and extent of tribal sovereignty, we believe the petition is premature. Mille Lacs County is opposed to the proposed rule, as written, and also to it being adopted by the Court as a procedural matter. Clearly, in our opinion, the adoption of a rule that recognizes a jurisdictional authority that is not bound by either the United States or Minnesota Constitutions is a very substantive matter. Accordingly, we respectfully request that any such rule adoption be accomplished only after full review and input from the people and their elected representatives via the legislative process.

Sincerely,

David A Tellinghuisen

David Tellinghuisen, Chairman
Mille Lacs County Board of Commissioners

cc: Senator Dan Stevens
Representative Sondra Erickson

INDIAN CHILD WELFARE LAW CENTER

October 14, 2002

Frederick Grittner
Clerk of Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155

Re: Written statement regarding Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments

Dear Mr. Grittner:

This letter is our written statement to the Supreme Court regarding the Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments. The Indian Child Welfare Law Center is a public defense corporation providing legal services to Indian families whose rights are affected by the Indian Child Welfare Act, 25 U.S.C.A. § 1901 et seq. (1978). As such we routinely interact with tribal courts located both within the boundaries of the State of Minnesota and other states most notably South Dakota.

This letter is to urge the adoption of a rule of procedure for the recognition of tribal court orders and judgments. There is currently no uniformity in the enforcement of tribal court orders and judgments in the courts of the State of Minnesota. Our organization is routinely faced with the day to day realities created by the absence of a simple procedural rule to guide local courts. Our position is based upon the safety of our Indian children which is often put in jeopardy while local courts attempt to ascertain the next step to take when presented with a tribal court order. This process often takes many weeks if not months in the local court. Meanwhile Indian children are put at risk. The very basis for having a procedural rule in place is to ensure uniformity of application through out the state. Currently there is no uniformity to the process. The response received in attempting to enforce a tribal court order often depends on the county, the particular judge, and/or the particular law enforcement officer you encounter in the process. While it could be argued the existence of other laws ensure this process, this argument simply ignores the fact there also is a lack of procedure to ensure the uniform application of existing

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law. Indeed it is not the law which is lacking but a uniform mechanism to register and enforce tribal court orders and judgments. Often when presented with a recognition or enforcement request judges are encountering tribal court orders for the first time the first time. Even those who wish to recognize a judgment have no guidance on how to proceed consequently creating delay and confusion. The lack of procedure is a day to day real practice problem facing both practitioners and state courts. The problem will not be resolved anytime in the future without a procedural rule. In fact, we anticipate the problem to grow as tribal courts become more active within the State of Minnesota as we see with each passing month.

The following are real situations encountered by the Law Center in attempting to enforce tribal court orders in Minnesota State courts. In most cases, the tribal court previously resolved the issues which were presented and re-litigated in state court. Additionally, Indian children were placed at serious risk causing enormous stress for Indian families and fostering the continued distrust of the Anglo-American judicial system.

In the first example, a pre-existing child custody order from the Rosebud Sioux Tribal Court was not recognized by local courts. The children in this case were in a potentially violent and dangerous situation for approximately three months while our office worked to dismiss three other court orders from three different courts located in Minnesota. The matter ended up in the same procedural posture in the Rosebud Tribal court over three months later. The mother and father in this case were involved in a violent relationship wherein the father was the perpetrator. The father sought an Ex-Parte custody order from the Rosebud Tribal court which he received. The mother retained an attorney, filed objections, and an evidentiary hearing was set in Rosebud Tribal court. The father then fled with the children to Minnesota in order to avoid the Rosebud Tribal court jurisdiction. The father returned home to the Prairie Island reservation wherein a child protection matter was opened in tribal court against him shortly after arriving. The Prairie Island Tribal Court gave custody to Dad under protective supervision as long as he resided with his father the paternal grandfather. One reason the mother did not access the system at this point was a lack of resources. She did not have the ability to pay for an attorney but the father did have the resources. The mother followed the father to the Prairie Island reservation where father committed an assault against the mother. Based upon the assault, the mother upon advise of a non-attorney proceeded to the Hennepin County court and received an Order for Protection granting her custody of the children. Additionally, in the related criminal matter in Goodhue County the court issued a no contact order against the dad with the mom and the kids. The result was four courts with custody orders all which conflict one another. This creates quite a dilemma in having any one court order enforced. The mother retained the Law Center in an attempt to dismiss all four proceedings located in Minnesota in order for the Rosebud Tribal court proceedings to continue in an orderly fashion. It took three months but all courts located in Minnesota dismissed the matters in front of them. All parties agreed that the proper forum for this matter was the Rosebud Tribal Court. If the Rosebud Tribal Court order was immediately recognized and enforced, the children would not have been moved and placed in a potentially violent and dangerous situation. The father was able to cross state lines, conceal the Rosebud order even though he sought it, and keep the children for over three months while this matter was re-litigated in several different forums.

In a second example, the Standing Rock Sioux Tribal Court issued a custody order giving

custody of three children to the father in a divorce proceeding. The mother and the father were married at the time of conception and birth of the child. The mother crossed state lines and gave physical custody of the smallest child to a non-Indian, non-relative couple in St. Paul. The mother concealed the whereabouts of the child from the father for months. Upon discovering the child's whereabouts the father came to St. Paul to retrieve the child. The couple refused to give up the child to the father. The father next enlisted the aid of the sheriff's office in an attempt to retrieve the baby. The officer was uncertain how to proceed when faced with a custody order from tribal court and refused to act on the tribal court order. The couple had absolutely no custody rights to the child. The couple then filed a custody petition in Ramsey County. The father again sought the help of the same sheriff's office to retrieve the child and this particular officer helped the father regain physical custody of the child. The couple then filed for an Emergency Ex-Parte Custody Order in Ramsey County which was denied. At the first hearing on the Petition for Custody the Ramsey County Judge refused to recognize the tribal court custody order because it was not registered in Minnesota which is circular in reasoning but the result nonetheless. The Ramsey County Judge also granted temporary custody to the St. Paul couple. The father was forced to implead the couple in the tribal court custody matter. Only when the Tribal court asserted continuing jurisdiction over the child did the Ramsey County Court dismiss the couple's Petition for Custody. The Ramsey County Court never recognized the Tribal Court order. A settlement was reached by the parties and their attorney's. Meanwhile the child was separated from family for months. Non-recognition enabled a parent to flee with a child across state lines and conceal the child's whereabouts. Additionally, the only substantive issue the couple and the mother asserted was a question of paternity of the father. This issue was previously brought up and resolved in the divorce proceeding in tribal court wherein the mother fully participated. If Ramsey County continued this matter the court would have just re-litigated the same issue of paternity previously resolved by the tribal court. This matter was resolved with all parties participating in Tribal Court.

In a third example the county resisted transfer of a child protection case to tribal court because of distrust as to the application of Minnesota law in tribal court despite a full faith and credit law enacted under the tribal code. This example illustrates the hesitancy or reluctance to apply existing law despite clear laws guiding the state courts. Application of existing laws is still difficult in state courts. The problem is compounded with the lack of procedural rules. The Indian Child Welfare Act makes clear that tribal courts have exclusive jurisdiction over children who are domiciled on the reservation. Despite this clear statement of Federal law, a Hennepin County Court hesitated to transfer a child protection matter to tribal court because of existing perceptions by social services and Hennepin County attorneys the tribal court might not enforce Minnesota State Court orders in a companion criminal case. The hesitancy remained in spite of clear authority giving the State of Minnesota the ability to exercise criminal jurisdiction on the reservation. The children were the ones to suffer in this matter again. While this battle was fought in Hennepin County, the children were in shelter care and stranger care when relative care was available immediately for the children on the reservation. The case was eventually transferred to tribal court and the children immediately placed with family. However, because of the current lack of trust and understanding between the two courts the children were separated from family.

The fourth example shows where a State Court is willing to recognize a tribal court order

a case can still proceed for months without resolution. All parties hesitated to do anything until the court decided upon whether or not it had jurisdiction.. In the meantime, the child who should have been picked up and returned to the legal custodian was on the run. The Blackfeet Tribal Court in Montana issued a custody order giving custody to the grandmother of a teenage child. The Mother subsequently became involved in a Hennepin County child custody proceeding. The child was able to stay on run in a dangerous situation while the Hennepin County court confirmed with the Tribal Court the validity of the order. The child protection matter was dismissed months later in Hennepin County and the grandmother eventually regained custody of the child.

The fifth and final example shows the potential dangerous situations our Indian children are placed because of a lack of uniformity in enforcing tribal court orders. As case number two above shows, often it is dependant on which county you are in and which particular person you encounter which determines the outcome of enforcement of a tribal court order. Tribal court orders instructing law enforcement to pick up juveniles are particularly troublesome from an enforcement perspective. The child is usually a high risk youth suffering from a variety of problems. It has been our experience the success is greater in retrieving a high risk teenager nearer that particular reservation. The further the child runs from the reservation the less likely that the child will be retrieved. At times the outcome is dependant on whether there is some type of formal agreement worked out between the Tribe and that particular county. This is a time consuming and spotty resolution to locating high risk teenagers. Often our teenagers become involved in gangs, drug/alcohol use, violent living situations, and dangerous sexual activities during the periods they are on the run. Often, they are allowed to stay in these dangerous environments even though the social worker, family, court system, and law enforcement officers know the location of the child. However, with no enforcement mechanism in the state courts the children are often on run for months at a time usually until they become hospitalized or are picked up on an unrelated criminal matter.

The examples above are recent examples encountered by this agency. Many more examples exist. The examples are not unusual cases nor more complicated than other cases. These individuals qualified for our services. The parents in these examples where initially unable to hire an attorney to have these issues resolved. In many other cases parents are unable to hire an attorney to resolve these very complicated problems. It is unfortunate that resources play a part in enforcement issues and resolving dangerous situations for Indian children. The lack of co-operation and uniformity of enforcement creates real dangers for families which is wholly avoidable and can be greatly diminished by having a procedural rule in place.

Thank-you for the opportunity to comment. Tribal courts are a reality in Minnesota and their importance to Indian communities will continue into the future. As Tribes and families access their own judicial system to resolve internal familial issues, the problems encountered by the lack of enforcement and recognition procedures of tribal court orders and judgments in Minnesota courts will continue to grow and escalate in severity. We urge the Supreme Court to adopt the rule of procedure. We believe it would be unfortunate if the Supreme Court passed by this opportunity to enact a simple procedural rule to ensure uniform application of tribal court orders and judgements and a real tragedy occurred to an Indian child.

Sincerely,

Heidi A. Drobnick
Executive Director

Sondra Erickson
State Representative

District 17A
Kanabec, Mille Lacs
and Morrison Counties

Minnesota House of Representatives

COMMITTEES: EDUCATION POLICY; GOVERNMENT OPERATIONS AND VETERANS AFFAIRS POLICY; K-12 EDUCATION FINANCE; STATE GOVERNMENT FINANCE

October 14, 2002

The Honorable Kathleen A. Blatz
Chief Justice
Minnesota Supreme Court
c/o Frederick Grittner
Clerk of the Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul MN 55155

RE: Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments

I respectfully request that the Supreme Court deny the petition for adoption of a rule of procedure for the recognition of tribal court orders and judgments as recommended by the Supreme Court's Advisory Committee, until the matter has been presented to the Legislature for consideration.

Granting full faith and credit to tribal court orders and judgments is an issue that is substantive, not procedural; thus, it is an issue more properly entrusted to a legislative process that will allow for testimony, debate of the substantive issues and appropriate legislation that will meet the needs and concerns of tribal members.

Because we lack information on how tribal courts in Minnesota operate, I have grave concerns about whether or not these courts are independent courts. Tribal members have raised serious questions to me about whether their civil liberties and civil rights are protected by tribal courts. Moreover, I am concerned about the point at which jurisdiction of state courts ends and the jurisdiction of tribal courts begins.

Therefore, I again respectfully request that the Supreme Court deny this petition as recommended by the Supreme Court's Advisory Committee, until the matter has been presented to the Legislature.

Sincerely yours,

Sondra Erickson
State Representative District 17A

1947 Ridge Road, Princeton, Minnesota 55371 (763) 389-4498
State Office Building, 100 Constitution Ave., St. Paul, Minnesota 55155-1298 (651) 296-6746
FAX (651) 296-3949 TTY (651) 296-9896 Email: rep.sondra.erickson@house.leg.state.mn.us

Minnesota Department of **Human Services**

October 15, 2002

The Honorable Kathleen Blatz
Minnesota Supreme Court
25 Constitution Avenue
St. Paul, MN 55155

RE: Proposed rule on the recognition of tribal court procedures

Dear Justice Blatz:

The purpose of this letter is to inform you that the Minnesota Department of Human Services, Child Support Enforcement Division supports the effort to establish a Supreme Court rule that will clarify the recognition of tribal court procedures. While federal law exists in this area for the purpose of recognizing tribal orders in the area of child support, the existence of such a rule in the state courts will ensure that the law is familiar to private attorneys as well as the state courts. This should lead to more efficient and equitable legal proceedings for parents and more timely support for children. Furthermore, I understand that some tribes are currently considering establishing their tribal-based child support programs. The promulgation of this proposed rule would enhance the ability of such tribal programs to enforce tribal court support orders.

Very truly yours,

Wayland Campbell, Director
Child Support Enforcement Division

MINNESOTA TRIBAL COURT/STATE COURT FORUM

October 24, 2002

OFFICE APPELLATE COURTS

OCT 2 4 2002

FILED

Frederick Grittner
Clerk of Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155

Re: Public Hearing on the Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments

Dear Mr. Grittner:

Enclosed with this letter is a communication from the Chairman of the Shakopee Mdewakanton Sioux (Dakota) Community regarding Sheldon Peters Wolfchild's short film entitled "The New Buffalo," which has apparently been provided to the Justices of the Supreme Court.

All of those who are familiar with matters of Tribal identity have indicated very clearly that the film cannot be viewed in isolation, but rather must be given an historical and factual context. The attached letter from the government of the Shakopee Mdewakanton Sioux (Dakota) Community provides that context and history, so that the inevitable misimpressions from viewing the film in isolation can be avoided.

I have enclosed 14 copies of the letter and formally request that it be made part of the record in the Supreme Court's review of the Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments.

Very truly yours,

Honorable Robert H. Schumacher
Chair, State Court Committee

cok

enclosures

Shakopee Mdewakanton Sioux Community

2330 SIOUX TRAIL NW • PRIOR LAKE, MINNESOTA 55372
TRIBAL OFFICE: 952•445-8900 • FAX: 952•445-8906

September 18, 2002

Honorable Gil Gutknecht
United States House of Representatives
425 Cannon House Office Building
Washington, D.C. 20515

Dear Representative Gutknecht:

We have now had the opportunity to carefully review a copy of your letter of September 4, 2002, to the Minnesota Congressional Delegation and the short film that apparently prompted that letter. I regret to inform you that you have been provided much misinformation about the Shakopee Mdewakanton Sioux (Dakota) Community and its laws. The short film produced by Mr. Sheldon Peters Wolfchild fails to properly distinguish the tribal and federal laws that recognize the unique character of membership in an individual federally recognized tribe. We thought that it might be helpful for you and the rest of the Minnesota Congressional Delegation to hear the Tribe's story.

The Mdewakanton are one of the original seven bands of the Sioux or Dakota Nation. People of Mdewakanton descent reside on and are enrolled in at least eight different Sioux or Dakota Reservations located in Nebraska, South Dakota, Montana, and Minnesota. Each of the individual tribes on those reservations are comprised, at least in part, of tribal members of Mdewakanton origin but each is also a separate federally recognized tribe. A shared Mdewakanton origin and history does not dilute the separate sovereign status of each tribe. Many people of Mdewakanton descent are able to meet the minimal eligibility requirements of one or more of the eight tribes noted above. But enrollment is not automatic: each of the tribes applies its own enrollment criteria to determine if an eligible applicant should become a member of that tribe. No one can be a member of two tribes, regardless of his or her descent or eligibility. Additionally, eligibility for receipt of tribal services, and any per capita payments, is a determination made by each tribe pursuant to its own laws.

The Shakopee Mdewakanton Sioux (Dakota) Tribe was formally recognized in November of 1969 when the Constitution of the tribe was approved by the federal government. The original members of the tribe were those persons of Mdewakanton descent who were living at the Tribe's Reservation on the date that the federal government held the secretarial election for the Tribe's Constitution. Please note that none of the persons portrayed in the short film were part of that effort in 1969 to obtain federal recognition at the Shakopee Community, nor were any of them residents of our reservation at that time, or at any other time.

The Constitution adopted by the original tribal members included the following enrollment provisions (unchanged over the years) under which one could seek to obtain membership in the tribe:

1. Article II, Section 1(a), the Base Roll includes only the original 33 charter members of the Tribe;

2. Article II, Section 1(b), includes the children of the enrolled members with at least one-quarter Mdewakanton Sioux blood; and

3. Article II, Section 1(c), includes Mdewakanton Sioux descendants of at least one-quarter blood degree who could trace their ancestry to the May 20, 1886 Roll, provided they are found qualified by the governing body and provided they are not enrolled in another tribe.

The Indian individuals appearing in the film apparently decided to leave their own tribe or tribes of origin and seek enrollment in the Shakopee Tribe under the Article II, Section 1(c) provision listed above. This is so because it is obvious that they could not possibly seek to apply as original charter members of the Tribe (for they were not), or as children of enrolled members of the Tribe (for they are not). They clearly do not qualify under Sections 1(a) and 1(b).

Under Article II, Section 1(c), the original drafters of the Shakopee Constitution back in 1969 determined that blood quantum as listed in the May 20, 1886 Roll, was necessary and helpful, but not solely determinative of enrollment eligibility. Thus, the Tribe's charter members reserved for themselves the responsibility of determining whether an applicant was otherwise qualified. Such a determination on the part of the General Council could include many elements, such as (1) the extent of an applicant's ties to the Shakopee tribal community; (2) whether an applicant had any relatives enrolled in the Shakopee Tribe; (3) whether an applicant had ever resided on or near the Tribe's Reservation; or (4) whether an applicant was seeking enrollment within the Shakopee Tribe merely to obtain a better benefits packet or to obtain a higher per capita payment. Although the respective values that apply to such determinations are different as between the Shakopee Tribe and the United States of America, each government determines for itself who should be a citizen of that government. And just as the United States follows its Constitution, so does the governing body of the Shakopee Tribe exercise its Constitutional authority carefully and judiciously.

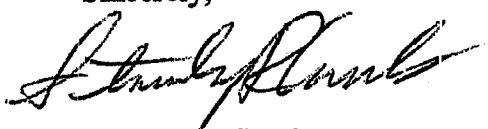
The fourth part of the Tribe's Constitution that speaks to possible membership in the Tribe provides at Article II, Section 2 that the governing body has the power to pass an adoption law. The Tribe complied with the Constitution and passed an Adoption Ordinance on May 13, 1997. That Adoption Ordinance received final approval on August 21, 1997, and is no longer subject to review by the Interior Department.

One other matter that requires clarification of your statements to the Minnesota Congressional Delegation is that of the authority of the Secretary of Interior to take any action regarding the membership of Shakopee Mdewakanton Sioux (Dakota) Community. Federal law provides the Secretary of Interior with only limited authority to determine tribal membership for federal purposes, and then only when (1) it administers a tribally requested secretarial election to adopt or amend the Tribe's Constitution (25 USC 476); or (2) when a membership enumeration is necessary in a docket matter providing for the award of federally appropriated judgment funds through the United States Claims Court. Each of those federal purposes is clearly distinguishable from membership determinations for tribal purposes. All other federal laws that reference membership, such as the Indian Child Welfare Act, the Indian Self-Determination and Education Assistance Act and the Indian Gaming Regulatory Act do not provide any authority for the Secretary to make membership determinations: each Act recognizes the tribal right to make membership determinations. Because the federal government does not make tribal membership determinations for strictly tribal purposes, the rules governing enrollment among the 567 federally recognized tribes differ, sometimes markedly.

In conclusion, we believe that it is wholly unnecessary for your office, or for anyone else, to urge the BIA to resolve or correct any difficult enrollment issues relating to the Shakopee Tribe. The individuals participating in the short film are well-respected, long-time Mdewakanton tribal members from other federally recognized Indian Tribes. While it may be that they are able to trace their lineage to the May 20, 1886 Roll, as mentioned above, that factor is not by itself determinative of enrollment eligibility under the requirements of the Tribe's 1969 Constitution. They here seek to abandon their enrollment in their respective ancestral tribes and to utilize the influence of your office to force themselves onto the Rolls of the Shakopee Tribe. As a final note, we are confident that you also recognize that the short film's characterization of the Tribe's constitutional enrollment process as cultural genocide or as modern day calvary is unfortunate and unnecessary invective in these communications. It should be remembered that many Mdewakanton tribal members, perhaps several thousand, are proudly enrolled in at least eight separate federally recognized tribes.

We hope that this information is helpful and we would be more than happy to meet with you and/or your staff to discuss these matters in more detail if you believe that it would be beneficial.

Sincerely,



Stanley R. Crooks
Tribal Chairman

cc: Minnesota Congressional Delegation

DISTRICT COURT OF MINNESOTA
NINTH JUDICIAL DISTRICT

HONORABLE DENNIS J. MURPHY
CHIEF JUDGE

Pennington County Courthouse
1st Street and Main Avenue
P.O. Box 366
Thief River Falls, Minnesota 56701-0366
Phone: (218) 681-0905
FAX: (218) 681-0907
E-mail: dennis.murphy@courts.state.mn.us

October 15, 2002

Mr. Fred Grittner
Clerk of Appellate Courts
305 Judicial Center
25 Martin Luther King Ave.
St. Paul, MN 55155

Dear Mr. Grittner:

As chairman of the Administration Committee of the Conference of Chief Judges I wish to appear before the Supreme Court to state the support of the conference of the Full Faith and Credit Proposal.

Very truly yours

Dennis J. Murphy
Chairman of Administration Committee
Conference of Chief Judges

MID-MINNESOTA LEGAL ASSISTANCE
430 FIRST AVENUE NORTH, SUITE 300
MINNEAPOLIS, MN 55401-1780
TELEPHONE: (612) 332-1441
FACSIMILE: (612) 334-5755

October 26, 2002

Frederick K. Grittner
Clerk of Appellate Courts
25 Constitution Avenue
St. Paul, MN 55155

RE: Petition To Grant Full Faith And Credit To Decisions Of Tribal Courts In Minnesota

Dear Mr. Grittner:

I regret that circumstances prevent my attending the hearing on the Tribal Court Full Faith and Credit Petition on October 29. I ask that this letter be made available to the Court in lieu of my personal apearance.

I support the petition. A significant portion of the opposition appears to be anecdotal in nature. Based on over 30 years' practice in Minnesota, I could tell similar anecdotes about a number of Minnesota's district courts. Such anecdotes do not, I believe, establish a basis for denying recognition to Tribal Court decisions. The proper question to ask is whether there is a pattern of defective decision-making which justifies the conclusion that, as a system, the Tribal Courts should essentially be disregarded as legitimate decision-making bodies. No such pattern has been established to my knowledge.

The proposed rule, appropriately, provides an opportunity for a litigant to demonstrate to a state court judge that there is a defect in a Tribal Court decision so as to justify denying it full faith and credit. That is sufficient protection against the occasional error.

As the director of a legal services program serving a number of rural counties including reservations with tribal courts, one of my ongoing concerns is the amount of time lawyers must spend traveling to distant courts. Adoption of the proposed rule will improve the efficiency of the judicial system as a whole, cutting down on the duplication of effort required to obtain and enforce a judicial determination.

A reading of the credentials of the Tribal Court trial judges reveals that they compare well with state district court judges. Some of the finest law schools, in and out of Minnesota, are represented on the Tribal Court benches.

I believe it is significant that this proposal was the result of long, hard work by lawyers and judges closest to the problems the proposal seeks to address. I believe their insights should be given significant respect by the court as it weighs the proposal. In my experience, the best solutions to

problems usually come from those most familiar with the issue on a daily basis. I believe that is the case here.

Thank you for your consideration.

Very truly yours,

MID-MINNESOTA LEGAL ASSISTANCE

Jeremy Lane
Executive Director

JL:nb

THE SUPREME COURT OF MINNESOTA
MINNESOTA JUDICIAL CENTER
25 REV. DR. MARTIN LUTHER KING BOULEVARD
SAINT PAUL, MINNESOTA 55155

Bridget Gernander, Project Specialist
Court Services Division
State Court Administrator's Office

(651) 284-0248
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October 11, 2002

Mr. Fred Grittner
Clerk of the Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

RE: Comment on the Tribal Court/State Court Forum Petition

Dear Mr. Grittner:

The Implementation Committee on Multicultural Diversity and Racial Fairness in the Courts (Implementation Committee) has reviewed and considered the Tribal Court/State Court Forum's Amended Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments, and submits fourteen copies of this letter for consideration at the October 29, 2002 Supreme Court hearing on the Petition. The committee does not wish to make an oral presentation at the hearing, but does wish to express its support in writing for adoption of the Tribal Court/State Court Forum's Amended Petition.

The Minnesota Supreme Court Task Force on Racial Bias in the Judicial System released its report in May 1993. The Implementation Committee was created at that time to put the report recommendations into action, and has been working towards that goal for almost 10 years. Several recommendations in the Race Bias Report touch on the same issues raised by the Tribal Court/State Court Forum's Petition. The Race Bias Report found that tribal courts were often not recognized in court proceedings and that there was a general ignorance in the legal community about issues of tribal court jurisdiction, sovereignty and autonomy.[1] The Implementation Committee supports adoption of the Tribal Court/State Court Forum's Amended Petition because it would serve to educate judges and attorneys about the status of tribal courts as courts of competent jurisdiction, addressing a problem recognized in the 1993 Race Bias Report that continues to this day.

The 1993 Race Bias Report also specifically addressed the importance of recognizing tribal court jurisdiction in the area of child protection matters. The report outlines several recommendations regarding the Indian Child Welfare Act (ICWA), including training of judges, attorneys and Guardians

[1] Minnesota Supreme Court Task Force on Racial Bias in the Judicial System, Final Report 117, 122 (May 1993).

ad Litem on the provisions of ICWA and requiring the Department of Human Services to notify Native Americans of their right to have the tribe intervene and the right to have the matter brought to tribal court.[2] The Tribal Court/State Court Forum's Amended Petition provides examples of how failure to recognize a tribal court order has caused potentially dangerous situations for Native American children and teenagers.[3] No Native American child should be caught in limbo while a court order is questioned simply because it originated in a tribal court, particularly when Congress has mandated that such orders be given full faith and credit.[4] The Implementation Committee believes that adoption of the Tribal Court/State Court Forum's Amended Petition would improve the relationship between the state courts and tribal courts, and this improved relationship would increase protection and services for Native American children and teenagers.

In conclusion, the Implementation Committee voted overwhelmingly to support the Tribal Court/State Court Forum's Amended Petition because adoption of the proposed rule would move the judicial system forward in implementing the recommendations of the Minnesota Supreme Court Task Force on Racial Bias in the Judicial System.[5] The Implementation Committee believes that adoption of the proposed rule would serve to educate judges and attorneys on the status of tribal courts as courts of competent jurisdiction and would improve the relationship between the state courts and the tribal courts, thereby increasing protection for Native American children. These issues were clearly stated in the 1993 Race Bias Report and continue to this day. As a state with a significant Native American population, Minnesota needs to have a court rule providing the procedure for recognizing tribal court judgments.

Respectfully submitted on Behalf of the Implementation Committee on Multicultural Diversity and Racial Fairness in the Courts,

Bridget C. Gernander

Bridget C. Gernander
Implementation Committee Staff
120 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Boulevard
St. Paul, MN 55155
(651) 284-0248

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[2] Id. at 95-96.

[3] Tribal Court State Court Forum, Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments 4-5 (April 11, 2002).

[4] See 25 U.S.C. § 1911(d).

[5] Justice Page abstained from voting in this matter, and Justice Paul Anderson was not present at the Implementation Committee meeting at which the vote occurred.

UNIVERSITY OF MINNESOTA

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November 1, 2002

Frederick Grittner
Clerk of Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155

Re: Minnesota Supreme Court Hearing on the Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Judgments; Supplemental Comments.

Dear Mr. Grittner:

Following the hearing on Tuesday, October 29, 2002, I wish to supplement my remarks. In the paragraphs below, I seek to address general concerns raised by the Supreme Court at the hearing and, in particular, a question by Justice Anderson that was likely prompted by an omission in the petition for adoption of the rule.

One recent state supreme court to have faced the question of whether to adopt a broad rule recognizing tribal court judgments is the Supreme Court of Arizona.[1] The Arizona court adopted a rule that is substantially similar to the proposed Minnesota rule in the following key respects: First, it is not limited to a narrow area of particular subject matter, but extends broadly to "any final written judgment, decree or order of a tribal court[.]"[2] Second, it imposes the burden of objecting and the burden of proof on the party opposing recognition.[3] Finally, if the state court finds that the tribal court lacked jurisdiction or failed to provide due process, the state court is prohibited from recognizing the tribal court judgment.[4] This last provision insures independent and objective state court review of the tribal court judgment to insure that the tribal judgment complies with federal due process.

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[1]The chart attached to the petition in this matter, which was no doubt completed at an earlier time during this lengthy undertaking, is incomplete. The chart notes an Arizona rule adopted in 1994 that is limited to involuntary commitment orders, but it omits Arizona's more recent and more relevant action. In 2000, the Arizona Supreme Court adopted a broad rule that applies to all tribal court judgments, irrespective of subject matter. See Arizona Rules of Procedure for the Recognition of Tribal Court Civil Judgments, Rules 1-6, 17B Ariz. Rev. Stat. Ann. (2002).

[2]Arizona Rules of Procedure for the Recognition of Tribal Court Civil Judgments, Rule 2 (definitions).

[3]Id. at Rule 4 (burden of objecting) and 5(c) (burden of proof following objection).

[4]Id. at Rule 5(c)(1) and (2).

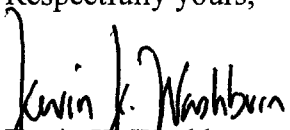
In adopting this rule, the Arizona court therefore implicitly rejected the alternatives of demurring to uncertain legislative action or awaiting the development of common law.

In contrast, in South Dakota, the tribal court judgment recognition rule originally developed by common law, but ultimately yielded to legislation.[5] Legislation was necessary there apparently because the legislature wished to impose a substantive change in the burden of proof that developed under common law principles of comity. In other words, the South Dakota Supreme Court's leadership spurred public debate on the issue.

The proposed rule in Minnesota is substantially similar to the Arizona rule. It is a cautious approach in dealing with a thorny problem that is sure to arise in the future. For ready reference, the Arizona rule and the South Dakota law are appended below.

Thank you for your consideration.

Respectfully yours,



Kevin K. Washburn
Associate Professor
(612) 624-3869

Attachment:

Arizona Rules of Procedure for the Recognition of Tribal Court Civil Judgments;
South Dakota Codified Law on Recognition of Tribal Court Order or Judgment in State Courts.

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[5]Compare Mexican v. Circle Bear, 370 N.W.2d 737 (S.D. 1985) (applying regular civil burden of proof in comity analysis as to whether to recognize tribal court judgment) with S.D. Codified Laws § 1-1-25 (Michie 1992) (requiring clear and convincing evidence in such comity analysis). See also Red Fox v. Hettich, 484 N.W.2d. 638, 641 n.2 (S.D. 1993) (explaining that the South Dakota Legislature rejected the Supreme Court's approach in Mexican v. Circle Bear and enacted "more restrictive" requirements for comity toward tribal court judgments).

ATTACHMENT

Arizona Rules of Procedure for the Recognition of Tribal Court Civil Judgments
17B Ariz. Rev. Stat. Ann. (2002) (adopted May 31, 2000, effective Dec.1, 2000)

Rule 1. Applicability

These rules shall govern the procedures for recognition and enforcement by the superior courts of the State of Arizona of trial court civil judgments of any federally recognized Indian tribe. Determinations regarding recognition and enforcement of a tribal judgment pursuant to these rules shall have no effect upon the independent authority of that tribal judgment. To the extent that they are not inconsistent with these rules, the Arizona Rules of Civil Procedure shall apply.

These rules do not apply to tribal judgments for which federal law requires that states grant full faith and credit recognition or for which state law mandates different treatment.

Nothing in these rules shall be deemed or construed to expand or limit the jurisdiction either of the State of Arizona or any Indian tribe.

Rule 2. Definitions

As used throughout these rules:

(a) "Tribal court" means any court or other tribunal of any federally recognized Indian nation, tribe, pueblo, band, or Alaska Native village, duly established under tribal or federal law, including courts of Indian Offenses organized pursuant to Title 25, Part 11 of the Code of Federal Regulations.

(b) "Tribal judgment" means any final written judgment, decree or order of a tribal court duly authenticated in accordance with the laws and procedures of the tribe or tribal court.

Rule 3. Filing Procedures

(a) Documents to be Filed. A copy of any tribal judgment may be filed in the office of the clerk of the superior court in any county of this state.

(b) Notice of Filing. The person filing the tribal judgment shall make and file with the clerk of the superior court an affidavit setting forth the name and last known address of the party seeking enforcement and the responding party. Promptly upon the filing of the tribal judgment and the affidavit, the enforcing party shall serve upon the responding party a notice of filing of the tribal judgment, together with a copy of the judgment, in accordance with Rule 4.1, Arizona Rules of Civil Procedure, or shall mail by certified mail, return receipt requested, the notice of filing and a copy of the judgment to the responding party at the last known address. If the responding party is the State of Arizona, or any of its officers, employees, departments, agencies, boards, or commissions, the notice of filing shall be mailed to the Attorney General's Office. The enforcing party shall file proof of service or mailing with the clerk. The notice of filing

shall include the name and address of the enforcing party and the enforcing party's attorney, if any, and shall include the text of Rules 4 and 5(a) and (b).

Rule 4. Responses

Any objection to the enforcement of a tribal judgment shall be filed within twenty (20) days of service or of receipt of the mailing of the notice of filing the judgment, or within twenty-five (25) days of the date of mailing, whichever last occurs. If an objection is filed within this time period, the superior court may, in its discretion, set a time period for replies and/or set the matter for hearing.

Rule 5. Recognition of Tribal Judgments

(a) Enforcement of Tribal Judgment. A tribal judgment, unless objected to in accordance with Rule 4, shall be recognized and enforced by the courts of this state to the same extent and shall have the same effect as any judgment, order, or decree of a court of this state.

(b) Certification by Clerk of Court. If no objections are timely filed, the clerk shall issue a certification that no objections were timely filed, and the tribal judgment shall be enforceable in the same manner as if issued by the superior court.

(c) Mandatory Considerations Following Objection. A tribal judgment shall not be recognized and enforced if the objecting party demonstrates to the court at least one of the following:

1. The trial court did not have personal or subject matter jurisdiction.
2. The defendant was not afforded due process.

(d) Discretionary Considerations Following Objection. The superior court may, in its discretion, recognize and enforce or decline to recognize and enforce a tribal judgment on equitable grounds, including:

1. The tribal judgment was obtained by extrinsic fraud.
2. The tribal judgment conflicts with another final judgment that is entitled to recognition.
3. The tribal judgment is inconsistent with the parties' contractual choice of forum.
4. Recognition of the tribal judgment or the cause of action upon which it is based is against fundamental public policy of the United States or the State of Arizona.

Rule 6. Stay

If the objecting party demonstrates to the superior court that an appeal from the tribal judgment is pending or will be taken, or that a stay of execution has been granted, the court shall stay enforcement of the tribal judgment until the appeal is concluded, the time for appeal expires, or the stay of execution expires or is vacated.

South Dakota Statute on Recognition of Tribal Court Judgments
S.D. Codified Laws § 1-1-25 (Michie 1992)

No order or judgment of a tribal court in the state of South Dakota may be recognized as a matter of comity in the state courts of South Dakota, except under the following terms and conditions:

(1) Before a state court may consider recognizing a tribal court order or judgment the party seeking recognition shall establish by clear and convincing evidence that:

(a) The tribal court had jurisdiction over both the subject matter and the parties;

(b) The order or judgment was not fraudulently obtained;

(c) The order or judgment was obtained by a process that assures the requisites of an impartial administration of justice including but not limited to due notice and a hearing;

(d) The order or judgment complies with the laws, ordinances and regulations of the jurisdiction from which it was obtained; and

(e) The order or judgment does not contravene the public policy of the state of South Dakota.

(2) If a court is satisfied that all of the foregoing conditions exist, the court may recognize the tribal court order or judgment in any of the following circumstances:

(a) In any child custody or domestic relations case; or

(b) In any case in which the jurisdiction issuing the order or judgment also grants comity to orders and judgments of the South Dakota courts; or

(c) In other cases if exceptional circumstances warrant it; or

(d) Any order required or authorized to be recognized pursuant to 25 U.S.C., § 1911(d) or 25 U.S.C., § 1919.

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November 4, 2002

Frederick Grittner
Clerk of Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Re: Public Hearing on the Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments

Dear Mr. Grittner:

I attended the Supreme Court's hearing on this proposed rule on October 29, 2002, and submit this writing in response to Chief Justice Blatz's invitation for supplemental written material.

A couple of the speakers opposed to the proposed rule suggested a lack of support for the proposed rule both among members of the tribal court bars and among Indian people. As an enrolled member of the Oglala Sioux Tribe and an attorney who has practiced in three of the tribal courts in Minnesota, I write to dispel that myth.

I have practiced in the courts of the Shakopee Mdewakanton Sioux (Dakota) Community, the Mille Lacs Band of Ojibwe, and the Grand Portage Band of Chippewa. I also served as the Court Administrator for the courts of the Prairie Island Indian Community and the Lower Sioux Community for several years and observed hundreds of proceedings in those courts. Each of these courts has established rules of procedure,[1] law-trained judges,[2] and decisions that are available to the public.[3] Each court system also has its own appellate

[1] The Mille Lacs Band of Ojibwe has adopted the Federal Rules of Procedure to govern its proceedings. The rules of admission to practice and of procedure for many of the Tribal Courts in Minnesota can be found on the Minnesota American Indian Bar Association's web site, at www.maiba.org. Contrary to at least one speaker's claim, one does not generally have to be a member of a tribe to become licensed to practice in that tribe's court system. In all but the Red Lake Tribal Court (and the Court should be aware that because the Red Lake Tribal Court system does not currently recognize Minnesota's judgments and orders, it will not be affected by the proposed rule), the major requirement to become licensed to practice is to be licensed to practice in any state.

[2] The trial court judge for the Mille Lacs Band is required to be law-trained, but the Justices on its Court of Appeals are not (though they are served by a law-trained judicial clerk).

[3] The Shakopee Mdewakanton Sioux (Dakota) Community Tribal Court has published its own decisions and a digest, copies of which were given to the Chief Justice in 1999, and which are available through the Tribal Court and in the libraries of at least three of the four law schools. Decisions of all of the

(Footnote continued on next page.)

system, and I can tell you from personal experience that the appellate courts do not simply function as rubber stamps for the trial courts.

Although it seemed few of those who spoke against the proposed rule at the Court's hearing last week had *any* actual experience in a tribal court, those who professed any experience seemed to focus on the alleged lack of independence of the tribal courts from the governments they served. In my experience in Minnesota's tribal courts, I have never seen evidence, directly or indirectly, that a tribal government interfered with a court's independence or influenced a court's decisions, and this includes my experience representing tribal governments in their own tribal courts.

What I have seen—and what many of the speakers opposed to the proposed rule seemed to really be complaining about—is that tribal leaders do play a role in selecting tribal court judges. This is no different than in state or federal systems, however, where governors and presidents play large roles in selecting judges for their government's courts, even when those judges will have to rule on cases in which the government is a party. Tribal courts should not be condemned (or their decisions refused to be recognized) simply because their judges are selected by an almost universal system.

In short, as someone who has practiced in and observed proceedings in five of the eleven tribal courts that would be affected by the proposed rule, I have seen nothing to back up the claims any of the speakers who purported to have personal knowledge about these tribal courts. In evaluating the proposed rule, the Court must be sure to recognize much of the opposition for what it is: *allegations of disgruntled litigants* and *accusations by tribal political dissenters.*

As litigation in Minnesota's tribal courts has increased in recent years, tribal courts have come to play an ever-more-important role in the administration of justice in the state. In fact, this Court has ruled that when examining whether a state court should exercise concurrent jurisdiction over a matter within a tribal court's jurisdiction, the guiding principle is deference. Gavle v. Little Six Inc., 555 N.W.2d 284, 291 (Minn. 1996). Adopting the proposed rule will not only protect Indian children, but will fulfill that principle of deference and clarify that litigants need not re-litigate civil matters already decided in tribal courts just to have judgments enforced off the reservations.

Sincerely,

Vanya S. Hogen

(Footnote continued from previous page.)
tribal courts, except those designated as confidential (usually juvenile or children's matters) are available through their clerks' offices.

MINNESOTA TRIBAL COURT/STATE COURT FORUM

November 5, 2002

Frederick Grittner
Clerk of Appellate Courts
305 Judicial Center
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St. Paul, Minnesota 55155

Re: Post-Hearing Submission on Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments

Dear Mr. Grittner:

Members of the Minnesota Tribal Court/State Court Forum ("Forum") appreciated the opportunity to both participate in and view the hearing that this Court provided on October 29, 2002, regarding the Petition that was submitted to the Court on April11, 2002, requesting adoption of a rule of procedure for the recognition of tribal court orders and judgments. Because the Chief Justice provided an opportunity for further comment, the Forum submits the following for further consideration by the Court.

- **RULE OR STATUTE**

  The Court raised several questions regarding the need for a rule instead of a statute enacted by the legislature, presumably following up on the advice of the Minnesota Supreme Court Advisory Committee on General Rules of Practice that the proposed rule was of a substantive rather than procedural nature.

  The proposed rule recognizes those elements of comity that typically apply when considering enforcement of a foreign judgment. It contains nothing that would affect a litigant's substantive rights. A statute is required where substantive rights are affected, such as shifting the burden of proof onto a party seeking recognition. S.D.C.L. § 1-1-25(1) (The parties seeking recognition shall establish [the requirements of comity] by clear and convincing

evidence.) The proposed rule recognizes the burden at common law that is customarily placed on a party objecting to enforcement.

Two states have spoken both legislatively and by rule regarding enforcement of tribal court judgments:

NORTH DAKOTA
1995-court rule - N.D.R.Ct. 7.2 (1995).
1995-legislation - N.D. Cent. Code § 27-01-09 (1995).

OKLAHOMA
1994-court rule - Okl. St. Ch. 2, App., Rule 30 (1995).
1994-legislation - Okl. Stat. § 728 (1995).

Three states currently have spoken only by rule:

ARIZONA
2000-court rule - Ariz. R. Proc. Tribal Ct. Civ. Judgments 1-6 (2000).

WASHINGTON
1995-court rule - Wash. R. Super. Ct. Civ. C.R. Rule 82.5(c) (1995).

MICHIGAN
1996-court rule - M.C.R. 2.615 (1994).

Four states have spoken only through legislation:

NORTH CAROLINA
2001-legislation - N.C. Gen. Stat. § 1E-1 (2001).

SOUTH DAKOTA
1986-legislation - S.D.C.L. §1-1-25 (1986).

WISCONSIN
1991-legislation - Wis. Stat. §806.245 (1991).

WYOMING
1994-legislation - Wyo. Stat. §5-1-111 (1994).

Four states have spoken to this issue by Supreme Court decision - **NEW MEXICO, IDAHO, MONTANA** and **OREGON.**

- **DUE PROCESS AND PROVISION OF COUNSEL**

Justice Paul Anderson asked several times for a clarification of the meaning of *minimal due process*. It is not clear from what source that concern arose, but the proposed rule contains no such standard. The requirement is ". . . a process that afforded fair notice and a fair hearing compatible with due process of law." This is a higher level than the United States Supreme Court imposed in its requirements for the application of comity in Hilton v. Guyot, 159 U.S. 113 (1895) (the foreign decree must have been rendered by its system of law reasonably assuring the requisites of an impartial administration - - due notice and a hearing). There is no conceivable justification for characterizing the due process provision of the proposed rule as "minimal," or implying that it is in any way deficient.

The Court also asked whether a tribal court would be required to provide counsel to litigants who could not obtain their own counsel. We must keep in mind that the proposed rule only speaks to civil matters and explicitly excludes criminal matters from its application. However, even if the proposed rule were applicable to criminal matters, the Indian Civil Rights Act specifically excludes a requirement for tribes to provide assigned counsel. *See*, 25 U.S.C. § 1302(6).

- **MANDATORY COMITY**

Counsel for the Minnesota Supreme Court Advisory Committee on General Rules of Practice has suggested to the Court that the effect of the proposed rule will make comity mandatory within the State of Minnesota. The Forum has already questioned the accuracy of that characterization in its October 15, 2002, submission to the Court. It is true that recognition and enforcement pursuant to comity is voluntary and discretionary because an enforcing country or state is not bound to enforce a foreign nation's or state's judicial orders and laws. However, the United States Supreme Court set forth four requirements for the application of comity in Hilton v. Guyot, *supra*. We see little or no difference between the requirement set forth by the United States Supreme Court there and the proposal before this Court that would require certain considerations for a comity enforcement decision by a trial court in Minnesota.

- **COMMON LAW DEVELOPMENT**

  Justice Blatz asked why an issue of such importance has not been presented to the Court to date. There are several very clear reasons why this has not happened. In emergent situations, it would be next to impossible to obtain emergency review by this Court to ensure the safety of a baby born with cocaine in its system and on the verge of being released to its addicted parent or parents. Additionally, when a tribal court issues an order that needs recognition and enforcement in state court, the tribal court is not a party to that recognition and enforcement action and could not appeal such a matter to this Court. If a party is not solvent enough to present an appeal to this Court, he or she is simply left without resolution.

Another obvious reason why it is most appropriate for this Court to address the recognition and enforcement difficulty, rather than the legislature, is the simple fact that it is a proper communication between governments for courts to find resolution to such problems among themselves. Such was the understanding of the judges participating in the cooperative effort that produced the proposed rule, as well as the Conference of Chief Judges and the Board of Governors of the Minnesota State Bar. We would note that the proposed rule was approved by those two bodies in its present form, not in a form that would exclude all but juvenile and family matters.

All of the substantive law necessary to allow for recognition and enforcement of tribal court orders in the State of Minnesota currently exists: this proposed rule would provide the necessary procedure so that all of those laws are uniformly applied throughout the State.

We again ask that the Court approve the proposed rule.

RESPECTFULLY SUBMITTED,

MINNESOTA TRIBAL COURT/STATE COURT FORUM

HONORABLE HENRY M. BUFFALO, JR.
Chair, Minnesota Tribal Court Association

HONORABLE ROBERT H. SCHUMACHER
Chair, State Court Committee

State of Minnesota in Supreme Court,
CX-89-1863,
re Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments

Submitted herewith is a rough draft of remarks I was going to make at the October 29, 2002, if given the chance. I was not one of the speakers chosen to testify but William Lawrence and Clara Niiska attempted to yield some of their time so that I could speak. However, Frederick Grittner, Clerk of Appellate Courts, would not allow Mr. Lawrence or Ms. Niiska to yield to me.

In addition to the draft of my remarks I am also enclosing a letter dated June 20, 2000, that I had sent to the Lower Sioux Community Council expressing my dismay with their actions. Although I did not receive a direct response from the council that they received my letter, a letter (copy enclosed) from attorney James Schoessler, addresses my concerns. Copies of the first two pages of said letter were dispersed to those of us who attended a meeting In July, 2000. Since we did not receive the entire letter from the council, we inquired as to why and were told that the remainder was about another matter pertaining to "dogs." We could receive no further information from the council.

As I wrote in my petition, I felt that it was because of my outspoken criticism of the council's actions that I was removed as a "qualified member." This is just one example of the capricious and arbitrary actions taken by the tribal council, aided and abetted by the tribal attorneys who are petitioning for adoption of a Rule of Procedure for Recognition of Tribal Court Orders and Judgments.

I feel my reasons for opposing the adoption of a Rule of Procedure for Recognition of Tribal Court Orders and Judgments are compelling, and I hope the State of Minnesota in Supreme Court will review my petition as submitted, along with the enclosed evidence.

Thank You,

Maxine V. Eidsvig

Maxine V. Eidsvig

5625 Xerxes Ave. So. #112
Minneapolis, MN 55410
Tel: 612-929-4638

My name is Maxine Eidsvig. I would like to thank Bill Lawrence and Clara Niiska for yielding some of their time to me. Since I have submitted written petitions to the Court, I will try not to go into detail about the points I have already addressed. I am an enrolled member of the Lower Sioux Indian Community. Lower Sioux has approximately 900 enrolled members, adults and minors. Some 300-plus are adults (18 years and over) receiving per capita. There are a few members who have not returned and the rest of the population are children under 18 years of age. I moved back to the community area in 1991, nearly two years after I had retired from my position as a payroll supervisor for the U.S. Postal Service. I decided to move back, not only to take advantage of the per capita payments to members from casino profits to supplement my annuity but also because this is where I spent my formative years. I remember the community as a wonderful place to grow up. We were children of the Depression and of World War II, both events which left lasting impressions on all of us. I believe we were molded by those events just as all American youth were. Perhaps it is why we grew up to be the people we were even while as American Indians we were denied certain rights and privileges.

One of those privileges was education. I graduated from the Morton Public School in 1945, the only Indian student in my class. I would have liked to have gone on to college after graduation but that privilege was not available to me at that time, for various reasons.

In 1995 at the age of 68, I finally got the opportunity to go for that degree that had eluded me for 50 years. I received my Bachelor of Arts degree from the University of Minnesota on May 12, 2001, at the age of 73.

I was required to return to the community within 60 days after graduation, based on the rules of the Membership Privilege and Gaming Revenue Allocation Ordinance I was well aware of this rule, and also aware that I would be watched by the tribal council. In fact, I was told by one of the member of that council that I would be watched. I told her I knew that and that I was looking for a place in Redwood Falls, where I had resided before moving to Minneapolis to attend the University. When it appeared that I was not going to be immediately successful in finding what I was looking for, a distant relative offered me the use of a bedroom in her home, an offer which I accepted gratefully. As you have probably read in my written affidavit, this was not acceptable to the council. The council passed a resolution to take away not only my per capita privileges but also my right to vote in

community elections. While the community has established a litany of rules for residency for members returning after a two-year absence from the area, there are no such rules for students returning from a period of absence in pursuit of an education except the 60 day requirement.

I was left in the tenous position of finding a lawyer to represent me in tribal court. I have an excellent lawyer, but we both knew that it was going to an uphill battle. But what choice did I have. After my complaint was filed, the Lower Sioux Community Court, on April 5, 2002. enacted the Lower Sioux Indian Community Administrative Procedures Ordinance which the court would have us believe was done to enable me and others similarly situated to bring an action against the Community, but which actually precludes me from having my day in court. On September 26, 2002, the LS Community Court dismissed my case.

What is difficult to accept is why this action was taken against me when the son of the chairman who signed the initial petition to remove me as a qualified member, left the area and was gone for two years before he started school. Under the new administration, he was ordered to return early in 2002, but has since returned to California and is not longer a student. To date, no action has been taken against him and he remains a "qualified member." Others have been affected by the disparate actions of the community council.

When i was removed on October 29, 2001, one year ago today, another elder, 65 year old, Paul Crooks was also removed. Paul has the misfortune of being memtally disabled and has since suffered a severe brain injury and is a resident in a nursing home in Franklin, MN, which is within the 10-mile prescribed area.

Leona Bluestone, age 83, has been a patient at same nursing home since June 1996 but the community will not recognize that she is entitled to the same benefits that other "qualified members" receive. Paul and Leona have been enrolled members their entire lives. To deny them just so that others may get a few more dollars in their pockets is unconscionable. Early this year, the community adopted a resolution affecting members with mental health problems. This resolution was specifically adopted for the 30 year old son of another past council president, who literally destroyed his brain with drugs and is now a resident of a health facility ourside the 10-mile prescribed area. This resolution guarantees that his per capita will not be stopped., which is as it should be. Per capita is responsible

for his health situation and per capita should take care of him This is just another example of the disparate treatment accorded certain members.

Marion Ross, age 82, is an elder who has been denied enrollment even though she was born and raised in the community. The current president in an interview with the Redwood Gazette in September, 2001, said one of the council's priorities were the elders of the community. Their action or lack of action regarding these elders would seem to contradict those remarks.

I oppose full faith and credit for tribal courts. Without a separation of powers, tribal courts represent only the tribal governments. Sovereignty no longer protects the people for whom it was intended. In all of my 75 years, I cannot recall a more difficult time to be an Indian. Thnak you.

To: Lower Sioux Community Council
Lower Sioux Enrollment Committee
P.O. Box 308 RR #1
Morton, MN 56270

From: Maxine V. Eidsvig
5625 Xerxes Ave. So. #112
Minneapolis, MN 55410

Date: June 20, 2000

I am writing in regard to the "survey" conducted on June 15, 2000. The notice sent out to voting community members emphasized that this was only a survey on the five-year residency requirement, which had been voted on and passed on November 17, 1998. The "survey" was not to be construed as a vote, and yet for all intents and purposes, it appeared it was a vote. There was nothing in the notice or on the "ballots" to indicate just how comprehensively the results of this "survey" were to be studied or if the numbers were going to be tallied to determine what action was to be taken. Providing substantial information beforehand saves a lot of questions being asked later.

In actually, the vote held on November 17, 1998, did not appear to have been conducted properly. According to Article VIII, Section 1, any exercise of any enumerated powers lodged by the Community Council shall be subject to a referendum vote of the people upon a written petition signed by not less than 25 percent of the total number of voters in the last regular election. To my knowledge there was no such petition circulated prior to the election conducted on November 17, 1998. If there was such a petition, members were never notified. And if there was, perhaps it should be produced now. According to the letter dated October 9, 1998, from Area Director Larry Morrin, it was the Lower Sioux Community Council who made the request to Call and Conduct a Secretarial Election. At the quarterly meeting conducted in March, 2000, when members asked who determined that an election was to be conducted to change the residency requirement from two years to five years, there were not definite answers given. Yes, we were all aware that there was an election and we were notified of the results, but who actually called the election and was it called properly? It seems there was an attempt to shift the blame to the Enrollment Committee at the March meeting or at least to hold them accountable. A committee's sole responsibility should be to make recommendations which the Council may or may not go forward with. All in all, the questions asked and the Council's inability to answer them was an embarrassing exchange to witness.

We are all aware of how and when the two year residency requirement was instituted. That requirement was a travesty and everyone knew it. It was wrong because most of the people involved in the lawsuit at that time were members who were either born and/or raised on the reservation. Many were in their 50's, some in their 60's. and a few in their 70's. Requiring us to fulfill a two year residency was wrong. There is not other way to describe it. The legal team employed at that time, (which, ironically, is the same team today), had a lot to do with coming up with a residency requirement. One can not help but wonder if the council that was in place at that time would have even thought of a residency requirement. Residency requirements for enrolled members of an Indian reservation was unheard of. Even today, Lower Sioux is probably the only Indian reservation with such a requirement. That is why it is so wrong. The image of the Indian as a people who care about one another is sorely being challenged by our own actions. We rail against the U.S. Government and everyone else whom we feel compelled to blame for our woes, but what we do to ourselves is far worse.

There are so many other matters we should be concerning ourselves with, such as what we are doing to the young people. When our youth are dropping out of school at an alarming rate, without even a high school education, we should be concerned. These are the people who will be conducting reservation business in the future and we are not doing anything to prepare them for the task at hand. The council must do whatever is necessary to change the direction in which the youth of the community appears to heading. It is a terrible onus that the council has to bear but bear it they must. If the Bureau of Indian Affairs or the legal counsel representing the community cannot help, then the Lower Sioux Council must seek help and advice elsewhere. What this council seeks to do about the education of the youth will have an impact on the community for many years to come. Wouldn't it better to be remembered as a council who was not afraid of attacking a serious, daunting problem than one who was aware there was a problem and did nothing?

There should also be some serious dialogue about the people who lived on the reservation during the 1930's, the 1940's, and the 1950's, who have yet to return to the reservation. Yes, there were those of us who had to fight in the courtroom to regain our rightful status, and who had to settle for the two-year residency rule. As I said before, it was wrong and we should not sit back and say, "I had to wait two years so everyone else should have to wait also." Additionally, if someone grew up on the Lower Sioux Reservation but through no fault of their own had dual enrollment or is the only one in the family to have been enrolled at another reservation where they had never resided, they should be allowed to return to their home reservation. I am thinking in particular of Leonard Eller. He never ever lived in Flandreau, so why, in his later years must he be separated from his family. The community should welcome him back where he belongs. When his sister, Juanita, returned at the age of 70 years old, she should not have had to wait two years to reestablished her residency. The number of this particular group of people cannot number more than twenty-five or thirty, it that, so we are not talking about a large group of people, which seems to be the concern of the council. The longest these people should have to wait is one month. For those who never lived on the reservation but are enrolled members, the two years residency requirement is proper. A five-year residency requirement is unconscionable.

These are just a few of the concerns this council should be focusing on. There is such a thing as taking care of those who are not only deserving, but entitled to some consideration, and dealing with those who are only interested in themselves. For the most part, this council has acted responsibly and should be commended for that but calling for a vote to change the residency rule from two years to five years is a blemish on their tenure and should be expunged.

Sincerely,

Maxine V. Eidsvig

cc: United States Department of the Interior
Bureau of Indian Affairs
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July 19, 2000

Loretta Oliver
Lower Sioux Community Council
39527 Reservation Highway 1
Morton, MN 56270

Re: Inquiries About the 1998 Constitutional Amendment Process and the Requirements of Residency for Newly Enrolled Members

Dear Loretta:

This is in response to the questions you asked recently by phone and letter concerning the 1998 Constitutional Amendment and the residency requirement of newly enrolled members.

Constitutional Amendment

You asked whether the referendum vote in November of 1998 on the Constitutional Amendment (regarding a five year residency requirement) was conducted properly. The short answer is yes: it was conducted in accordance with federal law and Lower Sioux Constitutional provisions. It was approved as lawful by the United States Secretary of the Interior.

Your primary question revolved around the lack of a "petition" from the membership asking for the Amendment and the corresponding Secretarial Election. Neither the Lower Sioux Constitution nor federal law states that a petition is necessary to call a Secretarial Election for a Constitutional Amendment. In fact, Article XIII of the Constitution requires the Community Council, not the membership, to ask for the Election. Specifically, that Article states:

> It shall be the duty of the Secretary of the Interior to call an election on any proposed amendment upon receipt of a written resolution of the Community Council signed by at least three members of the Council.

The federal regulations governing Secretarial Elections defer to the language in the Tribal Constitution. 25 Code of Federal Regulations § 81.5(d) says that "the Secretary shall authorize the calling of an election on the adoption of amendments to a constitution and bylaws or a charter when requested pursuant to the amendment article of those documents." (There is a "default" mechanism in the federal regulations, to be used in the absence of applicable constitutional procedures. 25 CFR § 81.5(e). That also requires a request, not from the membership, but from the "recognized tribal government.") The Secretary of the Interior determined that the Lower Sioux Community Council's resolution requesting a Secretarial Election was appropriate under the Community Constitution and federal law.

In sum, the Lower Sioux Council properly submitted a request to the Secretary of the Interior to call a Secretarial Election for the proposed Constitutional Amendment. The Secretary determined that the request was valid. The Secretary supervised the notification of the membership concerning the date of the vote and the meaning of the proposed amendment. The vote was monitored by representatives of the Secretary. The results were certified by the Secretary. The procedure was proper.

There is no Constitutional requirement that the Community membership must approve by referendum each and every exercise of governmental authority by the Community Council, including the exercise of authority to ask for a Secretarial Election. It is true that certain actions by the Council may be vulnerable to a referendum if the appropriate petition with appropriate signatures is submitted. The referendum provision is contained in Article VIII of the Community Constitution. Article VIII states:

> Any exercise of any enumerated powers lodged in the Community Council shall be subject to a referendum vote of the people upon a written petition signed by not less than 25 percent of the total number of voters in the last regular election, provided that not less than 30 percent of the eligible voters shall vote in any such referendum.

However, the Constitutional provisions for referendum did not affect the Constitutional Amendment vote for two reasons. First, no appropriate petition was ever submitted to the Council regarding its request for a Secretarial Election. Second, there was in fact a referendum on the Amendment—that was the vote in the Secretarial election. The Amendment was submitted to the voters of the Community—a referendum—and the voters chose to adopt the Amendment.

State of Minnesota
Fifth Judicial District

ROBERT D. WALKER
Judge of District Court
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507/238-4491
FAX # 507/238-1913

November 4, 2002

Honorable Kathleen Blatz
Chief Justice
Minnesota Supreme Court
305 Minnesota Judicial Center
25 Constitution Ave.
St. Paul, MN 55155-6102

In Re: Petition Minnesota Rules of Court-Full Faith and Credit for Tribal Court Orders

Dear Chief Justice Blatz:

Thank you for an opportunity to supplement the submissions made to your court on Tuesday, October 29, 2002. As I listened to the oral presentations made to the court hearing on Tuesday, there were several points which needed a response or further explanation.

In all of the arguments presented in opposition to the rule the court was presented with many emotional issues that are not appropriate to that forum. The opponents to the proposed rule suggested to the court that the rule addresses (or should address) a multitude of issues which are really geo-political, financial, or philosophical in nature. It was not the mandate of the committee to review two hundred years of history between the State Courts and the Minnesota Native Americans.

One aspect that permiated the objectors was the different structure of Tribal Courts and State Courts. Throughout their arguments they missed a crucial and dispositive point. The Native Americans, which compose the various tribes in Minnesota, are sovereign. It is not for the court committee to re-write the long standing establishment of that principal. As a sovereign nation they have the inherent right to determine such internal issues as membership, economics and structure of their government. Neither a rule implemented by our Supreme Court of Minnesota nor any legislation promulgated by the state legislature can overturn their inherent sovereignty. It would be inappropriate to try and address the issues argued by the opponents to the petition, by court rule, or even in most instances by legislative enactment. Under clear and definitive standards the sovereign tribes by long standing rulings of the state and federal courts have the inherent power to determine their own membership enrollment and qualifications. It is not appropriate to relitagate that issue in the forum of this rule.

The Cass County Attorney alluded to issues of the economics that would be faced by a Full Faith and Credit Rule. An example he gave was who pays the cost for a prisoner incarcerated on a warrant by a Minnesota Tribal Court? As a sitting judge in a border county with the State of Iowa, I do not believe that that is a valid argument. We routinely see warrants from other state court jurisdictions including Iowa and South Dakota, which result in an arrest and detention of persons in our local county jail. The county sheriff executes those warrants and notifies the appropriate jurisdiction who in turn come and retrieve their prisoner. There is no billing nor ought there be any billing for local housing costs of those persons.

It is also important to remember that the proposed rule would be reciprocal, that is the state court judgment would be entitled to the Full Faith and Credit in the Tribal Courts as would their rules be enforced in the State Court. That is an important concept to understand in terms of enforcement of such orders as child support, paternity and visitation. For example, I would respectfully submit it is an inappropriate result if a native american fathers a child and retreats to the sovereignty of his reservation and then is deemed to be immune from a child support order by the State of Minnesota. We could easily see a representative of the Shakopee tribe who is receiving an annual income in excess of $100,000.00 and seeks asylum from his responsibility to support his children simply by the fact that the court's order would not be enforceable in the Tribal Court setting.

Another objection to the petition raised the issue of a separate requirement for admission of attorneys who practice before the Tribal Courts and the criticism that the Tribal Courts set their own standards of admission. I thought that was ironic when again I live in a community eleven miles from the State of Iowa and certainly the attorneys in my community are subject to different standards of admission before they can practice in the state courts of Iowa or any other state for that matter. It is not unusual for state courts to set their own standards of admission, and I do not believe that issue should in any way bar the implementation of the rule proposed by the petition before your court.

Finally, as a sitting trial court Judge for the District Court in the State of Minnesota I would earnestly ask your court to grant the petition. It would be extremely beneficial to have a set and recognized procedure for enforcement of Tribal Court judgments and orders. That would eliminate the case-by-case, separate analysis of every Tribal Court order that is proffered in our system. Without a standardized rule and process Tribal Court orders would be subject to interpretation de novo by more than 260 state court judges. That would most likely result in confusion and different standards applied throughout the state rather than a uniform consistent standard of the appropriateness of the Tribal Court orders.

In response to a question raised during the hearing if this is a necessary issue why hasn't a case winded its way to the Supreme Court through the appeal process? I believe the answer to that is very simple, at the time a Tribal Court order is denied enforcement there is not adequate remedy in the state court, which would afford the aggrieved party an

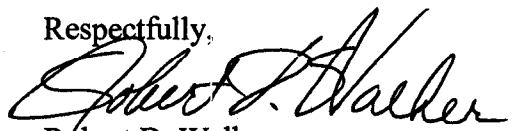
opportunity to appeal to the Supreme Court. In essence the denial of enforcement in itself renders the issue moot in 99 percent of the cases. For example, if a child is subject to a custody order from a Tribal Court and runs from their placement and is discovered in my jurisdiction, if the local sheriff denies enforcement of that Tribal Court order what would the remedy be? Would there be a suit for damages against the local sheriff? Would there be a mandamus action? Those are not likely. It would be more likely that the aggrieved party would seek a separate petition as a CHIPS matter in the state court. That could result in conflicting or concurrent court orders rather than simply enforcing the first Tribal Court decision.

In response to Justice Paul Anderson's comment, should the rule apply only to children's issues? I do not think that is a precedent that the Supreme Court should establish. If there is sufficient due process that relates to an order of child custody, why should we ascribe to a different validation process to other court orders issued by the Minnesota Tribal Courts?

In conclusion I respectfully submit it is appropriate that the Supreme Court move forward and take leadership in regard to these issues. It would be well to keep in mind that Native American's system of government, and in fact their resolution of conflict long predates the establishment of our first even provisional territorial court in Minnesota. The fact that their system is not identical to ours should not somehow disqualify it from our Full Faith and Credit provisions. We have already recognized the efficiency and appropriateness of many of their dispute resolution models and have adopted many of those into our practice. For example, the Department of Corrections has adopted the restorative justice principals which have long been used by Minnesota Tribal Courts. The child welfare rules as are applied through ICWA also have been clearly established for many years, and it is time to move forward and resolve this issue by establishment of the court rule granting Full Faith and Credit.

Thank you for an opportunity to comment and respond.

Respectfully,



Robert D. Walker

State of Minnesota in Supreme Court

CX-89-1863

Re: Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments

Supplement to oral testimony of Clara NiiSka

Honorable Justices of the Supreme Court of Minnesota:

The importance of whether or not to adopt a court rule expediting the Minnesota Courts' acceptance of any "judgment, decree, order, apprehension order, protection order, warrant, subpoena, record or other judicial act of a tribal court of a federally-recognized Indian tribe" far outweighs the apparent significance of a rule perhaps most likely to affect approximately 54,967 adults and children who were "self-identified" as "Indians" in Minnesota for the 2000 Census.

The key issue is whether the Minnesota Supreme Court will uphold fair and equal applicability of the Minnesota Constitution and Minnesota laws in Minnesota courts, or whether the Court will systematically abrogate the civil and legal rights of specific groups of Minnesotans and adopt a proposed rule grounded in defective process, inadequate information, and biased arguments.

As was clear from my testimony, I am urging the Court to reject the proposed "full faith and credit" rule. I briefly describe the grounds for doing so, at this point mostly because the thorny issues at the interface between tribal courts and state courts will continue to fester until either this Court or the U.S. Supreme Court unambiguously establishes that Minnesota courts will not by rule or otherwise "abridge the privileges or immunities of citizens of the United States; nor ... deprive any person of life, liberty or property without due process of law, nor deny to any person within [Minnesota] jurisdiction the equal protection of the laws" [U.S. Const. 14th

Amendment, *see also* Minn. Const. Art. I, Secs. 7, 8].

I also very briefly mention concerns about problems the processes through which the Tribal Court / State Court Forum arrived at its proposed "rule of procedure for the recognition of tribal court orders and judgments," and note that the factual and background information presently before the Court is grievously inadequate. My purpose is, in part, to encourage the Minnesota Appellate Courts to initiate and maintain a collection of tribal codes, tribal council resolutions, and other pertinent information as a part of the public State Law Library system, in part so that anyone who does become involved with a tribal court in Minnesota has access to fairly up-to-date, comprehensive information.

I. Problems with Tribal Court / State Court Forum's process

There are several serious problems with the process by which the proposed "full faith and credit" rule has come to the Minnesota Supreme Court. These include:

1. Procedural problems. I request judicial notice of the minutes of the Tribal Court /State Court Forum ("Forum") in their entirety. The minutes of those meetings held on-reservation are not part of the public record. Some of the on-reservation Forum meetings were closed to the public, some were meetings at which the public was barred from comment, and some were devoted to planning lobbying strategies intended to secure acceptance of the proposed "full faith and credit" rule. Whether or not the exemptions to Public Law 280's unambiguous extensions of state jurisdiction [28 USCS § 1360] delineated by *Bryan* v. *Itasca County*, 426 U.S. 373 (1976), etc., could be stretched to include Minnesota judges' nonpublic meeting with tribal employees and tribal attorneys and to discuss matters which would significantly expand the power of those attorneys' clients, those closed and off-the-record Forum meetings give at the very least the

appearance of impropriety.

2. The Forum did not properly fulfill the mandate of the Supreme Court to study the issues involving tribal courts in Minnesota. Some of the requisites for a proper study were discussed at early meetings, but such balanced and comprehensive research quickly became overshadowed by certain Forum members' push for "full faith and credit."

3. Documents crucial to any proper study of tribal courts are apparently absent from the Forum's records, and there is no indication that Forum members examined them. Many of these records are not a part of the state law library system and, in fact, are not catalogued as a part of any public library in Minnesota. One of the Forum's tribal attorney/tribal court judges (Andrew Small) explained at one meeting that tribal courts are "different." Precisely *how* tribal courts are "different" is important.

The following are among the documents indispensable to understanding the day-to-day operation of tribal courts, and should have studied for each of Minnesota's reservations:

a) current and historical versions of tribal constitutions,

b) current and historical tribal codes, rules of procedure, rules of court, etc.,

c) tribal council resolutions in their full corpus,

d) complete tribal court dockets, thorough consideration of tribal court records, and extensive studies of cases heard in tribal courts including interviewing the parties in a statistically valid sampling of those cases

e) list of judges who have served on each tribal court for the past ten years, processes used in hiring, grounds for dismissal, codes of ethics and professional conduct, grounds for recusal, judges available for appeal

f) criteria for establishing "custom" and any compilations detailing such

"customs"

g) complete list of the tribal court orders, judgments, etc. entered into state courts from each tribal court, as well as the state courts' disposition of those cases.

The Forum should have thoroughly assessed the jurisdiction asserted by each tribal court in Minnesota from the several relevant vantages. If tribal court jurisdiction is in some instances contingent on someone being "Indian," how is that determined? Are tribal enrollment records and the underlying genealogies public information? Are there extant or potential enrollment disputes, and how do these affect tribal court jurisdiction?

The Forum should have also critically examined the validity of the grounds upon which the legitimacy of each tribal court is asserted: historically and factually, as well as legally.

Furthermore, there are some contentious and fairly complicated disputes involving certain of the tribal courts in Minnesota. In addition to questions about the legitimacy of tribal courts under the Minnesota Chippewa Tribe constitution, there is a longstanding and convoluted dispute about the court at Red Lake. The U.S. Government defines the Red Lake court as a "Court of Indian Offenses," subject to the federal regulations in 25 C.F.R. Chapter 11 as well as to the U.S. Constitution and to federal law including the Freedom of Information Act, *U.S.* v. *Red Lake Band of Chippewa*, 426 U.S. 373 (1987). The Forum's summary, appended to the petition, describes it as the "Red Lake Nation Tribal Court," which is a substantially different sort of entity in terms of jurisdiction as well as applicable federal case law.

Instead of doing adequate research, comprehensively surveying the morass of law, and carefully considering the facts, the Forum apparently succumbed to the vested interests of the tribal attorneys/tribal court judges who comprise the "tribal" half of the Forum, and fairly quickly moved toward advocacy of "full faith and credit."

Those members of the Forum who are judges should *not* have reached this kind of decision without first considering the facts, the applicable laws, regulations, etc.

4. There are seven people whose requests to speak at the Supreme Court's October 29, 2002 hearing were denied. All but one of those thus silenced would have spoken *against* the proposed rule. The Supreme Court should not adopt any rules when opposing voices are not fully heard. A majority of the people barred from speaking were Indians, several of them people from White Earth who filed photocopies of documents in support of arguments that Minnesota Chippewa Tribe (MCT) tribal courts are illegal courts established by a corrupt government.

5. Indian people have been inadequately represented throughout the Forum's process. In general, the people advocating for the "full faith and credit" rule are professionals and members of the "Indian establishment," not the people whose lives would be most deeply affected by the proposed rule.

II. The Minnesota Supreme Court is *mandated* to uphold the state and federal constitutions

As the "third branch" of government, the Court serves a number of functions in Minnesota. Crucial among them is to protect the rights of the people in Minnesota as guaranteed by the state and federal constitutions. That's everyone – not 'everyone except Indians.'

Arguments by the proponents of "full faith and credit" have centered around themes of efficiency, uniformity, potentially urgent cases at the interface of tribal and state courts, and respect for Indian tribal councils. They have also argued in terms of "comity." "Comity" means, in part, 'respect' – and undiscerning 'respect' makes the concept meaningless.

State and federal protections including the Miranda warning, requirements for search warrants, etc. are not "efficient," but are crucial to U.S. democracy.

The "uniformity" argument is inapplicable because tribal courts in Minnesota are far from uniform.

The potentially urgent cases-in-point cited by the proponents of the "full faith and credit" rule are irrelevant. State "full faith and credit" is unnecessary because such instances are already covered by federal law (and are, in fact, the *only* two areas of federal law in which there is general recognition of "public acts, records, and judicial proceedings of Indian tribes):

> 25 USCS § 1911. Indian tribe jurisdiction over Indian child custody proceedings.
> (d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes. The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

and "Sheila's law":

> 18 USCS § 2265. Full faith and credit given to protection orders
> (a) Full faith and credit. Any protection order issued that is consistent with subsection (b) of this section by the court of one State or Indian tribe (the issuing State or Indian tribe) shall be accorded full faith and credit by the court of another State or Indian tribe (the enforcing State or Indian tribe) and enforced as if it were the order of the enforcing State or tribe.
> (b) Protection order. A protection order issued by a State or tribal court is consistent with this subsection if--
> (1) such court has jurisdiction over the parties and matter under the law of such State or Indian tribe; and
> (2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State or tribal law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights.

To the best of my knowledge, neither of these sections of federal code has been challenged on constitutional grounds.

However, a precedential Minnesota case, *In Re the Matter of the custody of: K.K.S.*, 508 N.W.2d 813 (1993), is illustrative of one of the problems at the interface between tribal courts

and state courts. In *In re K.K.S.*, the Minnesota Court of Appeals upheld the Red Lake tribal court's assertion of custody jurisdiction over K.K.S., the child of Patricia Neadeau, a Red Lake enrollee, and Aaron Stenseng, a non-Indian. The problem is that according to Red Lake enrollment records, K.K.S. is also non-Indian: not enrolled, and with a potential "Red Lake blood quantum" of 13/64 not eligible for tribal membership, not entitled to tribal benefits, not reasonably an "Indian child" under federal law, and not generally subject to the jurisdiction of the Red Lake court. This writer asked Stenseng's attorney, Michael Ruffenach, if he raised the issues of enrollment and tribal court jurisdiction. Ruffenach claimed he did, although the state courts' consideration of this aspect of the tribal court's jurisdiction is not apparent from those court records open to the public.

Should Stenseng and his child have been able to avail themselves of due process in Minnesota courts? Or ... on what constitutionally-sustainable grounds was it denied? What about the Minnesota Constitution, Art. I, § 2?

III. Tribal courts are *not* courts of law within the meaning of either the U.S. or Minnesota constitutions.

The United States Constitution vests the "judicial power of the United States ... in one supreme court, and in such inferior courts as the Congress may, from time to time, establish," Art. III § 1, and delineates certain criteria which must be observed by state courts. The U.S. Constitution does *not* authorize the Executive branch (*i.e.* the Department of the Interior) to establish courts, and the Tenth Amendment makes it clear that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people."

Although Congress funds "tribal forums," and in one single instance has mandated

recognition of "a protection order issued by a ... tribal court," there is no law establishing tribal courts.

The Minnesota Constitution vests "the judicial power of the state ... in a supreme court, a court of appeals, if established by the legislature, a district court and such other courts, judicial officers and commissioners with jurisdiction inferior to the district court as the legislature may establish," Art. VI, § 1.

Tribal courts are clearly not "courts of law."

As noted above, there are two very different sorts of 'courts' operating on Minnesota reservations. The 'court' at Red Lake is listed in 25 CFR § 11.100 as a "Court of Indian Offenses."

The U.S. Court of Appeals, Ninth Circuit, describes the establishment of Courts of Indian Offenses in *Colliflower* v. *Garland*, 342 F.2d 369 (1965), quoting from the *Annual Report of Commissioner of Indian Affairs* to the Secretary of the Interior, 1885:

> 'Under date of April 10, 1883, the then Secretary of the Interior gave his official approval to certain rules prepared in this office for the establishment of a court of Indian offenses at each of the Indian agencies, except the agency for the five civilized tribes in the Indian Territory. It was found that the longer continuance of certain old heathen and barbarous customs, such as the sun-dance, scalp-dance, polygamy, etc. were operating as a serious hindrance to the efforts of the Government for the civilization of the Indians.
> ...
> 'There is *no special law authorizing the establishment of such a court*, but authority is exercised under the general provisions of law giving this Department supervision of the Indians. The policy of the government for many years past has been to destroy the tribal relations as fast as possible and to use every endeavor to bring the Indians under the influence of law.' (P. xxi) [emphasis added]

United States v. *Clapox*, 35 F. 575 (1888), the legal case generally cited as legitimating these "courts," reiterates the understanding that they are not courts of law:

> 'These 'courts of Indian offenses' are not the constitutional courts provided for in section 1, art. 3, Const., which congress only has the power to 'ordain and establish,' but mere educational and disciplinary instrumentalities, by which the government of the United

> States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian. In fact, the reservation itself is in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man.' [quoted from *Colliflower*]

In *Colliflower*, the U.S. Court of Appeals wrote that,

> [u]nder these circumstances, we think that these courts function in part as a federal agency and in part as a tribal agency, and that consequently it is competent for a federal court in a habeas corpus proceeding to inquire into the legality of the detention of an Indian pursuant to an order of an Indian court

but, noting the non-uniformity of tribal courts, confined its decision to those on the Ft. Belknap reservation.

The development of the Court of Indian Offenses at Red Lake closely parallels that at Ft. Belknap, and is detailed in the "'*Indian Courts': a brief history*" series printed in the *Native American Press/Ojibwe News* in June 2001, and included in the appendices below.

The governments on the other six Ojibwe reservations are organized as "Reservation Business Councils" of the Minnesota Chippewa Tribe. The *Revised Constitution of the Minnesota Chippewa Tribe*, as posted by the Leech Lake Band of Ojibwe on their tribal government's official website, is appended below. The tribal courts of the Minnesota Chippewa Tribe (MCT) are not authorized by MCT constitution.

Both MCT and Dakota tribal courts were established and are operated by tribal governments *established* pursuant to the 1934 Indian Reorganization Act (I.R.A.), 25 USCS § 461 *et seq.*

> 25 USCS § 476. Organization of Indian tribes; constitution and by-laws and amendment thereof; special election.
>
> (a) Adoption; effective date. Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when--
>
> (1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the

Secretary may prescribe; and
(2) approved by the Secretary pursuant to subsection (d) of this section.

...

(e) Vested rights and powers; advisement of presubmitted budget estimates. In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also *vest in such tribe or its tribal council the following rights and powers*: To employ legal counsel; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments. The Secretary shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.
(f) Privileges and immunities of Indian tribes; prohibition on new regulations. Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.
... [emphasis added]

There is no Congressional delegation of power to the tribal governments established under its aegis.

The BIA's argument that these "tribal forums" rest on unextinguished 'tribal sovereignty' does not withstand scrutiny on either historical or cultural grounds. To this point, there is appended here a copy of Lorraine Kingsley's 1986 paper on "discipline." I am also providing the Minnesota Supreme Court with a copy of Wub-e-ke-niew's *We Have the Right To Exist* (1995), which addresses this and other related issues from the vantage of an aboriginal indigenous person of Red Lake. Wub-e-ke-niew's work may not be 'easy-to-read' for people whose think in European-American terms. He did not structure his analysis as a scholar trained in those traditions would have, he didn't think within those structures – and that's relevant. Tribal courts bear no resemblance to indigenous systems based on consensus, elders, personal responsibility grounded in indigenous religion and epistemology.

It should be clear from the foregoing that present-day tribal courts on Minnesota

reservations are not "courts of law" within the meanings of the U.S. and Minnesota constitutions. Particularly given the "business committee" orientations of the tribal governments established under the 1934 I.R.A., it may be enlightening to contemplate such "tribal forums" in terms of company-controlled dispute-resolution/disciplinary bodies in "company towns."

IV. The Minnesota Supreme Court's mission statement reads, in part, "justice according to the law," which must include upholding the constitutionally-protected rights of *everyone* in Minnesota.

Whatever the jurisdictional situation(s) on any particular reservation – and this is not consistent across all Minnesota reservations – the moment a tribal court order or judgment crosses into Minnesota jurisdiction, it is a piece of paper in Minnesota. *It must be subject to rights and protections in the Minnesota and federal constitutions.*

Further, as the Minnesota Supreme Court has ruled in both criminal and civil matters, if the *intent* is for the on-reservation action to have an effect in Minnesota, state jurisdiction extends back across the reservation line along the cause of action.

In *State of Minnesota* v. *Donald Rossbach, Jr.*, 288 N.W.2d 714 (1980), the Minnesota Supreme Court ruled that "State had jurisdiction to prosecute a defendant for aggravated assault where the facts revealed that defendant, standing on an Indian Reservation, fired a high-powered rifle at a deputy sheriff standing across the border on Minnesota land." If an on-reservation action is committed with the intent of having an effect in Minnesota, the act itself is subject to Minnesota law.

In *State of Minnesota, By its Minnesota State Ethical Practices Board* v. *The Red Lake DFL Committee,* 303 N.W.2d 54 (1981)], the Minnesota Supreme Court considered the activities of political committee which "occurred within the confines of the reservation." The Court

concluded, however, that,

> Plainly, the activities put in motion by the Committee were not confined to the reservation nor were they intended to be so circumscribed. *Cf. State v. Rossbach*, 288 N.W.2d 714 (Minn. 1980) ...
>
> Defendants say nothing they did (placing the order; signing the check) occurred outside the reservation, but they choose to ignore that what they did caused something to occur beyond the reservation boundaries, namely, the dissemination of a political message, which is the activity here sought to be regulated.
>
> ... We agree with the trial court that *activities initiated within the reservation and reasonably calculated to influence voters outside the reservation are a proper concern of the state and subject to its reasonable regulation.* In fact, defendants did not demonstrate that compliance with [Minn. Stat. § 10A.14] would have any adverse effect on tribal self-government, but even if some interference had been shown, the public interest in protecting the integrity of the election process, particularly through disclosure of significant financial influences on elected officials, is a compelling public concern. ... [emphasis added].

It is likely that most of the tribal court judgments, decrees, orders, apprehension orders, protection orders, warrants, subpoenas, and other judicial acts subsequently entered into Minnesota jurisdiction are *intended* to "cause ... something to occur beyond the reservation boundaries." It is indisputable that the public interest in Minnesota includes protecting the integrity of Minnesota's courts and in upholding the constitutionally-guaranteed civil rights of the people of Minnesota.

V. Tribal courts in Minnesota are part of a tightly centralized "tribal establishment" structure created by the Bureau of Indian Affairs in the 1930s, grounded in obsolete apartheid notions from an era when "Jim Crow" had not yet been discredited.

Like the BIA which it supplants – and with it contracts for more than a hundred million dollars annually in federal programming[1] for Minnesota tribes – the "tribal establishment" controls almost every aspect of Indians' lives on the reservation: housing, jobs, police, government, tribal businesses – and the courts.

Santa Clara Pueblo et al. v. *Martinez et al.* 436 U.S. 49 (1978) effectively gutted the

[1] U.S. Department of Commerce Single Audit Database, http://harvester.census.gov/sac/dissem/entity.html

Indian Civil Rights Act. In that case, often cited as precedent by tribal attorneys, the U.S. Supreme Court ruled that,

> A federal court civil action for declaratory and injunctive relief to obtain redress for an alleged violation of a right protected against infringement by an Indian tribe under Title I of the Indian Civil Rights Act (25 USCS 1302) cannot be brought against an officer of an Indian tribe, since no such private remedy can be implied from the statute, federal judicial review of tribal action being expressly authorized in Title I only through the provision making the writ of habeas corpus available to test the legality of a person's detention by an Indian tribe (25 USCS 1303). (White J., dissented from this holding.)

The U.S. Supreme Court also made it clear in *Santa Clara Pueblo* v. *Martinez* that "tribal sovereignty" is generally limited to tribes' "power of regulating their *internal* and social relations." The Court clarified such limitations on exercise of 'tribal sovereignty' in *Montana* v. *United States*, 450 U.S. 544 (1981):

> The exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes and cannot survive without express congressional delegation.

and ruled in the same case that, with certain limited exceptions,

> The inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe,

nor do such tribal powers extend beyond the reservation.

The U.S. Supreme Court recently ruled in *Nevada* v. *Hicks*, 533 U.S. 353 (2001) that:

> The Tribal Court had no jurisdiction over the [42 U.S.C.] § 1983 claims. Tribal courts are not courts of "general jurisdiction." The historical and constitutional assumption of concurrent state-court jurisdiction over cases involving federal statutes is missing with respect to tribal courts, and their inherent adjudicative jurisdiction over nonmembers is at most only as broad as their legislative jurisdiction. Congress has not purported to grant tribal courts jurisdiction over § 1983 claims, and such jurisdiction would create serious anomalies under 28 U.S.C. § 1441.

However, there is virtually no effective redress for tribal courts' violations of Indian people's constitutional rights on-reservation. There is also no appeal out any tribe's particular tribal court system. Tribal court judges and attorneys are not bound by professional ethics and professional

standards, and as the documentation provided to this court by others indicates, there are in some instances blatant conflicts of interest affecting tribal courts in Minnesota.

VI. Abuses deriving from tribal courts are symptomatic of structural problems in the system

As case in point illustrating abuses deriving from tribal courts (and from jurisdiction-kiting), I have appended most of the news articles that the *Native American Press/Ojibwe News* has published about the custody dispute between Jawnie Hough, a Leech Lake enrollee, and Donald Brun, Jr., a Red Lake enrollee. Also appended is a copy of the most recent Order filed by Judge Terrance Holter of the Ninth Judicial District, Beltrami County [September 24, 2002].

The principal differences between the Hough / Brun case and certain other custody disputes involving the Red Lake tribal court is the light of public scrutiny shed on the case through *Press/ON*'s ongoing coverage, and that Ms. Hough has generally had competent legal representation.

As of November 5th, 2002, Donald Brun, Jr. had not responded to the Minnesota Court's most recent order to return the child, Meghan Brun.

VII. Irregardless of what happens on an Indian reservation under whatever tribal jurisdiction, what happens in Minnesota is clearly the business of the Minnesota courts, and protecting the rights of people in Minnesota is among the mandates of this court.

There is no legal reason for not guaranteeing the full protections of the Minnesota Constitution to everyone within Minnesota jurisdiction – and there are compelling constitutional reasons to do so. "Full faith and credit" for any "judgment, decree, order, apprehension order, protection order, warrant, subpoena, record or other judicial act of a tribal court of a federally-recognized Indian tribe" is unconstitutional in Minnesota, as the foregoing discussion and

appendices hopefully make clear.

The problems deriving from tribal courts probably aren't going to go away any time soon, but the proposed "full faith and credit rule" is *not* the proper way to resolve the problems.

VII. I ask and request that this court *not* accept the proposed FF&C rule.

I ask and request that this court:

1. Do the comprehensive study that the Tribal Court / State Court Fourm did not, specifically including thorough and balanced scrutiny of:

a. tribal codes / constitutions

b. state and federal laws, precedents, and not only the treaties and "agreements" but also the treaty transcripts and the lists of names (signature rolls, annuity rolls) of the people affected by the treaties

c. the full body of tribal council resolutions now in effect

d. all tribal court dockets over the past ten years, as well as thoroughly studying a statistically valid sample of court cases from each tribal court

2. And, in the interim:

· recognize the hardships of Indian litigants and the difficulties of finding attorneys on or near reservations who are willing to challenge the tribal establishment

· make it *clear* that tribal court orders and judgments enter the Minnesota court system *as evidence*, not as orders and judgments from courts of law, because tribal courts are *not* courts of law

· clearly establish that the burden of proof is on the party submitting the tribal court order or judgment to a state court for consideration

· ensure that tribal constitutions, MCT reservation bylaws, tribal codes, rules of court, council and RBC resolutions, and all other relevant legal documents are deposited and catalogued in the state law library system, and hopefully also available online

· adopt a rule that in order to be considered by a Minnesota court, the party submitting the tribal court order or judgment must *also* provide:

a) grounds for assertion of jurisdiction

b) all applicable proofs of service

c) clear and convincing evidence that all constitutionally-protected rights were respected during all phases of the tribal court proceedings

d) court records, and transcripts on request

and that any tribal court order or judgment will be rejected by Minnesota courts if there is inadequate provision for discovery, subpoenas, or unavailability of other evidence, including tribal enrollment records where relevant

· Make it clear to the district courts that tribal court orders and judgments are *not* court decisions protected from collateral attack

Minnesota courts have a mandate to uphold the rights of the people of Minnesota.

Thank you.

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Appendices

GCT-PL. Race and Hispanic or Latino: 2000; Data Set: Census 2000 Redistricting Data (Public Law 94-171) Summary File

Geographic area	Total population	Race								Hispanic or Latino (of any race)
		Total	White	Black or African American	American Indian and Alaska Native	Asian	Native Hawaiian and Other Pacific Islander	Some other race	Two or more races	
AMERICAN INDIAN RESERVATION AND OFF-RESERVATION TRUST LAND -- FEDERAL										
Bois Forte Reservation, MN	657	651	185	0	464	2	0	0	6	2
Fond du Lac Reservation and Off-Reservation Trust Land, MN--WI (part)	3,728	3,583	2,215	3	1,353	4	0	8	145	45
Fond du Lac Reservation	3,728	3,583	2,215	3	1,353	4	0	8	145	45
Grand Portage Reservation and Off-Reservation Trust Land, MN	557	523	199	0	322	0	0	2	34	11
Grand Portage Reservation	557	523	199	0	322	0	0	2	34	11
Grand Portage Off-Reservation Trust Land	0	0	0	0	0	0	0	0	0	0
Ho-Chunk Reservation and Off-Reservation Trust Land, WI--MN (part)	0	0	0	0	0	0	0	0	0	0
Ho-Chunk Off-Reservation Trust Land (part)	0	0	0	0	0	0	0	0	0	0
Leech Lake Reservation and Off-Reservation Trust Land, MN	10,205	9,894	5,278	9	4,561	16	4	26	311	144
Leech Lake Reservation	10,205	9,894	5,278	9	4,561	16	4	26	311	144
Leech Lake Off-Reservation Trust Land	0	0	0	0	0	0	0	0	0	0
Lower Sioux Reservation, MN	335	326	28	1	294	0	0	3	9	7
Mille Lacs Reservation and Off-Reservation Trust Land, MN	4,704	4,627	3,418	27	1,171	6	0	5	77	40
Mille Lacs Reservation	4,548	4,474	3,410	19	1,034	6	0	5	74	40
Mille Lacs Off-Reservation Trust Land	156	153	8	8	137	0	0	0	3	0
Minnesota Chippewa Trust Land, MN	78	78	14	0	64	0	0	0	0	0
Prairie Island Indian Community and	199	199	33	0	166	0	0	0	0	3

Off-Reservation Trust Land, MN										
Prairie Island Indian Community	177	177	11	0	166	0	0	0	0	3
Geographic area	**Total population**	**Total**	**White**	**Black or African American**	**American Indian and Alaska Native**	**Asian**	**Native Hawaiian and Other Pacific Islander**	**Some other race**		**Hispanic or Latino (of any race**
Prairie Island Off-Reservation Trust Land	22	22	22	0	0	0	0	0	0	0
Red Lake Reservation, MN	5,162	5,142	61	5	5,071	2	0	3	20	88
Sandy Lake Reservation, MN	70	70	4	0	66	0	0	0	0	0
Shakopee Mdewakanton Sioux Community and Off-Reservation Trust Land, MN	338	306	87	1	214	3	0	1	32	13
Shakopee Mdewakanton Sioux Community	266	242	63	0	175	3	0	1	24	8
Shakopee Mdewakanton Sioux Off-Reservation Trust Land	72	64	24	1	39	0	0	0	8	5
Upper Sioux Reservation, MN	57	57	10	0	47	0	0	0	0	2
White Earth Reservation and Off-Reservation Trust Land, MN	9,192	8,515	5,105	7	3,378	5	0	20	677	99
White Earth Reservation	9,188	8,511	5,105	7	3,374	5	0	20	677	99
White Earth Off-Reservation Trust Land	4	4	0	0	4	0	0	0	0	0
Totals	**64,205**	**61,618**	**32,972**	**100**	**28,336**	**72**	**8**	**130**	**2,587**	**809**

Source: U.S. Census Bureau, Census 2000 Redistricting Data (Public Law 94-171) Summary File, Matrices PL1 and PL2. [http://factfinder.census.gov/servlet/BasicFactsServlet]

1266-C-23

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

WASHINGTON, D.C. 20245

IN REPLY REFER TO:

Tribal Government Services (JS)

NOV 12 1985

Memorandum

To: All Area Directors

From: Acting Deputy Assistant Secretary - Indian Affairs

Subject: Personnel Conduct and Responsibilities in Courts of Indian Offenses

It has come to our attention that courts of Indian offenses may be violating mandates set forth in the Constitution of the United States; the Indian Civil Rights Act, 25 U.S.C. §1301-1303; the Freedom of Information Act, 5 U.S.C. §552; 18 U.S.C. §2071; 43 C.F.R. §20.735-15; and 18 U.S.C. §209.

Courts of Indian offenses are created by the Secretary of the Interior in accordance with his general authority 5 U.S.C. §301 and 25 U.S.C. §§2 and 200 and operate pursuant to 25 C.F.R. Part 11. The authority of the Secretary to promulgate regulations with respect to courts of Indian offenses was recognized in U.S. v. Clapox, 35 Fed. 575, 577 (D.C. Ore. 1888). Courts of Indian offenses are federal instrumentalities that are required to comply with federal statutes as well as the Constitution of the United States. Therefore, you are directed to take immediate steps to have reviewed the conduct and responsibility of court personnel and their operations to ensure violations are not occurring and will not occur in the courts of Indian offenses under your administrative responsibility:

1. Employees in courts of Indian offenses are prohibited from willfully and unlawfully removing, concealing, destroying or falsifying public records (i.e. court proceedings, maps, books, papers, court documents, etc.). Violators of this provision will be referred to the U.S. Attorney for felony prosecution. Penalties for such a violation can include a fine not more than $2,000 or imprisonment for not more than three years, or both. A violator also may forfeit his/her office and be disqualified from holding any office under the United States, or be subject to disciplinary action. See 18 U.S.C. §2071; See also 43 C.F.R. §20.735-15.

2. Federal employees in courts of Indian offenses are prohibited from supplementing their salaries from the money accumulated through criminal fines, court fees and from other sources. Violators of this provision will be referred to the the U.S. Attorney for felony prosecution. A fine of not more than $5,000 and/or imprisonment of not more than one year applies. See 18 U.S.C. §209.

3. Courts of Indian offenses personnel must comply with a request for court records made in accordance with the Freedom of Information Act, 5 U.S.C. §552. Any federal employee in the court who acts contrary to this provision will be subject to adverse action.

4. The Indian Civil Rights Act and the Constitution of the United States guarantee that individuals appearing before courts of Indian offenses will be afforded all of those rights guaranteed by the Constitution to all citizens of the United States in any federal court.

5. An indigent criminal defendant facing imprisonment must be afforded a court appointed attorney if he/she so desires. The responsibility for paying for the attorney is with the CFR court (federal government).

6. A criminal defendant facing possible imprisonment has the right to a trial by jury of not less than six persons. The cost for paying for a jury trial is the responsibility of the CFR court (federal government).

7. Professional attorneys can not be denied the right to practice before courts of Indian offenses. Tribes may establish criteria that place reasonable requirements on the eligibility to practice (ie. tribal bar examination and membership fees, etc..). Criteria of that nature must be made equally applicable to all persons who practice before a particular CFR court.

8. In locations where CFR courts have been established tribal and BIA law enforcement officers are required to comply with both the Constitution of the United States and the Indian Civil Rights Act in making arrests and in conducting search and seizures.

9. Courts of Indian offenses shall not enforce any tribal resolution or ordinance which is in conflict with any of the foregoing provisions. Review all resolutions and ordinances that have been adopted in accordance with 25 C.F.R. §11.1(e) to insure that they comply with present constitutional and statutory requirements.

The Superintendent is responsible for the appraisal of job performance at the local level. Accordingly, he is charged with the responsibility for assuring that the CFR personnel are performing in accordance with the federal mandates and incorporating performance standards for CFR magistrates which will insure that individual civil rights are protected in courts of Indian offenses.

Every CFR court judge and employee shall be provided a copy of this memorandum to read and be required to sign a copy of it as evidence that they have read and understand it prior to assuming any CFR court duties. The signed copy shall be made a part of each judge's and employee's official personnel file.

Please complete the attached questionnaire for each of your CFR courts and return them to the Branch of Judicial Services, Room 2618, Code 440 by COB November 18, 1985. If you have questions regarding this directive or the questionnaire please contact Allen Davis at FTS 343-7585.

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Hazel E. Elbert

Attachment

Ojibwe News, The 6/8/2001 V.13; N.29 p. 1

"Indian Courts": a brief history

by Clara NiiSka

In August 1881, Crow Dog, "belonging to" the Brule Sioux Band, killed Spotted Tail, who signed the treaty of 1868 as the principal Chief of the Brule Sioux. "The killing," according to court records, "took place at their agency upon the Great Sioux Indian reservation, in the first judicial district of Dakota Territory." Crow Dog was convicted of murder by the district court of Dakota territory, and sentenced to death.

In November 1883 the U.S. Supreme Court heard arguments on writs of habeas corpus and certiorari filed on behalf of Crow Dog. In the case Ex Parte Crow Dog, decided December 1883, the Supreme Court reversed the territorial court decision, and ruled that, "the First District Court of Dakota is without jurisdiction to find or try an indictment for murder committed by one Indian upon another in the Indian country, and a conviction and sentence upon such indictment are void, and imprisonment thereon is illegal."

The Supreme Court's decision in Ex Parte Crow Dog includes a fine- grained analysis of the jurisdiction of the district courts of the Territory of Dakota, sections of the revised U.S. statutes pertaining to "crimes arising within the maritime and territorial jurisdiction of the United States," the provisions of the treaty of April 29th, 1868 and an agreement with "certain bands of the Sioux Indians, &c." approved by Congress February 28th, 1877. The eighth article of the 1877 agreement provided that the signatory Sioux "be subject to the laws of the United States, and each individual shall be protected in his rights of property, person and life." The Supreme Court decided that the words of that agreement "can have no such effect as that claimed by them" --that the Sioux were subject to U.S. law, "not in the sense of citizens, but ... as wards subject to a guardian ... as a dependent community who were in a state of pupilage."

U.S. policy: "annihilation," "assimilation," and "tutelage" in "civilization"

In 1871, Congress ended U.S. treaty-making with Indians. United States Indian policy underwent a transformation in the 1870s and early 1880s: from President Grant's "peace policy" -- "Indians who did not go willingly to the reservations would either be driven there by force or exterminated in the process" --to a long-range agenda of "assimilation." As Senator Dawes, better- known for the General Allotment Act, put it, the "Indian people will not remain as a separate race among us ... He is to disappear in the midst of our population, be absorbed in it, and be one of us and fade out of sight as an Indian..."

The assimilationists' agenda of Christianization and the use of "education" to "kill the Indian... and leave the man and the citizen" was countered by the philosophy expressed by the Supreme Court in Ex Parte Crow Dog: that Indians were"... aliens and strangers... a community separated by race, by tradition, by the instincts of a free though savage life ..." During the 1870s, most U.S. Indian reservations remained under military control-- Indian agents were often also officers in the U.S. Army. Excerpts from the annual Report of the Commissioner of Indian Affairs provide a glimpse of the foundations of present U.S. Indian policy:

1878, Indian police:

By Act of May 27, passed at the last session of Congress, provision was made for the organization at the various agencies of a system of Indian police... Too short a time has elapsed to perfect or thoroughly test the workings of such a system, but the results of the experiment at the thirty agencies in which it has been tried are entirely satisfactory, and commend it as an effective instrument of civilization.... The police organization should be followed up by the adoption of a code of laws for Indians, and peace and good order among them will result.

1879, law for Indian reservations:

In the last three annual reports of this office urgent appeals have been made for the enactment of laws for Indian reservations. The following bill was introduced at the last Congress...

... That the provisions of the laws of the respective States and Territories in which are located Indian

reservations, relating to the crimes of murder, manslaughter, arson, rape, burglary and robbery shall be deemed and taken to be the law, and in force within such reservations; and the district courts of the United States... shall have original jurisdiction over all such offenses which may be committed within such reservations...

It is matter if vital importance that action should be taken to secure the passage of the above bill, or of some measure of equal efficiency to provide law for Indians, to the end that order may be secured. A civilized community could not exist as such without law, and a semi-civilized and barbarous people are in a hopeless state of an archy without its protection and sanctions. It is true the various tribes have regulations and customs of their own, which, however, are founded on superstition and ignorance of the usages of civilized communities... To supply their place it is the bounden duty of the government to provide laws suited to the dependent condition of the Indians. ... the wonder is that such a code was not enacted years ago.

1880, legislation needed:

... The enactment of suitable laws for Indian reservations. In the annual reports of this office for some years past the necessity for a judicial system or code of laws for the Indians has been specially commented upon ...

It is of the utmost importance that some such measure ... should be passed, not only in the interest of peace and good order among the Indians, but also as a necessary factor in the work of their civilization. Under the present system, outside of the five civilized tribes, crimes and offenses committed by one Indian against the person and property of another are remitted to tribal laws or customs for punishment. It is time that this relic of barbarism should cease. The Indian should be taught to know and respect the same law which governs the white man, and to recognize the fact that, while he is amenable to the law, he is equally entitled to its protection and privileges.

1881, the enactment of laws for Indian reservations:

Various measures looking to this end have been introduced in Congress, among the latest being House bill No. 350, Forty-sixth Congress, second session... This bill, as well as others of a kindred nature, died a natural death at the close of the last Congress.

I ... earnestly hope that Congress will find time to bestow attention upon this important subject....

1882, laws for Indians:

For years past urgent appeals have been made by this office for such legislation as will insure a proper government of the Indians, by providing that the criminal laws of the United States shall be in force on Indian reservations, and shall apply to all offenses, including those of Indians against Indians; and by extending the jurisdiction of the United States courts to enforce the same; in short to make an Indian as amenable to law as any other subject of the United States.

From time to time various measures looking to this end have been introduced in Congress; but from some cause or other ... they have invariably fallen through, so that today the only statutes under which Indians are managed and controlled are substantially those created in 1834, known was the trade and intercourse laws....As civilization advances and the Indian is thrown into contact with white settlers the authority of the chiefs proportionately decreases. It is manifest that some provision of law should be made to supply this deficiency and protect Indians in their individual rights of person and property. At the same time, the Indian should be given to understand that no ancient custom, or tribal regulation, will shield him from just punishment for crime....

I again respectfully recommend that the attention of Congress be called to the subject, with a view to such legislation as it may deem expedient.

1883, laws for the government of Indians:

In the annual reports of this office for several years past, attention has been invited to the urgent necessity of some suitable code of laws for Indian reservations. Indians in the Indian country are not punishable for crimes or offenses committed against the persons or property of each other. Such offenses are generally left to the penalties of tribal usage ... or the offenders are subjected to a few weeks or months arbitrary confinement in an agency guardhouse or military fort.

The Indian is not a citizen of the United States. He cannot sue or be sued under the judiciary act of

1789, and only gets into Federal courts as a civil litigant, in occasional instances, by favor of special law, and in many of the States and Territories he has no standing at all in court....

No action has been taken by Congress ... asking for the enactment of a general statute putting Indians under the restraints and protection of law ...

... Congress should confer both civil and criminal jurisdiction on the several States and Territories over all Indian reservations within their respective limits, and make the person and property of he Indian amenable to he laws of the State or Territory in which he may reside ... and give him all the rights in the courts enjoyed by other persons.... What is required is a law for the punishment of crimes and offenses among the Indians themselves, one which shall make the Indian equally secure with the white man in his individual rights of person and property, and equally amenable for any violation of the rights of others.

COURT OF INDIAN OFFENSES

On the 10th of April last you [the Secretary of the Interior] gave your official approval to certain rules governing the "court of Indian offenses," prepared in this office in accordance with instructions contained in your letter of December 2 last. These rules prohibit the sun-dance, scalp-dance and war-dance, polygamy, theft, &c., and provide for the organization at each agency of a tribunal composed of Indians empowered to try all cases of infraction of the rules.... I am of the opinion that the "court of Indian offenses," with some few modifications, could be placed in successful operation at the various agencies, and thereby many of the barbarous customs now existing among the Indians would be entirely abolished.

There is no good reason why an Indian should be permitted to indulge in practices which are alike repugnant to common decency and morality; and the preservation of good order on the reservations demands that some active measures should be taken to discourage and, if possible, put a stop to the demoralizing influence of heathenish rites ...

1884:

In his annual Report, 1884, the Commissioner of Indian Affairs once again wrote that, "a law is badly wanted for the punishment of crimes and offenses amongst Indians themselves." The Commissioner referred to Crow Dog, "at large upon the reservation unpunished," as illustrative of the "necessity for amendment of the law," and commented that, "the average Indian may not be ready for the more complex question of civil law, but he is sufficiently capable to discriminate between right and wrong, and should be taught by the white man's law to respect the persons and property of his race, and that under the same law he himself is entitled to like protection."

Despite his apparent pleas for equal protection under the law for Indians, in the same 1884 Report, the Commissioner also extolled the newly- established court of Indian offenses for being "instrumental in abolishing many of he most barbarous and pernicious customs that have existed among the Indians from time immemorial," specifically including such "heathenish customs" as the sun dance. His report included quotations from the reports of several Indian agents, including at White Earth Agency, Minnesota: "The court here has relieved me of many trying cases ... it is only a question of time and it will become a permanent fixture and recognized as the only way to settle the little differences" among Indians. He also recommended a Congressional appropriation of $50,000 to pay the salaries of Indian court judges and "other necessary expenses," and urged that, "it would be a matter of economy to the Government in saving the expense heretofore incurred of suppressing crimes which are now included in the jurisdiction of the court of Indian offenses."

1885:

U.S. Congress enacted the precursor to the Indian Major Crimes Act as the ninth section of the Indian Appropriations Act of March 3, 1885. That act "gave" U.S. courts jurisdiction over the Indians accused of the crimes of murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. In his 1885 Report, the Commissioner described the legislation as a "step in the right direction," and once again expressed the notion that "Indians should eventually become subject to and enjoy the protection of all laws in the same manner and to the same extent as other persons." (Congress' assertion of federal jurisdiction was upheld the following year by the U.S. Supreme Court in the case United States v. Kagama, involving a murder on the Hoopa Valley Reservation in California. The grounds upon which the Supreme Court affirmed federal

jurisdiction rested on the notion of Indian "pupilage," and, as the Court wrote: "The power of the General Government of these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it has never existed anywhere else ... because it has never been denied, and because it alone can enforce its laws on all tribes.")

The Commissioner also addressed the court of Indian offenses in his 1885 Report, writing: "Under the date of April 10, 1883, the then Secretary of the Interior gave his official approval to certain rules prepared in this office for the establishment of a court of Indian offenses at each of the Indian agencies ... It was found that the longer continuance of certain old heathen and barbarous customs, such as the sun-dance, scalp-dance, war-dance, polygamy, &c., were operating as a serious hindrance to the efforts of the Government for the civilization of the Indians....

"There is no special law authorizing the establishment of such a court, but authority is exercised under the general provisions of the law giving this Department supervision of the Indians. The policy of the Government for many years past has been to destroy the tribal relations as fast as possible, and to use every endeavor to bring the Indians under the influence of law. To do this the agents have been accustomed to punish for minor offenses, by imprisonment in the guard-house and by withholding rations, but under the present system the Indians themselves, through their judges, decide who are guilty of offenses under the rules, and pass judgment in accordance with the provision thereof. Neither the section in the last Indian appropriation bill [granting federal jurisdiction over major crimes] ... nor any other enactment of Congress reaches any of the crimes or offenses provided for in the Department rules, and without such a court many Indian reservations would be without law or order, and the laws of civilized life would be utterly disregarded.

"At each agency, where it has been found practicable to establish it, the reports of the Indian agents show that the court has been entirely successful, and in many cases eminently useful in abolishing the old heathenish customs that have been for many years resorted to, by the worst elements on the reservation, to retard the progress and advancement of the Indians to a higher standard of civilization and education...."

Ojibwe News, The 6/15/2001 V.13; N.30 p. 6
"Indian Courts": a brief history

(Part 2)
Last week, Press/ON published excerpts from the Annual Reports of the Commissioner of Indian Affairs from 1878 to 1885. During those years, the Commissioner repeatedly wrote of the "urgent" need for the "enactment of laws for Indian reservations." He urged that state and territorial criminal and civil jurisdiction be extended over Indian reservations, and he advocated that Congress enact laws which would "make the Indian equally secure with the white man in his individual rights of person and property, and equally amenable for any violation of the rights of others."

On April 10, 1883, the Secretary of the Interior "gave his approval" to rules governing what the Indian Commissioner called a "court of Indian offenses." In his Annual Report, the Commissioner made repeated pleas that Congress enact legislation extending equal protection under the law to Indians. Despite his rhetoric, the rules for courts of Indian offenses that the Commissioner's office actually provided to the Secretary on December 2, 1882 were specifically intended to repress religious practices--the Commissioner termed them "heathenish rites"--and to "destroy the tribal relations as fast as possible."

In the case Ex Parte Crow Dog, decided by the U.S. Supreme Court in December 1883, the Court ruled that despite explicit extension of U.S. jurisdiction over "certain bands of Sioux Indians" in 1877, they were subject to U.S. law not as citizens entitled to equal protection under the law and the rights guaranteed by the U.S. Constitution, but as "wards subject to a guardian ... as a dependent community who were in a state of pupilage." The Supreme Court ruled that Crow Dog's actions in killing Spotted Tail remained under tribal jurisdiction.

The Office of Indian Affairs used the Crow Dog case, and the fact that Crow Dog was "at large upon the reservation unpunished" by U.S. law, to lobby for laws extending U.S. criminal jurisdiction over Indians. In 1885, the U.S. Congress passed the predecessor to the Indian Major Crimes Act, which the Commissioner

of Indian Affairs praised as a "step in the right direction."

The Commissioner also continued to press for extension of U.S. civil jurisdiction over Indians, as well as for Congressional legalization of their "court of Indian offenses." At the same time, he lauded the Indian court, established without legal authority other than the general authority of the Department of the Interior, and extolled its `civilizing' effectiveness in abolishing "certain old heath and barbarous customs, such as the sun-dance ..."

Commissioner of Indian Affairs,
Annual Report, 1886:

The Commissioner of Indian Affairs wrote in his 1886 Report that the courts of Indian offenses were, "...unquestionably a great assistance to the Indians in learning habits of self-government and in preparing themselves for citizenship. I am of the opinion that they should be placed upon a legal basis by an act of Congress authorizing their establishment, under such rules and regulations as the Secretary of the Interior may prescribe. Their duties and jurisdiction could then be definitely determined and greater good accomplished..."

Annual Report, 1888:

In his 1888 Report, the Commissioner once again urged that, "the jurisdiction of these courts [of Indian offenses] be defined by law." He enumerated the "offenses" over which the Secretary of Interior had asserted jurisdiction: "the sun-dance, the scalp-dance, the war-dance (and all other so- called feasts assimilating thereto); plural marriages; the practice of the medicine man; the destruction or theft of property; the payment or offer to pay money or other valuable thing to the friends or relatives of any Indian girl or woman, are declared to be Indian offenses, punishable by withholding of rations, fine, imprisonment, hard work, and in the case of a white man, removal from the reservation."

According to the Commissioner of Indian Affairs, the jurisdiction of his courts of Indian offenses also included: "misdemeanors committed by Indians; civil suits when Indians are parties thereto; cases of intoxication; and violations of the liquor regulations. There civil jurisdiction is declared to be the same as that of justices of the peace ... If these rules, amended in several essential particulars, were enacted into law, the usefulness of the courts of Indian offenses would thereby be greatly increased, and under the authority exercised by these courts the Indian would be compelled either to obey the law or suffer its penalties ..."

The Commissioner explained that legislation authorizing the courts of Indian offenses "would supplement" the jurisdiction asserted by the "Indian Crimes Act" of 1885. He cited the Supreme Court case United States v. Kagama and Another, Indians as providing that the Indian Crimes Act "is valid and constitutional" based on the "state of semi-independence and pupilage" which the United States government had "heretofore recognized in the Indian tribes ..."

U.S. v. Clapox, 1888

Six years after the federal bureaucracy asserted jurisdiction over Indians through its establishment of courts of Indian offenses, the federal district court of Oregon affirmed the legality of those courts in its adjudication of the case United States v. Clapox, et al. The case began with the arrest, by Indian police, of Minnie, "an Indian woman." Minnie was jailed "for the offense of living and cohabiting" with an Indian other than her husband. Prior to any trial, Minnie was rescued and "set at liberty" by the defendants in U.S. v. Clapox, also Indians. Her rescuers were charged with the federal crime of "rescue" -- "forcibly setting a person at liberty who has committed for `a crime against the United States'."

The Oregon district court determined that despite the fact that there were no written records kept by the court of Indian offenses, that adultery was not even a misdemeanor at common law, and that there was no federal statute regulating consensual sexual conduct between adult Indians, Minnie was, nonetheless, charged with a "crime against the United States." The remarkable legal reasoning in U.S. v. Clapox rests, in part, on article 8 of the Indian treaty made at Camp Stevens on June 9, 1855, in which the "Walla- Wallas, Cayuses and Umatilla tribes, and bands" of Indians, "acknowledge their dependence on the government of the United States ... and engage to submit to and observe all laws, rules and regulations which may be prescribed by the United States for the government of said Indians."

The Oregon district court acknowledged that, "These 'courts of Indian offenses' are not the constitutional courts provided for in section 1, art. 3, Const., which congress only has the power to 'ordain and establish,' but mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian. In fact, the reservation itself is in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man." The curriculum established by the U.S. included punishment for certain `"Indian offenses,' such as the `sun,' the 'scalp,' and the 'war dance,' polygamy, 'the usual practices of so-called 'medicine men',' ... and buying or selling Indian women for the purpose of cohabitation."

In some remarkable legal reasoning invoking English ecclesiastical law and the "conduct peculiar to the Indian in his savage state," the Oregon district court ruled that although adultery was not specifically prohibited by the rules of the court of Indian offenses, "it is altogether in keeping with the general purpose and spirit of these rules that adultery should be prohibited and punished by them." The United States, "by virtue of its power and authority in the premises, had established a rule," which Minnie was allegedly accused of violating. She was "therefore committed for a crime against the lawmaker,--the United States." Thus, continued the Oregon court, her rescuers were, "in flagrant opposition to the authority of the United States on this reservation, and directly subversive of this laudable effort to accustom and educate these Indians in the habit and knowledge of self- government."

Nearly a century later, in a November 12, 1985 memorandum to B.I.A. Area Directors and addressing issues involving Courts of Indian Offenses, Acting Deputy Assistant Secretary of Indian Affairs Hazel Elbert explained that "Courts of Indian offenses are created by the Secretary of the Interior in accordance with his general authority ... and operate pursuant to 25 C.F.R. [Title 25, Code of Federal Regulations], part 11. The authority of the Secretary to promulgate regulations with respect to courts of Indian offenses was recognized in U.S. v. Clapox. Courts of Indian offenses are federal instrumentalities ..." [*please see memorandum immediately preceding this article series.*]

1972 legal review--the foundation of courts of Indian offenses

In his September 1972 article in the North Dakota Law Review, "Tribal injustice: the Red Lake court of Indian offenses," Press/ON publisher William J. Lawrence chronicled the United States' establishment of courts of Indian offenses, and examined the Indian court at Red Lake.

Lawrence observed that, "the Indian police systems were organized in 1878, and not until 1883 did the federal government see fit to establish the court system, and not until 1888 did Congress see fit to appropriate any money to finance the courts. It would seem that the federal government since the early days of the Indian service has been police-oriented, and that the courts, which are the heart of any system of justice, have been low in the order of priorities ..."

Lawrence scrutinized the courts of Indian offenses' shaky legal foundation, resting on U.S. v. Clapox--"mere educational and disciplinary instrumentalities" deriving their authority from U.S. 'guardianship.' He noted that another "defense of their legality" is the doctrine, espoused in 1934, that courts of Indian offenses "derive their authority from the tribe rather than from Washington." Lawrence adds, "whichever of these explanations is offered for the existence of the courts of Indian offenses, their establishment cannot be held to have destroyed or limited the powers" vested in the people.

The 1934 Indian Reorganization Act

The year in which tribal authority--rather than the authority of the U.S. government--was held to legitimate Indian courts is significant: 1934. Following years of lobbying by the Bureau of Indian Affairs, led by "reformer" and Indian Commissioner John Collier, the U.S. Congress enacted the Indian reorganization Act (I.R.A.) in 1934.

In legislation codified as Title 25, Section 476 of the U.S. Code, the U.S. Congress passed a law providing for "the Organization of Indian tribes; constitution and by-laws and amendment thereof." The I.R.A. details the processes by which an "Indian tribe" may be "organized" under U.S. Law; paragraph (d)

requires that the U.S. Secretary of the Interior approve the constitutions of tribes organized under the I.R.A. The I.R.A. also mandates that such Indian tribal constitutions not be contrary to "applicable laws."

The I.R.A. also delineates the powers of the "Indian tribe or tribal council": in addition to all powers "vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments." The I.R.A. does not legitimate Courts of Indian offenses, nor does it enumerate the establishment of Indian tribal courts as among the powers of an "Indian tribe or tribal council."

Legal challenges to Indian courts

Iron Crow v. Oglala Sioux Tribe, 1956

The authority of Indian tribal courts was challenged in 1956 in case involving adultery: Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation, heard by the U.S. Court of Appeals, Eighth Circuit. In that case, Marie Little Finger and David Black Cat were tried and convicted in the Oglala Sioux Tribal court of the crime of adultery, under the Revised Code of the Oglala Sioux Tribe. The Tribal Court exercised jurisdiction on the grounds that both Little Finger and Black Cat were enrolled members of the Oglala Sioux Tribe, and that their tryst took place on the Pine Ridge Reservation. Little Finger and Black Cat filed for an injunction in federal court, on the grounds that the Tribal Court did not have the jurisdiction to try and convict them, and that enforcement of the sentences of the Tribal Court was in violation of the due process clause of the Fifth Amendment to the U.S. Constitution.

The U.S. appellate court found that Tribal Courts are not provided for in either the U.S. Constitution, nor have they been "authorized by federal legislative action." However, the federal court ruled that since Congress had provided for "pay and other expenses of judges of Indian courts" and Indian police, Congress "recognized" the authority of Indian tribal courts, and that those courts had "inherent" jurisdiction.

Little Finger and Black Cat argued that their rights were protected "as citizens of the United States." Drawing on legal cases decided before passage of the Act of June 2, 1924 extended citizenship to all Indians "born within the territorial limits of the United States," the federal court ruled that the Oglala Sioux defendants did not attain the rights guaranteed to other citizens by virtue of their U.S. citizenship. The caselaw quoted by the Eighth Circuit Court included the 1916 case, U.S. v. Nice: "Of course, when Indians are prepared to exercise the privileges and bear the burdens of one sui juris, the tribal relation may be dissolved and the national guardianship brought to an end, but it rests with Congress to determine when and how this shall be done, and whether the emancipation shall be complete or only partial..."

The federal court also quoted from the case Lone Wolf v. Hitchcock, "It is thoroughly established that Congress has plenary authority over Indians ..." and held that, "the granting of citizenship in itself did not destroy ... jurisdiction of the Indian tribal courts and that there was no intention on the part of Congress to do so."

Colliflower v. Garland, 1965

In 1963 Madeline Colliflower, a member of the Gros Ventre Indian Tribe, Ft. Belknap Indian Reservation, was charged by the Ft. Belknap court of Indian offenses with "disobedience to the lawful orders of the Court." Mrs. Colliflower pled not guilty to the charges; the Indian judge "found her guilty and sentenced her to a fine of $25 or five days in jail. Mrs. Colliflower ... elected to take the jail sentence because she could not pay the fine."

Based on the due process clauses of the due U.S. Constitution, Mrs. Colliflower then petitioned for a writ of habeas corpus, claiming "that her confinement is illegal and in violation of her constitutional rights, because she was not afforded the right to counsel, was not afforded any trial, was not confronted by any witnesses against her, and because the action of the court was taken summarily and arbitrarily, and without just cause." The district court decided that it did not have the jurisdiction to issue a writ of habeas corpus for an Indian who was committed by a tribal court. Mrs. Colliflower appealed; the federal appellate court ruled on the jurisdictional issue but did not rule on the petition for a writ of habeas corpus.

In its opinion in the case Colliflower v. Garland, the U.S. Court of Appeals noted that Iron Crow v. Oglala Sioux Tribe "did not touch upon the question of whether the Constitution applies to the procedure of Indian courts," merely ruled that the Indian court had jurisdiction. The federal court continued, "In spite of the theory that for some purposes an Indian tribe is an independent sovereignty, we think that, in light of their history, it is pure fiction to say that the Indian courts functioning in the Fort Belknap Indian community are not in part, at least, arms of the federal government. Originally they were created by federal executive and imposed upon the Indian community, and to this day the federal government still maintains a partial control over them. ... Under these circumstances, we think that these courts function in part as a federal agency and in part as a tribal agency, and that consequently it is competent for a federal court in a habeas corpus proceeding to inquire into the legality of the detention of an Indian pursuant to an order of an Indian court."

The U.S. Court of Appeals, Ninth Circuit, however, muted its decision that a U.S. citizen who was also an Indian had the legal right to file a writ of habeas corpus in federal court by writing, "We confine our decision to the courts of the Fort Belknap reservation." The federal court also limited the impact of its decision with the caveat that, "it does not follow from our decision that the tribal court must comply with every constitutional restriction that is applicable to federal or state courts..."

Federal funding

Overall, the BIA budgeted more than $128 million for "tribal courts" during the year 2001. In the Bureau's narrative for its 2001 budget justifications, the BIA describes the tribal courts as enabling "Tribes to exercise their rights as sovereign nations by establishing and maintaining their own civil and criminal codes in accordance with local Tribal customs and traditions. ... The program also supports the Bureau's goal to foster strong and stable Tribal governments so they can exercise their authority as sovereign nations." The BIA makes no mention of the dubious legal basis for these courts, nor of the fundamental civil rights and due process guaranteed to all U.S. citizens under the U.S. Constitution....

Next week:

A chronicle of civil rights violations. And, the U.S. Court of Appeals rules on a court of Indian offenses in a case involving non-Indians: "an Indian tribe may not assert sovereign immunity against the United States."

Ojibwe News, The 6/22/2001 V.13; N.31 p. 1

Indian Courts: A Brief History; This Week; Quasi-Legal Courts at Red Lake

Last week, Press/ON reprinted brief excerpts from the Annual Reports of the Commissioner of Indian Affairs in 1886 and 1888. The "courts of Indian offenses" were formally proposed in late 1882 by the Indian Commissioner, and established with the "approval" of the Secretary of the Interior on April 10, 1883. The late 1800s were an era when political leaders like Senator Dawes-- also chief author of the General Allotment Act- exhorted other policy-makers that "the Indian... is to disappear." At that time, the main debate was whether "the vanishing Americans" were to be completely annihilated, or merely "civilized." The Interior Department's establishment of "courts of Indian offenses" deliberately intended to "destroy the tribal relations as fast as possible" as well as to repress religion and culture, does not seem to have raised much public concern.

In 1886, three years after the Indian courts had been created by the federal bureaucracy, the Commissioner of Indian Affairs was still urging that "they should be placed upon a legal basis by an act of Congress authorizing their establishment." Despite its claims to "plenary authority" over Indians, the U.S. Congress has never seen fit to legalize the courts of Indian offenses. After 118 years, these "Indian courts" remain "educational and disciplinary instrumentalities" operating under the "general authority" of the Secretary of the Interior.

Indian tribal governments were transformed by the Indian Reorganization Act (I.R.A.) in 1934. Tribal Constitutions which "contain all the requirements of an IRA-document" specifically limit "Indian tribal

government" by mandating that most acts of such Indian governments be approved by "the Secretary of the Interior or his authorized representative." The I.R.A. also provides that tribal organization chartered under the I.R.A "shall not be revoked or surrendered except by Act of Congress" (25 § 477). With its control over "Indian tribal governments" thus thoroughly entrenched, the Commissioner of Indian Affairs and his Bureau of Indian Affairs (B.I.A.) began claiming that the courts of Indian offenses and other "Indian courts" were founded on "tribal authority" rather than that of the Secretary of the Interior.

The B.I.A.'s notion that the courts of Indian offenses established by the U.S. government are somehow really "tribal" has been entrenched over the past seventy years. The B.I.A.'s fiscal year 2001 budget request to Congress included more than $145 million dollars for Indian courts. The B.I.A. explained its quasi-legal federal instrumentalities--originally established to destroy indigenous society--as "more than 250 Tribal justice systems and Courts of Indian Offenses" which "enable ... Tribes to exercise their rights as sovereign nations." Is this a "shell game" to divert responsibility, confuse Congress, and absolve the U.S. government of blame?

In Minnesota, 1884:

Based on the general authority asserted by the Secretary of the Interior, courts of Indian offenses were established in Minnesota in 1884. Minnesota Indian Agent C.P. Luse described these courts of Indian offenses in his 1884 report: "While I have selected three good men as judges of the court of Indian offenses for [White Earth reservation], I have not been able to find suitable persons both at Red Lake and Leech Lake to be competent judges." Despite its lack of competent judges, Agent Luse described the Red Lake Indian court as having, "relieved me of many a trying case." Luse prophesied that, "it is only a question of time and [the Court of Indian offenses] will become a permanent fixture and recognized as the only way to settle the little differences among them. If these judges could be paid a reasonable salary for their time and services, there would not be any doubt of the continued good results from this court." Six years later, in his 1890 Report, the Commissioner of Indian Affairs noted that the "reservation tribunals known as `courts of Indian offenses' have been placed upon a quasi-legal basis by an appropriation made by Congress for the pay of the judges of such courts." That same year B.P. Schuler, U.S. Indian Agent in Minnesota, wrote that there were three judges at the court of Indian offenses at the White Earth Agency (which also supervised Leech Lake, Mille Lacs, Red Lake, and several other places no longer distinguished as Indian reservations). The White Earth judges--Joseph Charette, William V. Warren, and John G. Morrison--Schuler continued, "speak English fluently and intelligently and wear citizens' dress.... The general influence of the court ... is good... This court should be regularly established and the judges compensated for their labor."

U.S. jurisdiction over "Indians"

The reality of jurisdiction--which court has authority over whom [personal jurisdiction] under what circumstances [subject matter jurisdiction]- -at Red Lake is fairly complicated in actual practice. The U.S. and the State of Minnesota have asserted jurisdiction piecemeal and by increments on Indian reservations, and legal writers have described the consequences as a "morass" and "dolefully" inconsistent. The details of how this was done are interesting history chronicled in state and federal case-law.

The jurisdictional cases specific to Red Lake begin with U.S. v. 43 Gallons of Whiskey--which went to the U.S. Supreme Court twice, in 1876 and again in 1883. The whiskey, belonging to white men Bernard Lariviere and Clovis Guerin, was seized in the village of Crookston on Feb. 12, 1872. Lariviere, who was a licensed "retail liquor dealer," argued that he and the whiskey were under State jurisdiction, in Polk County, Minnesota. The United States' position that federal law pertaining to "Indian country" had jurisdiction over Lariviere and his whiskey prevailed. U.S. v. 43 Gallons of Whiskey was still being cited as a precedent in 1933.

The philosophy underlying both U.S. and Minnesota law had been spelled out in 1823 by U.S. Supreme Court Justice Marshall in the case Johnson v. M'Intosh: "the different nations of Europe ... asserted the ultimate dominion to be in themselves." U.S. claims to hegemony were reaffirmed by Marshall in the U.S. Supreme Court case Cherokee Nation v. Georgia eight years later: "we assert a title independent of their will."

U.S. jurisdiction and Red Lake

At Red Lake, the United States' specific claims to jurisdiction rest on cession of land outside of the boundaries of the present-day "diminished reservation": under the treaty of October 2, 1863 (amended April 21, 1864 and proclaimed April 25, 1864); and pursuant to the Act of January 14, 1889, Chap. 24, "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota" (the "Nelson Act"). In the table "Indian reservations, areas and how established," published in the Indian Commissioner's Annual Report in 1893, the B.I.A. also listed U.S. President Harrison's Executive Order of March 4, 1890, which "restored" seven sections and partial section-- the Ponemah cut-off--which were "cut off" the diminished reservation after a survey to "establish" the boundaries of the Red Lake land ceded by the Minnesota Chippewa Tribe under the provisions of the 1889 Nelson Act. Red Lake reservation was "diminished" again pursuant to the U.S. Congress' Act of February 20, 1904.

Underlying U.S. v. Clapox--the appellate case cited as legitimizing courts of Indian offenses--is a specific cession of jurisdiction: Article 8 of the Indian treaty of 1855 between the "confederated bands" in Oregon and the United States. At Red Lake there has been no such direct ceding of jurisdiction, and the Secretary of the Interior's authority to establish a court of Indian offenses rests directly on the "ultimate dominion" asserted by the U.S. and its European predecessors.

Red Lake Agency Court of Indian Offenses, 1906 - 1935

The B.I.A. operated its Red Lake court of Indian offenses as a part of the White Earth Indian Agency until 1906, when it established a separate Indian agency at Red Lake and stationed a full-time Indian agent there. After 1906, "local members of the tribe were utilized as judges," but the Indian court continued to operate under the B.I.A.'s nineteenth-century "revised regulations" until new departmental regulations were approved by the Secretary of the Interior on November 27, 1935.

In 1918, the Red Lake Band of Chippewa Indians was formally organized under a written constitution: that of the General Council, generally known as "Peter Graves' council." The governmental powers delineated by the 1918 constitution did not include the establishment of a court. In fact, the 1918 constitution grants only extremely limited governmental power to the General Council: conferring authority on the "several Chiefs" to "call a meeting," deciding in "disputes as to Chiefs," respecting and giving "proper consideration" to petitions "placed before them by any member of the Red Lake Band," expending and accounting for funds--and very little else. The B.I.A. continued to operate the Red Lake court of Indian offenses under the general authority of the Secretary of the Interior.

1934 I.R.A.

The Indian Reorganization Act, enacted by the U.S. Congress on June 18, 1934, has often been held to validate the court of Indian offenses. The legislation enacted by Congress does not, however, include any language which could reasonably be construed to establish or validate either courts of Indian offenses or Indian tribal courts.

The Secretary of the Interior prescribed new regulations governing courts of Indian offenses on November 27, 1935, but these continued to rest on the Secretary's "general authority," rather than on either congressional legislation or the U.S. Constitution. It is unclear whether Congress' silence derives from silent acquiescence to the abuses in tribal courts, an absence of Congress' express delegation of authority, or Congressional avoidance of politically-controversial issues.

The Red Lake Band of Chippewa Indians did not adopt a constitution conforming to the requirements of the 1934 I.R.A. until 1958, and the degree to which the Indian Reorganization Act applied to Red Lake prior to 1958 is disputed. In any event, the B.I.A. continued to operate the Red Lake court of Indian offenses under the general authority of the Secretary of the Interior.

1952: Red Lake "Law and Order Provisions"

In 1952, seventy years after the courts of Indian offenses were established by the B.I.A, written "Law and Order Provisions" were finally adopted by the "Red Lake Tribe," and approved by the Secretary of the Interior. These "provisions" included some now-picturesque sections, including § 72, which barred "any

employable Indian" from "wander[ing] about in idleness ... without any attempt to obtain regular employment." Several sections of the 1952 provisions would have been--obviously--of dubious legality under the U.S. constitution, if Indians were meant to be protected by the fundamental civil rights guarantees of that constitution as it applies to non-Indians.

Peter Grave's General Council at Red Lake was disestablished in 1958. After a hiatus of several months, a constitution which contained "all the requirements of an IRA-document" was approved by the Constitution Committee, adopted by the Red Lake Band, and--as required by Sec. 16 of the I.R.A.-- approved by the Secretary of the Interior. The 1958 constitution established the Tribal Council of the Red Lake Band of Chippewa Indians.

Neither the 1958 Red Lake constitution, nor the Constitution of the Minnesota Chippewa Tribe (approved March 3, 1964), provides for the establishment of tribal courts--or for the legalization of the courts of Indian offenses. The B.I.A. continued to operate its Red Lake court of Indian offenses at Red Lake under the general authority of the Secretary of the Interior.

1972: "Tribal Injustice" and the "kangaroo court"

In the summer of 1972, the North Dakota Law Review published an article by William J. Lawrence, "Tribal Injustice: the Red Lake Court of Indian Offenses," detailing some of the legal, jurisdictional and procedural problems adhering to the Red Lake court. Lawrence described a "jurisdictional morass" at Red Lake. He also wrote about the parameters of jurisdiction at Red Lake: delineated by "race" and geography as well as by type of case. "Race" has been supplanted by "tribal enrollment," but courts of Indian offenses remain apartheid under present-day Department of the Interior regulations.

Lawrence, in the carefully-documented and dry language of law review articles, described the Red Lake Indian court: "in practice [it] ... is ineffective in enforcing its judgments and ... most band members receive little or no satisfaction in bringing civil cases before the court." He also touched on the problems of "tribal politics" affecting the outcome of cases before the Red Lake court of Indian offenses. "Obviously," he wrote, "a judge whose tenure is based on tribal politics tends to be extremely insecure and far from independent." He added, "it is an unusual case at Red Lake where the agency superintendent or the tribal politicians do not make their views known to the court."

In his law review article, Lawrence also discussed other problems with the Red Lake court of Indian offenses, including that, "the greatest shortcoming and most basic criticism of the court is its nearly total disregard for due process for law. The court is notorious for giving improper notice. There have been numerous cases in which judges have failed to allow parties to present testimony and evidence in their behalf.... It is this type of proceeding which has ... prompted many [both Indian and non-Indian] to refer to it as a `Kangaroo Court'."

May 1979: "Revolution" at Red Lake

In February 1979, tribal council chairman Roger Jourdain led the Red Lake tribal council's censure of their treasurer Stephanie Hanson. Jourdain was upset that she had "requested a legal opinion from the United States Department of the Interior Field Solicitor's office ... regarding a proposed, but not adopted, resolution" concerning chairman Jourdain's business account. Jourdain's subsequent "firing" the treasurer inflamed longstanding dissatisfaction at Red Lake. What a federal court subsequently called a "revolt" erupted on May 19, 1979.

According to court records, "at approximately 4:45 a.m. on the morning of May 19 ... armed men, led by tribal member Harry Hanson, entered the Red Lake Law Enforcement Center ("LEC") and took over the building." The prisoners were released, and "two of the BIA officers, a police dispatcher, and two BIA jailers" were taken hostage, "locking them in one of their own jail cells." The LEC was among the buildings subsequently burned.

The Red Lake tribal council sued the U.S. government for damages allegedly arising from "the defendant's employees negligent unilateral withdrawal of law enforcement personnel from the Red Lake Reservation in the middle of an insurrection." In addition, the "plaintiffs charged that the F.B.I. and the B.I.A. had negligently failed to make adequate plans prior to the uprising of May 19 despite warnings that something might happen." The U.S. government moved to dismiss the suit on the "ground that the allegedly negligent

activities were based upon the performance of a discretionary function and were thus exempt from liability under a statutory exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a)."

Roger Jourdain and his cohorts were awarded damages totaling $849,562.62 by the U.S. district court. In 1991, the U.S. Court of Appeals reversed the district court's judgment, concluding that the "damages were not proximately caused by the [U.S.] government's negligence." The United States did not address the underlying issues, including the persistent lack of any viable legal process through which the people at Red Lake could have addressed the problems that festered and eventually erupted into revolt at Red Lake.

May 1982: the Red Lake CFR Court

Three years after the "revolution," in the May 21, 1982 issue of the Federal Reporter, the B.I.A. published notice of its "update" of the listing of the courts of Indian offenses in title 25 of the Code of Federal Regulations, "by adding the Red Lake Court of Indian Offenses to the list. This amendment is necessary to reflect the true status of the Red Lake court which was inadvertently omitted from the listing when it was first published in the Federal Register in 1978. This amendment will effectively update the listing and eliminate the confusion concerning the status of the Red Lake Court of Indian Offenses."

The most recent Code of Federal Regulations, §11.100, continues to identify the "Red Lake Band of Chippewa Indians (Minnesota)" as a "Court of Indian Offenses"--Red Lake is the first on the list.

"... Islands of Injustice"

On January 5, 6, and 7 of 1986, the Minneapolis Star Tribune published a series of articles entitled "Indian Courts, Islands of Injustice." Star Tribune staffwriters Sharon Schmickle and Roger Buoen began researching the series of articles several months prior to publication. After unsuccessfully attempting to obtain access to Red Lake court of Indian offenses records through the Freedom of Information Act (FOIA), the Star Tribune and Sharon Schmickle sued the U.S. Department of the Interior, the Bureau of Indian Affairs, the Red Lake Agency and several individuals including Red Lake Indian court judge George Sumner, "seeking to access certain files of the Red Lake Court of Indian offenses. On the same [August 1985] date," according to U.S. district court records, "the files at issue were removed from federal custody by order of the Red Lake Tribal Council." The Department of the Interior undertook "certain efforts to effect the return of these documents, but has not yet succeeded ..."

Litigation arising from the Star Tribune's FOIA request for Red Lake Indian court records went into the appellate courts. At an October 17, 1985 hearing, the U.S. District Court for the District of Minnesota "requested" that the Department of the Interior "take further action" in `effecting' the Red Lake Tribal Council's return of the court records to federal custody, and that the Department "supply the court with a status report of its efforts." On November 18, 1985, the Department submitted its status report--and shortly thereafter sought a protective order limiting disclosure of the contents of that report. The U.S. District Court denied the motion for that protective order.

November 1985: "It has come to our attention ..."

Thirteen years after the North Dakota Law Review article was published-- and five days before its report to the U.S. District Court regarding the Red Lake Indian court records was due to be released to plaintiffs Star Tribune and Schmickle--the Department of the Interior noticed that there were problems with the courts of Indian offenses. In a November 12, 1985 memorandum (reprinted in the June 8, 2001 issue of Press/ ON), the Acting Deputy Assistant Secretary for Indian Affairs, Hazel Elbert, informed "All Area Directors" that: "It has come to our attention that courts of Indian offenses may be violating mandates set forth in the Constitution of the United States."

Elbert explained that, "courts of Indian offenses are federal instrumentalities that are required to comply with federal statutes as well as the Constitution of the United States. Therefore, you are directed to take immediate steps to have reviewed the conduct and responsibility of court personnel and their operations to ensure violations are not occurring and will not occurring the courts of Indian offenses under your administrative responsibilities..."

Eleven days later, Red Lake Tribal Council Chairman Roger Jourdain responded with a memorandum

to the B.I.A. demanding withdrawal of"the Hazel Elbert memorandum." He described enforcement of the memo as "a crime against the Red Lake Band of Chippewa Indians," and indicated that he would "order the removal of all individuals who enforce said memorandum" in the Red Lake court of Indian offenses.

About a month later, on December 27, 1985, B.I.A. Area Director Earl Barlow advised Jourdain that he could not disregard the directives in Elbert's memorandum. Barlow then shifted the center of the dispute by informing Jourdain that private attorney Richard Meshbesher intended to appear on behalf of clients at the Red Lake court. Jourdain ordered Meshbesher removed. Barlow instructed the Red Lake B.I.A. superintendent to ignore the order, and in a January 10, 1986 letter to the Department of the Interior, argued that the tribal council's criteria for licensing attorneys to practice before the court of Indian offenses were "so restrictive that it is a virtual certainty that no professional attorney could qualify for admission to practice. Imposition of those criteria would have the effect of denying the right to counsel ..." Despite Barlow's support, Meshbesher ended up bringing a habeas corpus petition in federal court in the case Anderson v. Schoenborne, alleging denials of the right to counsel, the right to a jury trial and the right to a speedy trial.

January 1986: "... Islands of Injustice"

The Star Tribune went to press with Schmickle and Buon's series, "Indian Courts, Islands of Injustice," in January 1986. The series included a section on the problems at Red Lake, and the concluding article included the observation that: "Civil rights abuses are occurring virtually unchecked on many of the nation's reservations with Indian courts.... Why isn't the federal government, which spends more than $8 million a year to finance courts for about 150 reservations, doing something to curb the abuses?"

Eight months after the Star Tribune went to press with its series, in August 1987, the U.S. Court of Appeals ruled on the Department of the Interior's suit against the Red Lake Band and Red Lake Tribal Council, seeking return of the Red Lake Indian court records. The U.S. appellate court affirmed the district court's ruling that "tribal court records were agency records belonging to the B.I.A. and the Department of the Interior, and that removal of these records violated the federal records act."

November 1987: Roger's Contract Court

The B.I.A.'s response to public concern about civil rights violations at the Red Lake court of Indian offenses, and to the sharp criticism of the Red Lake court in the federal district court case Cook v. Moran, was to sign a P.L. 93-638 contract with the Red Lake Tribal Council. Under that contract, Roger Jourdain's council was to administer the Red Lake court of Indian offenses on behalf of the B.I.A.

U.S. Attorney Jerome G. Arnold, Interior Department attorney Mark A. Anderson, and B.I.A. solicitor C. Hughes expressed concern about the proposed court administration contract in April 1987: "Given the past record of the Red Lake Tribe, it is unlikely that it will operate the court in compliance with the Indian Civil Rights Act unless compelled to do so. We recommend that the problem be addressed at the outset by insisting on specific language in the contract, rather than waiting until individual Indians seek to hold us accountable for the foreseeable actions of the tribal court."

Official concerns about the advisability of the B.I.A.'s hiring the Red Lake tribal council to administer the Red Lake court of Indian offenses went "to the top"--and were dismissed by Commissioner of Indian Affairs Ross Swimmer. At a December 23, 1987 hearing in Washington, D.C., Swimmer explained the rationale for not requiring the Tribal Council comply with federal law in administering the Indian court. "... no one living on a reservation today ... has to live there," Swimmer said. "There is no law that says anyone must live under the constraints of the Red Lake Tribal Council. They are free to move about anyplace in this country, and once they leave the jurisdiction of that tribe, they have no more responsibility to it nor the tribe to them, in most cases" [emphasis added].

In a July 12, 1988 interview--extensive transcripts were published by The Ojibwe News--Swimmer amplified his position with respect to the B.I.A.'s P.L. 93-638 contracts with the Red Lake tribal council. Indian Commissioner Ross Swimmer explained, "We have control over the program, they have to operate it in a certain way ... and we have control of the accountability of it." However, as Swimmer acknowledged during an interview with the Red Lake Peoples Council later that same day, the only remedy offered by the B.I.A. was the Red Lake court of Indian offenses--administered by the tribal council under B.I.A. contract. The transcripts published by Press/ON thirteen years ago are revealing:

Lawrence: You know, you just contracted [the Red Lake court of Indian offenses] out to Roger [Jourdain]. In spite of all these violations of civil rights, that's the tribal court.

Swimmer: Yes, it's tribal court.

Lawrence: So, where do we take it?

Swimmer: Tribal court. ... That's it. Those are your remedies. You don't have any remedies, is what you're saying to me.

Lawrence: OK.

Swimmer: That's right.

Lawrence: So, we can do nothing about it.

Swimmer: That's right.

Emboldened by the U.S. Government, the Red Lake tribal council passed Resolution No. 53-88: "... the Red Lake Tribal Council does hereby go on record as opposing and objecting to any attempt to enforce application of the ICRA [Indian Civil Rights Act]" at Red Lake. It is worth noting that under P.L. 93-638 contracts, the contracting tribe administers the B.I.A.'s programs. The B.I.A. still owns their programs--including the Red Lake court of Indian offenses.

1990: Civil Rights Commission review of the Red Lake court of Indian offenses

The U.S. Commission on Civil Rights responded to concerns about civil rights violations in Indian courts by holding hearings. Its Confidential Draft report included 32 meticulously-documented pages chronicling the problems at the Red Lake court of Indian offenses between 1972 and 1989.

The Civil Rights Commission concluded their draft with the observation that, "absent Congressional action to provide meaningful enforcement of the ICRA, it may be that the final paragraph of the Red Lake statement submitted for the Commission's record will provide the final word:

"The Tribe deeply resents the intrusion by the United States Civil [R]ights Commission and the Congress into Red Lake affairs through the passage of the 1968 Civil Rights Act. ..."

William J. Howard, General Counsel for the U.S. Civil Rights Commission, mailed Red Lake tribal council chairman Roger Jourdain a copy of the Commission's confidential draft report on Red Lake on May 30, 1990, "in order to give your tribe an opportunity to file a response."

The Civil Rights Commission did not include the section on the Red Lake court of Indian offenses in its final report.

1990: Red Lake Code of Indian Offenses revised

On September 11, 1990, the Red Lake tribal council adopted "recommended changes to the Tribal Law and Order code." The new code, drafted in collaboration with the B.I.A., was initially based on the tribal code for the Quinault tribe in Washington. The 1990 Red Lake version of the code §101.01, Subd. 1, established "the Red Lake court of Indian offenses as a court of record," and detailed everything from the qualifications of judges to watercraft regulations in seventy-four sections arranged into fifteen chapters.

Although the 1990 code included a section detailing the "right to jury trial," neither it nor the 1958 Constitution provide for civil rights generally. The 1990 code designated that appeal from the decisions made in the Red Lake court of Indian offenses be made to a "Court of Appeals" described in §101.02 Subd. 2., of that section, however, provides that appeals be heard by three judges, "none of whom shall have been the Judge that decided or was involved in the case being appealed at the trial level." Since there are only three Indian court judges at Red Lake, appeal is thus impracticable, or worse, subject to further proceedings overseen by politically indebted ad hoc judges with no legal training. The lack of judiciary for a court of appeals may be why the code does not spell out the rules to be used in such a "court of appeals."

Although the September 1990 code resolved some of the more glaring problems adhering to the 1952 code, particularly the overtly unconstitutional sections, it did not address the problems of, as the Minnesota Clergy and Laity Concerned expressed it, "justice ... meted along the same lines of patronage." The new code did not touch structural problems tainting most Indian courts--including lack of separation of powers and tribal governments which "function like corrupt, dynastic, political machines." It did not resolve the fundamental problem of courts of Indian offenses: that there is no legal basis for the establishment these courts.

And, the 1990 code continued to ignore the civil rights guaranteed by the U.S. Constitution. Nonetheless, the code was approved by the "Secretary of the Interior or his duly authorized representative," as required by the 1958 Red Lake constitution--as the "tribal code" for the Red Lake court of Indian offenses, a federally-funded federal instrumentality operating under the authority of the Secretary of the Interior as well as the U.S. Constitution and federal law.

1995: Red Lake "kangaroo courts"

In his 1995 book, *We Have The Right To Exist*, Wub-e-ke-niew describes his people's "oral history filled with cases chronicling derailment of what might be considered justice." He describes the process at the Red Lake court of Indian offenses as it remained in the mid 1990s: "... before court is held, the Indian Agent goes over the cases to be heard with the judge and tells him how much of a fine to levy, and how many days the defendant should spend in jail. The B.I.A. Indian Agent has the power to decide what the outcome of the trial will be, before it goes to court. ... As long as I can remember, even the Metis have called the courts set up for Indians, 'kangaroo courts'."

Ongoing: "tribal injustice" at Red Lake

Despite its shaky legal foundations and its extremely problematic record of civil and human rights violations, the United States continues to maintain a court of Indian offenses at Red Lake. In 2001, the Red Lake B.I.A. Agency was allocated a quarter of a million dollars to operate the B.I.A.'s court of Indian offenses at Red Lake.

The key problems described by William J. Lawrence in the North Dakota Law Review nearly thirty years ago persist at the Red Lake court of Indian offenses, including lack of impartiality. As Lawrence wrote in 1979, "A favorite tactic employed by the court to assure the outcome it desires is to notify only the party whom it feels should prevail, of the date and time of adjudication. Obviously, the lack of presence of the adversary allows the court to 'resolve the dispute' in an amiable atmosphere." In addition to defects in notification, the Red Lake Indian court has recently ensured one- sided "hearings" using intimidation, by jailing attorneys for opposing parties, and through exile.

Furthermore, fueled by gambling interests and Congressional policies of "strong tribal government"--and the legal expertise that both Indian casino revenues and federal appropriations can buy--and federal legal actions to expand federal jurisdiction on behalf of Indians under U.S. "trusteeship," Indian court decisions are being filed with Minnesota courts--with the expectation that they will be accorded "full faith and credit--with increasing frequency.

The abuse of Leech Laker Jawnie Hough in the ninth district court of the State of Minnesota pursuant to its rubber-stamp acceptance of a Red Lake Indian court decision has been chronicled by Press/ON. Ms. Hough is not alone in having been abused by the "tribal injustice" perpetrated by the Red Lake Indian court.

Revised Constitution and Bylaws of the Minnesota Chippewa Tribe, Minnesota.

PREAMBLE

We, the Minnesota Chippewa Tribe, consisting of the Chippewa Indians of the White Earth, Leech Lake, Fond du Lac, Bois Forte (Net Lake), and Grand Portage Reservations and the Nonremoval Mille Lac Band of Chippewa Indians, on order to form a representative Chippewa tribal organization, maintain and establish justice for our Tribe, and to conserve and develop our tribal resources and common property; to promote the general welfare of ourselves and descendants, do establish and adopt this constitution for the Chippewa Indians of Minnesota in accordance with such privilege granted the Indians by the United States under existing law.

ARTICLE I - ORGANIZATION AND PURPOSE

Section 1. The Minnesota Chippewa Tribe is hereby organized Section 16 of the Act of June 18, 1934 (48 Stat. 984), as amended. Section 2. The name of this tribal organization shall be the "Minnesota Chippewa Tribe."

Section 2. The name of this tribal organization shall be the "Minnesota Chippewa Tribe."

Section 3. The purpose and function of this organization shall be to conserve and develop tribal resources and to promote the conservation and development of individual Indian trust property; to promote the general welfare of the members of

the Tribe; to preserve and maintain justice for its members and otherwise exercise all powers granted and provided the Indians, and take advantage of the privileges afforded by the Act of June 18, 1934 (48 Stat. 984) and acts amendatory thereof and supplemental thereto, and all the purposes expressed in the preamble hereof.
Section 4. The Tribe shall cooperate with the United States in its program of economic and social development of the Tribe or in any matter tending to promote the welfare of the Minnesota Chippewa Tribe of Indians.

ARTICLE II – MEMBERSHIP
Section 1. The membership of the Minnesota Chippewa Tribe shall consist of the following:
(a) Basic Membership Roll: All persons of Minnesota Chippewa Indian Blood whose names appear on the annuity roll of April 14, 1941, prepared pursuant to the Treaty of said Indians as enacted by Congress in the Act of January 14, 111889 (25 Stat. 642) and Acts amendatory thereof, and as corrected by the Tribal Executive Committee and ratified by the Tribal Delegates, which roll shall be known as the basic membership roll of the Tribe.
(b) All children of Minnesota Chippewa Indian blood born between April 14, 1941, the date of annuity roll, and July 3, 1961, the date of approval of the membership ordinance by the Area Director, to a parent of parents, either or both of whose names appear on the basic membership role, provided enrollment was filed with the Secretary of the Tribal Delegated by July 4, 1962, one year after the date of approval of the ordinance by the Area Director.
(c) All children of at least one quarter (1/4) degree Minnesota Chippewa Indian blood born after July 3, 1961, to a member, provided that an application for enrollment was or is filed with the Secretary of the
Tribal Delegates or the Tribal Executive Committee within one year after the date of birth of such children.
Section 2. No person born after July 3, 1961, shall be eligible for enrollment if enrolled as a member of another tribe, or if not an American citizen.
Section 3. Any person of Minnesota Chippewa Indian blood who meets the membership requirements of the Tribe, but who because of error has not been enrolled, may be admitted to membership in the Minnesota Chippewa Tribe by adoption, if such adoption is approved by the Tribal Executive Committee, and shall have full membership privileges from the date of adoption is approved.
Section 4. Any person who has been rejected for enrollment as a member of the Minnesota Chippewa Tribe shall have the right of appeal within sixty days from the date of written notice of rejection of to the Secretary of the Interior from the decision of the Tribal Executive Committee and the decision of the Secretary of Interior shall be final.
Section 5. Nothing contained in this article shall be construed to deprive any descendant of a Minnesota Chippewa Indian of the right to participate in any benefits derived from claims against the U.S. Government when awards are made for and on behalf and for the benefits of descendants of members of said tribe.

ARTICLE III - GOVERNING BODY
The governing bodies of the Minnesota Chippewa Tribe shall be the Tribal Executive Committee and the Reservation Business Committees of the White Earth, Leech Lake, Fond du Lac, Bois Forte (Nett Lake), and Grand Portage Reservations, and the Nonremoval Mille Lac Band of Chippewa Indians. Hereinafter referred to as the six (6) Reservations.
Section 1. Tribal Executive Committee. The Tribal Executive Committee shall be comprised of the Chairman and Secretary-Treasurer of each of the six (6) Reservation Business Committees elected in accordance with Article IV. The Tribal Executive Committee shall, at it's first meeting, select from within the group a President, a Vice President, a Secretary, and a Treasurer who shall continue in office for the period of two (2) years or until their successors are elected and seated.
Section 2. Reservation Business Committee. Each of the six (6) Reservations shall elect a Reservation Business Committee composed of not more then five (5) members nor less then three (3) members. The Reservation Business Committee shall be composed of a chairman, secretary-Treasurer, and or (1), two (2), or three (3) Committeemen. The candidates shall file for their respective offices and shall hold their office during the term for which they were elected or until their successors are elected and seated.

ARTICLE IV – TRIBAL ELECTIONS
Section 1. Right to Vote. All elections held on the six (6) Reservation shall be held in accordance with the uniform election ordinance to be adopted by the Tribal Executive Committee which shall provide that:
(a) All members of the tribe, eighteen (18) years of age or over, shall have the right to vote at all elections held within the reservation of their enrollment. 1/
(b) All elections shall provide for absentee ballots and secret ballot voting.
(c) Each Reservation Business Committee shall be the sole judge of the qualifications of its voters.
(d) The precincts, polling places, election boards, time for opening and closing the pools, canvassing the vote and all

pertinent details shall be clearly described in the ordinance.
Section 2. Candidates. A candidate for Chairman, Secretary-Treasurer and Committeeman must be an enrolled member of the Tribe and reside on the reservation of his enrollment. No member of the Tribe shall be eligible to hold office, either as a Committeeman or Officer, until he or she has reached his or her twenty-first (21) birthday on or before the date or election. 2/
Section 3. Term of Office
(a) The first election of the Reservation Business Committee for the six (6) Reservations shall be called and held within ninety (90) days after the date on which theses amendments become effective in accordance with Section 1, of this Article.
(b) For the purpose of this first election, the Chairman and one (1) Committeeman shall be elected for a four-year term. Thereafter, the term of office for officers and committeeman shall be four (4) years. For the purpose of the first election, the Committeeman receiving the greatest number of votes shall be elected for a four-year term.

ARTICLE V – AUTHORITIES OF THE TRIBAL EXECUTIVE COMMITTEE
Section 1. The Tribal Executive Committee shall, in accordance with applicable laws or regulations of the Department of the Interior, have the following powers:
(a) To employ legal counsel for the protection and advancement of the rights of the Minnesota Chippewa Tribe; the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior, or his authorized representative.
(b) To prevent any sale, disposition, lease or encumbrance of tribal lands, interest in lands, or other assets including minerals, gas and oil.
(c) To advise with the Secretary of the Interior with regard to all appropriation estimates or Federal projects for the benefit of the Minnesota Chippewa Tribe, except where such appropriation estimates or projects are for the benefit of individual Reservations.
(d) To administer any funds within the control of the Tribe: to make expenditures from tribal funds for salaries, expenses of tribal officials, employment or other tribal purposes. The Tribal Executive Committee shall apportion all funds within its control to the various Reservations excepting funds necessary to support the authorized costs of the Tribal Executive Committee. All expenditures of tribal funds, under the control of the Tribal Executive Committee, shall be in accordance with a budget, duly approved by resolution in legal session, and the amounts to the control of the Tribe of any money deposited to the credit of the Tribe in the United States Treasury, subject to the approval of the Secretary of the Interior or his authorized representative.
(e) To consult, negotiate, contract and conclude agreements on behalf of the Minnesota Chippewa Tribe with Federal, State and local governments or private persons or organizations on all matters within the powers of the Tribal Executive Committee, except as provided in the powers of the Reservation Business Committee.
(f) Except for those powers hereinafter granted to the Reservation Business Committees, the Tribal Executive Committee shall be authorized to manage, lease, permit, or otherwise deal with tribal lands, interest in lands or other tribal assets; to engage in any business that will further the economic well being of members of the Tribe; to borrow money from the Federal Government or other sources and to direct the use of such funds for productive purposes, or to loan the money thus borrowed to Business Committees of the Reservations and to pledge or assign chattel or income, due or to become due, subject only to the approval of the Secretary of the Interior or his authorized representative, when required by Federal law or regulations.
(g) The Tribal Executive Committee may be ordinance, subject to review of the Secretary of the Interior, levy licenses or fees on non-members or non-tribal organizations doing business on two or more Reservations.
(h) To recognize any community organizations, associations or committees open to members of the several Reservations and to approve such organizations, subject to the provision that no such organization, associations, or committees may assume any authority granted to the Tribal Executive Committee or to the Reservation Business Committees.
(i) To delegate to committees, officers, employees or cooperative associations any of the foregoing authorities, reserving the right to review any action taken by virtue of such delegated authorities.

ARTICLE VI – AUTHORITIES OF THE RESERVATION BUSINESS COMMITTEES
Section 1. Each of the Reservation Business Committees shall, in accordance with applicable laws or regulations of the Department of the Interior, have the following powers:
(a) To advise with the Secretary of the Interior with regard to all appropriation estimates on Federal projects for the benefit or its Reservation.
(b) To administer any funds within the control of the Reservation; to make expenditures from Reservation funds for salaries, expenses of Reservation officials, employment or other Reservation purposes. All expenditures of Reservation

funds under the control of the Reservation Business Committees shall be accordance with a budget, duly approved by resolution in legal session, and the amounts so expended shall be a matter of public record at all reasonable times. The Business Committees shall prepare annual budgets requesting advancements to the control of the Reservation of tribal funds under the control of the Tribal Executive Committee.
(c) To consult, negotiate and contract and conclude agreements on behalf of its respective Reservation with Federal, State and local governments or private persons or organizations on all matters within the power of the Reservation Business Committee, provided that no such agreements or contracts shall directly affect any other Reservation or the Tribal Executive Committee without their consent. The Business Committees shall be authorized to manage, lease, permit or otherwise deal with tribal lands, interests in lands or other tribal assets, when authorized to do so by the Tribal Executive Committee but no such authorization shall be necessary in the case of lands or assets owned exclusively by the Reservation. To engage in any business that will further the economic well being of members of the Reservation; to borrow money from the Federal Government or other sources and to direct the use of such funds for productive purposes or to loan the money thus borrowed to members of the Reservation and to pledge or assign Reservation chattel or income due or to become due, subject only to the approval of the Secretary of the Interior or his authorized representative when required by Federal law and regulations. The Reservation Business Committee may also, with the consent of the Tribal Executive Committee, pledge or assign tribal chattel or income.
(d) The Reservation Business Committee may be ordinance, subject to the review of the Secretary of the Interior, levy licenses or fees on non-members or non-tribal organizations doing business solely within their respective Reservations. A Reservation Business Committee may recognized any community organization, association or committee open to members of the Reservation or located within the Reservation and approve such organization, subject to the provision that no such organization, association or committee may assume any authority granted to the Reservation Business Committee or to the Tribal Executive Committee.
(e) To delegate to committees, officers, employees or cooperative association any of the foregoing authorities, reserving the right to review any action taken by virtue of such delegated authorities.
(f) The powers herefore to granted to the bands by the charters issued by the Tribal Executive Committee are hereby superseded by this Article and said charters will no longer be recognized for any purposes.

ARTICLE VII - DURATION OF TRIBAL CONSTITUTION
Section 1. The period of duration of this tribal constitution shall be perpetual or until revoked by lawful means as provided in the Act of June 18, 1934 (48 Stat. 984), as amended.

ARTICLE VIII - MAJORITY VOTE
Section 1. At all elections held under this constitution, the majority of eligible votes cast shall rule, unless otherwise provided by an Act of Congress.

ARTICLE IX - BONDING OF TRIBAL OFFICIALS
Section 1. The Tribal Executive Committee and the Reservation Business Committees, respectively, shall require all persons, charged by the Tribe or reservation with responsibility for the custody of any of its
funds or property, to give bond for the faithful performance of his official duties. Such bond shall be furnished by a responsible bonding company and shall be acceptable to the beneficiary there of and the
Secretary of the Interior of his authorized representative, and the cost thereof shall be paid by the beneficiary.

ARTICLE X – VACANCIES AND REMOVAL
Section 1. Any vacancy in the Tribal Executive Committee shall be filled by the Indians from the Reservation on which the vacancy occurs by election under rules prescribed by the Tribal Executive Committee. During the interim, the Reservation Committee member to represent the Reservation until such time as the election herein provided for has been held and the successful candidate elected and seated.
Section 2. The Reservation Business Committee by a two-thirds (2/3) vote of its members shall remove any officer or member of the Committee for the following causes:
(a) Malfeasance in the handling of tribal affairs.
(b) Dereliction or neglect of duty.
(c) Unexcused failure to attend two regular meetings in succession.
(d) Conviction of a felony in any county, Sate or Federal court while serving on the Reservation Business Committee.
(e) Refusal to comply with any provisions of the Constitution and Bylaws of the Tribe.
The removal shall be in accordance with the procedures set forth in Section 3 of this Article.
Section 3. Any member of the Reservation from which the Reservation Business Committee member is elected may

prefer charges by written notice supported by the signatures of no less then 20 percent of the resident eligible voters of said Reservation, stating any of the causes for removal set forth in Section 2 or this Article, against any member or members of the respective Reservation Business Committee shall consider such notice and take the following action:
(a) The Reservation Business Committee within fifteen (15) days after receipt of the notice or charges shall in writing notify the accused of the charges brought against him and set a date for a hearing. If the Reservation Business Committee may remove as provided in Section 2 or it may schedule a recall election which shall be held within thirty (30) days after the date set for the hearing. In either event, the action of the Reservation Business Committee or the outcome or the recall election shall be final.
(b) All such hearings of the Reservation Business Committee shall be held in accordance with the provisions of this Article and shall be open to the members of the Reservation. Notices of shuch hearings shall be duly posted at least five (5) days prior to the hearing.
(c) The accused shall be given opportunity to call witnesses and present evidence in his behalf.
Section 4. When the Tribal Executive Committee finds any of its members guilty of any of the causes for removal from office as listed in Section 2 of this Article, it shall in writing censor the Tribal Executive Committee member. The Tribal Executive Committee shall present its written censure to the Reservation Business Committee from which the Tribal Executive member is elected. The Reservation Business Committee shall thereupon consider such censure in the manner prescribed in Section 3 of this Article.
Section 5. In the event of the Reservation Business Committee fails to ace as provided in Sections 3 and 4 of this Article, the Reservation membership may, by petition supported by the signatures or no less then 20 percent of the eligible resident voters, appeal to the Secretary of the Interior. If the Secretary deems the charges substantial, he shall call an election for the purpose of placing the matter before the Reservation electorate for their final decision.

ARTICLE XI - RATIFICATION
Section 1. This constitution and the bylaws shall not become operative until ratified at a special election by a majority vote of the adult members of the Minnesota Chippewa Tribe, voting at a special election called by the Secretary of the Interior, provided that at least 30 percent of those entitled to vote shall vote, and until it has been approved by the Secretary of the Interior.

ARTICLE XII - AMENDMENT
Section 1. This constitution may be revoked by Act of Congress or amended or revoked by a majority vote of the qualified voters of the Tribe voting at an election called for that purpose by the Secretary of the Interior if at least 30 percent of those entitled to vote shall vote. No amendment shall be effective until approved by the Secretary of the Interior. It shall be the duty of the Secretary to call an election when requested by two-thirds of the Tribal Executive Committee.

ARTICLE XIII - RIGHTS OF MEMBERS
All members of the Minnesota Chippewa Tribe shall be accorded by the governing body equal rights, equal protection, and equal opportunities to participate in the economic resources and activities of the Tribe, and no member shall be denied any of the constitutional rights or guarantees enjoyed by other citizens of the United States, including but not limited to freedom of religion and conscience, freedom of speech, the right to orderly association or assembly, the right to petition for action or the redress of grievances, and due process of law.

ARTICLE XIV - REFERENDUM
Section 1. The Tribal Executive Committee, upon receipt of a petition signed by 20 percent of the resident voters of the Minnesota Chippewa Tribe, or by an affirmative vote of eight (8) members of the Tribal Executive Committee, shall submit any enacted or proposed resolution or ordinance of the Tribal Executive Committee. The Executive Committee shall call such referendum and prescribe the manner of conducting the vote.
Section 2. The Reservation Business Committee, upon receipt of a petition signed by 20 percent of the resident voters of the Reservation, or by an affirmative vote of a referendum of the resolution or ordinance of the Reservation Business Committee to a referendum of the eligible voters of the Reservation. The majority of the votes cast in such referendum shall be conclusive and binding on the Reservation Business Committee. The Reservation Business Committee shall call such referendum and prescribe the manner of conducting the vote.

ARTICLE XV - MANNER OF REVIEW
Section 1. Any resolution or ordinance enacted by the Tribal Executive Committee, which by the terms of this Constitution and Bylaws is subject to review by the Secretary of the Interior, or his authorized representative, shall be

presented to the Superintendent or officer in charge of the Reservation who shall within ten (10) days after its receipt by him approve or disapprove the resolution or ordinance.
If the Superintendent or officer in charge shall approve any ordinance or resolution it shall thereupon become effective, but the Superintendent or officer in charge shall transmit a cope of the same, bearing his endorsement, to the Secretary of the Interior, who may within ninety (90) days from the date of approval, rescind the ordinance or resolution for any cause by notifying the Tribal Executive Committee.
If the Superintendent or officer in charge shall refuse to approve any resolution or ordinance subject to review within ten (10) days after its receipt by him he shall advise the Tribal Executive of his reasons therefor in writing. If these reasons are deemed by the Tribal Executive Committee to be insufficient, it may, by a majority vote, refer the ordinance or resolution to the Secretary of the Interior, who may, within ninety (90) days from the date of its referral, approve or reject the same in writing, whereupon the said ordinance or resolution shall be in effect or rejected accordingly.
Section 2. Any resolution or ordinance enacted by the Reservation Business Committee, which by the terms of this Constitution and Bylaws is subjected to review by the Secretary of the Interior or his authorized representative, shall be governed by the procedures set forth in Section 1 of this Article.
Section 3. Any resolution or ordinance enacted by the Reservation Business Committee, which by the terms of this Constitution and Bylaws is subject to approval by the Tribal Executive Committee, shall within ten (10) days of its enactment be presented to the Tribal Executive Committee. The Tribal Executive Committee shall at its next regular or special meeting, approve or disapprove such resolution or ordinance.
Upon approval or disapproval by the Tribal Executive Committee of any resolution or ordinance submitted by the Reservation Business Committee, it shall advise the Reservation Business Committee within ten (10) days, in writing, of the action taken. In the event of disapproval the Tribal Executive Committee shall advise the Reservation Business Committee, at that time, of its reasons therefor.

BYLAWS
Section 1. The President of the Tribal Executive Committee shall:
(a) Preside at all regular and special meetings of the Tribal Executive Committee and at any meeting of the Minnesota Chippewa Tribe in general council.
(b) Assume responsibility for the implementation of and resolutions and ordinances of the Tribal Executive Committee.
(c) Sing, with the Secretary of the Tribal Executive Committee, on behalf of the Tribe all official papers when authorized to do so.
(d) Assume general supervision of all officers, employees and committees of the Tribal Executive Committee and, as delegated, take direct responsibilities for the satisfactory performance of such officers, employees and committees.
(e) Prepare a report of negotiations, important communications and other activities of the Tribal Executive Committee and shall make this report at each regular meeting of the Tribal Executive Committee. He shall include in this report all matters of importance to the Tribe, and in no way shall he act for the Tribe unless specifically authorized to do so
(f) Have general management of the business activities of the Tribal Executive Committee. He shall not act on matters binding the Tribe until the Tribal Executive Committee has deliberated and enacted appropriate resolution, or unless written delegation of authority has been granted.
(g) Not vote in meetings of the Tribal Executive Committee except in the case of a tie.
Section 2. In the absence or disability of the President, the Vice-President shall preside. When so presiding, he shall have all rights, privileges and duties as set forth under duties of the President, as well as the responsibility of the President.
Section 3. The Secretary of the Tribal Executive Committee shall:
(a) Keep a complete record of the meetings of the Tribal Executive Committee and shall maintain such records at the headquarters of the Tribe.
(b) Sing, with the President of the Tribal Executive Committee, all official papers as provided in Section 1 (c) of this Article.
(c) Be the custodian of all property of the Tribe.
(d) Keep a complete record of all business of the Tribal Executive Committee. Make and submit a complete and detailed report of the current year's business and shall submit such other reports as shall be required by the Tribal Executive Committee.
(e) Serve all notices required for meetings and elections.
(f) Perform such other duties as may be required of him by the Tribal Executive Committee.
Section 4. The Treasurer of the Tribal Executive Committee. Make and submit a complete and detailed report of the current year's business and shall submit such other reports as shall be required by the Tribal Executive Committee.

(a) Receive all funds of the Tribe entrusted to it, deposit same in a depository selected by the Tribal Executive Committee, and disburse such tribal funds only on vouchers signed by the President and Secretary.
(b) Keep and maintain, open to inspection by members of the Tribe or representatives of the Secretary of the Interior, at all reasonable times, adequate and correct accounts of the properties and business transactions of the Tribe.
(c) Make a monthly report and account for all transactions involving the disbursement, collection or obligation of tribal funds. He shall present such financial reports to the Tribal Executive Committee at each of its regular meetings.
Section 5. Duties and functions of all appointive committees, officers, and employees of the Tribal Executive Committee shall be clearly defined by resolution of the Tribal Executive Committee.

ARTICLE III - INSTALLATION OF TRIBAL EXECUTIVE COMMITTEE MEMBERS

Section 1. New members of the Tribal Executive Committee who have been duly elected by the respective Reservations shall be installed at the first regular meeting of the Tribal Executive Committee following election of the committee members, upon subscribing to the following oath:
"I,_____, do hereby solemnly swear (or affirm) that I shall preserve, support and protect the Constitution of the United States and the Constitution of the Minnesota Chippewa Tribe, and execute my duties as a member of the Tribal Executive Committee to the best of my ability, so help me God."

ARTICLE IV - AMENDMENTS

Section 1. These bylaws may be amended in the same manner as the Constitution.

ARTICLE V – MISCELLANEOUS

Section 1. The fiscal year of the Minnesota Chippewa Tribe shall begin on July 1 of each year.
Section 2. The books and records of the Minnesota Chippewa Tribe shall be audited at least once each year by a competent auditor employed by the Tribal Executive Committee, and at such times as the Tribal Executvie Committee or the Secretary of the Interior or his authorized representative may direct. Copies of audit reports shall be furnished the Bureau of Indian Affairs.

ARTICLE VI - RESERVATION BUSINESS COMMITTEE BYLAWS

Section 1. The Reservation Business Committee shall by ordinance adopt bylaws to govern the duties of its officers and Committee members and its meetings.
Section 2. Duties and functions of all appointive committees, officers, and employees of the Reservation Business Committee shall be clearly defined by resolution of the Reservation Business Committee.

CERTIFICATION OF ADOPTION

Pursuant to an order approved September 12, 1963, by the Assistant Secretary of the Interior, the Revised Constitution and Bylaws of the Minnesota Chippewa Tribe was submitted for ratification to the qualified voters of the reservations, and was on November 23, 1963, duly adopted by a vote of 1,761 for, and 1,295 against, in an election in which at least 30 percent of those entitled to vote cast their ballots in accordance with Section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat.378).
(sgd) Allen Wilson, President
Tribal Executive Committee
(sgd) Peter DuFault, Secretary
Tribal Executive Committee
(sgd) H.P. Mittelhotz, Superintendent
Minnesota Agency

APPROVAL

I, John A. Carver, Jr., Assistant Secretary of the Interior of the United States of American, by virtue of the authority granted me by the Act of June 18, 1934 (48 stat. 984), as amended, do hereby approve the attached Revised Constitution and Bylaws of the Minnesota Chippewa
Tribe, Minnesota.
John A. Carver, Jr., Assistant Secretary of the Interior, Washington, D.C. , (SEAL) Date: March 3, 1964
Source: 'Leech Lake Band of Ojibwe Official Website' http://www.leechlakeojibwe.org/documents/mctconstitution.shtml

Lorraine Kingsley
English 121

November 3, 1986

DISCIPLINE

discipline, *n.*, *v.*... *-n.* 1. training, especially of the mind or character. 2. the training effect of experience, misfortune, etc. 3. trained condition of order and obedience. 4. order among school pupils, soldiers, or members of any group. 5. a particular system of rules for conduct. 6. methods or rules for regulating the conduct of members of a church. 7. control exercised over members of a church. 8. punishment; chastisement. 9. branch of instruction or education. *-v.* 1. train; bring to a condition of order and obedience; bring under control. 2. punish; *discipline a child for bad behavior.* [< L *disciplina* < *discipulus*. See DISCIPLE.]

punish, *v.* 1. cause pain, loss, or discomfort to for some fault or offense; *The government punishes criminals.* 2. cause pain, loss, or discomfort for; *The law punishes crimes.* 3. *Informal.* severe or rough treatment.

The dictionary definition of 'discipline' encompasses both the *means* and the *ends* of attaining the conformity of an individual to any group. The dictionary implies that this 'training' is in accord with the authority represented by the military, the "church" (i.e., an hierarchial organization of feudal political authority), or by the schools (the definition of "school" also implies enforced conformity). The dictionary, in defining 'discipline,' also infers that this 'training' is not pleasant, specifically: the 'training effect of ... misfortune, etc.' and 'punishment, chastisement.' The root of the word is 'disciple,' which in essence means a follower, in blind faith, of a 'leader.'

The American English language reflects European values, European feudal social hierarchy, the European intellectual inheritance of 'blind faith' in 'revealed truth' and 'authority,' and a belief that 'learning' can be equated with 'punishment.' Perhaps this is one reason that 'English' is such a difficult language for Ojibway people. The philosophical and social concepts embedded in the English language are alien to us.

'Discipline' assumes a particular culture's attitude toward different types of behavior: in any culture, some behaviors are rewarded, others are disciplined. In the White society attitudes depend on a person's position in the hierarchy. White people learn attitudes to 'keep people in their place.' By condescending attitudes

toward people they see as their "social inferiors," persons of lower social rank are disciplined, and the *status quo* is preserved.

The basic meaning of "discipline" is to enforce conformity with the group, either through the individual's blind faith acceptance of "revealed truth" (as presented by those in "authority"), or through "misfortune" or "punishment."

Within the dominant society, there are many kinds of discipline. Infants are "disciplined" by letting them cry themselves into exhaustion. Children are "disciplined" by physical beatings -- "sparking." Those unable, unwilling, or the wrong color to "work" are "disciplined" by being deprived of the basic necessities of life. The White man's "discipline" also includes separating individuals from their families and confining them in small spaces surrounded by iron bars for long periods of time. It includes "discipline" by murdering persons on the authority of the military, the church, or the state (*i.e.*, capital punishment).

Some of the dominant society's police administer corporal punishment as a means of discipline, either to frighten, or based on the old White philosphy of "if I beat you enough, you will love me." This is outdated thinking, but it is still there. This corporal punishment ("discipline") is usually administered to persons on a lower level of the social hierarchy. The White man has very strange ways of thinking.

Among the Anishinabe people, "discipline" has a different meaning. The foundation of Ojibway conformity to group norms is based not on "blind faith" and physical coercion, but on each person's understanding of the reasons for Indian values, and on each person's desire to remain a respected member of the group.

There are a number of kinds of Ojibway "discipline:"

1. Education and persuasion. Our "legends" are filled not only with our history, but also with teachings in human and social nature. Children who have listened to our legends since infancy learn the groundwork for living in compassionate, sharing and loving ways. The lessons of these legends are based on *understanding*, rather than on blind faith acceptance of prescribed "truths."

Indian values and behavior were taught in the home, by loving relatives. Our way conflicts with the White ways: the authoritarian, hierarchial discipline of the schools, the violence on television, etc. Many traditional Indian people feel that it is inappropriate

to send a child to school at the age of three; who would like to keep their children at home until they are ready, at least until the age of six. Many Indian people would like to let their children be themselves, a "little kid," until they are ready to go to school. It is unnecessary for a young child to have to "grow up" too quickly, to have to face the White man's discipline too soon. Most Indian parents don't want a genius, just a normal, happy child. If a child is pressured, and he doesn't live up to expectations, he's a good candidate for self-destruction. Children should be allowed to be who they are, to experiment, and to be guided with loving understanding. But, the dominant society wants to discipline/punish them if they do not meet the White man's expectations. (Under the International Convention, Article II, Section (e), "Forcibly transferring children of the group to another group" is genocide. Compulsory education in White schools is genocide. The "Catch-22" is the truancy law, under which Indian parents are "disciplined" for resisting genocide by fines and imprisonment.)

2. Scaring. All children have much to learn. Sometimes, children do things which are dangerous either to themselves or to others. Children are sometimes "scared" into behaving. For example, two summers ago, two young boys insisted on playing by the lake, in spite of warnings that there was a wounded bear in the woods nearby. The boys claimed, "we're tough enough to handle a bear!" An adult dressed up like a bear, and scared the boys. This was a lesson that the boys understood, and did not forget. They learned to respect the bear, and were not seen by the lake any more.

3. Teasing and ridicule. One of the foundations of Ojibway discipline is that our people want to belong to our society, and want to be admired by others. When a person behaves in socially unacceptable ways, this kind of discipline begins with casual mention of another person, either legendary or historical, who has behaved in a similar way, and a description of the consequences. The "disciplined" person will frequently see themselves in the story, and learn. If their behavior continues, an elder will then comment in their presence about their behavior to a third person. If the disciplined person still does not see themselves, then that person will be teased and ridiculed for their behavior. In a close-knit society, this is a very effective form of discipline. It also gives a person a chance to learn without being shamed.

4. Shunning. If a person has done something extremely harmful, for example endangering another person, one very severe form of discipline is not speaking to the person who is being disciplined. Even a few minutes of this discipline is remembered for a lifetime in our society where human relationships are more valuable than gold.

These are the major forms of discipline which are used by our people. When our society was intact, we did not need to beat our children. We did not need jails and prisons. We did not need any "force" in our discipline. We also had no "crime problem."

There are many lies which have been told about Indian people by the Whites who occupy our land. These lies include fantasies of torture, cruelty, and inhumanity -- fantasies which may have been true of the White people who told them, but which were certainly not true of Ojibway people!

The White people have tried to use their forms of "discipline" on us. We have been beaten, starved, and imprisoned. Our children have been forcibly taken away from us, and placed in institutions which are very much like your prisons. Even in the schools which our children are now forced to attend, the White teachers and administrators have no understanding of our culture and traditions, and use "discipline" on our children which is cruel punishment by Ojibway standards.

At the same time, the institutions which the Whites have forced upon us are, at least in some cases, explicitly designed to destroy the strength of our own forms of social control.

The word "discipline" can be a very political word, embodying the conflict between Ojibway society, where social control -- "discipline" -- is based on each individual's understanding and caring; and White society, where "discipline" is enforced by "higher" authority in a feudal social structure, and social control is based on blind faith, "learning .. from misfortune," and brute force. Ojibway people have tried, not entirely by our own choice, to do things in the White way for nearly a century. It hasn't worked.

The White society does have good things to offer us. But, we must be allowed to make our own choices, to take that which is good into our own culture, and be free to leave the rest. We do not want to "assimilate," to follow the same path into annihilation that the White man seems to have chosen.

3/16/2001

Illegal process and the Red Lake tribal courts: State legal system fails a young mother and daughter[2]

By Bill Lawrence and Clara NiiSka

[2] Published in the *Native American Press/Ojibwe News* and posted at the request of the Citzens' Alliance, at: http://www.citizensalliance.org/links/pages/Indian%20Courts%20Articles/Indian%20Courts%20by%20Clara%20NiiSka%203.htm

Press/ON has learned from court documents that a Minnesota State court in Beltrami County took away a Leech Lake tribal member's legal custody of her daughter—by rubber-stamping an *ex parte* Red Lake tribal court decision. The Red Lake custody hearing was held on behalf of the father, a Red Lake tribal member. The mother was not properly notified of the Red Lake hearing, and she thus was not present or represented. The State's reversal of State-awarded custody was also done *ex parte*. *Black's Law Dictionary* defines *ex parte* as, "on one side only; by or for one party; done for, in behalf of, or on the application of, one party only ..."

The District Court in Beltrami County did not inform the mother that custody of her daughter was being reconsidered in Beltrami County. Instead, Beltrami County's reversal of custody was based on the father's "Application for Ex-Parte Relief" and affidavit—and a May 22, 2000 Red Lake tribal court "judgement order of custody." Even though the State of Minnesota had granted physical custody to the mother, the Beltrami County judge, in his July 19, 2000 Order, wrote that the Red Lake tribal court order, "is recognized as principles of comity and shall be enforced by this court. ... law enforcement ... is ordered to take physical custody of the child and return the child to the jurisdiction of the Red Lake Nation."

The mother, a Cass County resident, was not informed that her legal rights to her daughter had been terminated *ex parte* in Beltrami County. Instead, the mother was apprehended at the University of Minnesota Hospital in Minneapolis, where she had accompanied a family member undergoing medical treatment there. The little girl was taken away by deputies of the Hennepin County Sheriff's Department. A witness recalls her crying out, "Gramma, how come I have to go with the cops? What did I do wrong?"

The mother is currently being prosecuted on felony charges in Beltrami County for "depriv[ing] another of custodial or parental rights." The Beltrami County criminal complaint rests on the Red Lake tribal court decision and the Minnesota State court's *ex parte* order to enforce the tribal court custody order.

Background

Meghan Agnes Brun was born in February 1997, to Red Lake enrollee Donald James Brun, Jr., and Leech Lake enrollee Jawnie Kaye Brun, *née* Hough. Meghan is "enrollable" both at Leech Lake and Red Lake. She was reportedly enrolled as a Red Lake member at her father's request.

Donald Brun, Jr.'s father is Donald "Dutch" Brun, and his mother is Geraldine "Joy" Brun, *née* Johns, who works for the tribal council. The former chairman of the Red Lake Band of Chippewa is Dutch's brother, Gerald "Butch" Brun. Francis "Chunky" Brun, Dutch Brun's first cousin, is tribal self-governance administrator. Chunky Brun controls all annually funded BIA self-governance contracts at Red Lake, which includes the tribal courts. His authority over the tribal courts is extensive—he is the individual who supervises the tribal court budgets. The Minnesota appellate case *Commissioner of Taxation* v *Brun*, 174 N.W.2d 120, establishing that enrolled members of the Red Lake Band of Chippewa Indians who live and work on Red Lake Reservation are exempt from State income tax, was litigated by Red Lake tribal attorneys on behalf of Chunky Brun and his wife.

Commissioner v *Brun* is also the legal precedent establishing that "process cannot be served on an enrolled member of the Red Lake Band residing within the boundaries of Red Lake Reservation, nor can a judgment against the member be enforced." Thus, the Bruns can file legal action against Jawnie Hough in Minnesota District Court. Jawnie, however, has had difficulty filing reciprocal legal action against the Bruns, who are presently residents of Red Lake reservation. The Beltrami County court files include legal action filed by Jawnie and her mother, which was continued and then dismissed due to their inability to serve process on the Bruns at Red Lake.

Separation and Divorce

There are "several" Beltrami County court records chronicling domestic violence by Donald Brun, Jr., some of which are, according to the Clerk of Court's office, confidential. On December 7, 1998, Jawnie filed for divorce in Beltrami County. After a violent encounter at her husband's parents' home (at that time in Bemidji, Minnesota), Jawnie petitioned Beltrami County for an order of protection (OFP). The hearing was set by Judge Holter for December 23, 1998.

It appears that Don Jr. left for Red Lake, and was not served with notice of the Beltrami County hearing on the OFP until April 22, 1999. The hearing was held on April 28, 1999—about two weeks after Judge Hass of Cass County found Don Jr. guilty of domestic assault during a February 1999 encounter with Jawnie in that jurisdiction. In his April 28, 1999 affidavit of response, Don Jr. acknowledged some of the violent incidents, and explained that Jawnie "provokes me into hitting her."

The Affidavit of Jawnie Kaye Brun, included in that court file, details a series of assaults and threats allegedly made by Don Jr., including several threats to kill her—and, in an apparent effort to prevent Jawnie from pressing charges against him, Don Jr.'s alleged threat to, "... fuck you up so bad that they'll have to fly you out to Fargo in a helicopter and you probably won't make it."

On May 5, 1999, Beltrami County Judge Terrance Holter granted an Order for Protection to Jawnie, in effect for one year. As a part of his May 5 order, Judge Holter granted Jawnie, the Petitioner, "sole legal and physical custody" of Megan, "subject to supervised visitation" by Don Jr., the Respondent. **"The supervised visitation shall be permissible when Petitioner approves of the supervisor and Petitioner can be assured that Respondent will not flee with the child to Red Lake"** [emphasis added].

On June 14, 1999, Judge Holter granted Jawnie's petition for divorce. In his Judgment and Decree, Judge Holter awarded Megan Brun's parents "joint legal custody," and stipulated that Jawnie would have "primary physical custody, subject to liberal and reasonable visitation" by Don Jr., provided that he "shall not use alcohol or non-prescription narcotics" during visitation.

Judge Holter also ordered that, "neither Party shall remove the minor child of the parties from the State of Minnesota for the purpose of changing her place of residence without the written consent of the other party or until further order of the court, so long as either party is a resident of the State of Minnesota."

Red Lake courts: Brun's response

Don Brun, Jr., responded to Jawnie's petitions for protection and divorce in Beltrami County by filing legal actions in the Red Lake courts. Don Jr. apparently obtained an unspecified *ex parte* order on March 3, 1999, and he allegedly filed for divorce on April 23, 1999—at press time the Red Lake courts had not responded to *Press/ON*'s formal requests for those Red Lake court records.

Don Jr. also requested an Order for Protection from the Red Lake courts, which was granted by former Red Lake associate Judge Bruce Graves after the hearing was continued on May 17, 1999. Reliable sources state that during the course of litigating that Red Lake Order for Protection, Red Lake chief Judge Wanda Lyons threatened to jail Jawnie's legal services attorney, Amber Ahola; that Judge Graves asserted that Jawnie was "living in a crack house ... in Tract 33"; and that an as-yet unseen order, perhaps the March 3 *ex parte* order, barred Jawnie from coming onto Red Lake reservation.

Red Lake "Order For Protection" 99R0086, was faxed on June 25, 1999 to Judge Paul Benshoof of the State Courts in Beltrami County. On that face of that order, Judge Graves finds that "The Red Lake Nation Tribal Court retains jurisdiction over the parties and subject matter herein pursuant to the Red Lake Nation Law and Order Civil Code." He also finds that "Mr. and Mrs. Don Brun Jr. ... both agree that the father should have a significant part" in Meghan's life, and "both agree to open visitation that will be arranged by the Grandfather Mr. Donald Brun, Sr." Bruce Graves also prohibits Jawnie from "interfering with" Don Jr., and orders that the Order "is in effect until June 17, 2000."

Actively asserting Red Lake jurisdiction

During the years 1999 and 2000, Jawnie continued working at the job she held at the time of her Beltrami County divorce, at the Palace Casino and Hotel in Cass Lake. (She has post high school business education, and holds a responsible position there.) Although Jawnie was initially "had kept the child from [going to] Red Lake," says a source who asked not to be identified, Megan's paternal grandparents, Dutch and Joy Brun, "gained Jawnie's trust." After a "few months of ... visits [which] went smoothly," Jawnie would regularly allow the senior Bruns to take Megan to Red Lake, where the Bruns moved in early 1999. Jawnie would meet them at K-Mart in Bemidji, the source explained, because Jawnie was "afraid of the restraining order and refused to go" onto Red Lake reservation.

On Good Friday, in April of 2000, Donald "Dutch" Brun, Sr. (the grandfather) reportedly met Jawnie at K-Mart, and took Mehgan back to Red Lake for what Jawnie believed would be a few days' visit. As Easter weekend, 2000 came to a close, Jawnie called the Bruns to "make arrangements to pick up her daughter"—and the Bruns "said, 'you can't have her'."

On April 13, 2000, Donald Brun, Jr., had filed a petition in the Red Lake courts, seeking custody of Meghan under Red Lake jurisdiction. The petition was heard on May 9, 2000 by Dan Charnoski, associate Judge at the Red Lake Courts.

Jawnie was not present at the hearing, and was apparently never formally notified. Donald Brun, Sr., reportedly told Jawnie by telephone that the hearing would be "May 10, ten o'clock. Jawnie called May 9th, at 2:30, just to make sure that was when it was at ... He said, at 2:30, 'court is at 3:00 today'." Jawnie was in Cass Lake, where she worked and lived—nearly an hour's drive away from Red Lake.

In his May 22, 2000 Judgment and Order of Custody, Red Lake Judge Charnoski wrote that Jawnie "was duly apprised of this hearing and fully aware of the status of Meghan Brun," and that he entered a judgment in favor of Donald Brun, Jr., "by reason of default."

The Red Lake court reportedly did not provide Jawnie with a copy of its May 22, 2000 decision.

Reclaiming Mehgan under State jurisdiction

On June 6, 2000, the senior Bruns took Mehgan to get her hair cut, at Cost Cutters in Bemidji. As her daughter came out of the barbershop, Jawnie, who had been waiting outside, reportedly picked her up and "just started walking toward her car." On June 6, 2000, Jawnie still had legal custody of her daughter in Minnesota.

According to court records, Geraldine and Donald Brun, Sr., then "reported to Beltrami County Law Enforcement that their granddaughter, Meghan Brun, had been abducted by Meghan's mother, Jawnie Brun, now known as Jawnie Hough. Sgt. Daryle Russell of the Bemidji Police Department spoke with the Bruns, and was told that Meghan Brun, age 2 [*sic*], was the daughter of Jawnie Hough and their son, Donald Brun, Jr. They stated that legal custody of the child had been awarded to their son by the Red Lake Tribal Curt. ... A subsequent investigation showed that on May 22, 2000, an order was issued from the Red Lake Tribal Court awarding custody of Meghan Brun to Donald Brun, Jr. A check of Beltrami County court records, however, indicated that a custody order had been issued from the District Court, Beltrami County, awarding custody of Megan to Jawnie Hough.

"The Bruns were so informed of this, and told that they needed to pursue this matter of custody in the civil courts."

Minnesota's *ex parte* rubber stamp

On June 16, 2000, Michael Ruffenach, attorney for Donald Brun, Jr., filed an "Application for Ex-Parte Relief" in the State Courts, Beltrami County. Ruffenach entered the *ex parte* application into the Ninth District Courts as a continuation of Jawnie and Donald Jr.'s 1999 divorce, File No. F1-99-602, rather than initiating a new legal proceeding.

Jawnie was not notified of the proceedings—as one source put it, "the grandparents conveniently forgot Jawnie's phone number."

Beltrami County does not seem to have put much effort into upholding the U.S. Constitution's guarantees of due process. Judge Terrence Holter, of the Ninth District Court, State of Minnesota, decided Donald Brun, Jr.'s application for *ex parte* relief and filed his Order in three days. The court files which *Press/ON* examined—all of those which were public information—give no indication that Jawnie had any opportunity to rebut the allegations made by Don Jr. in an affidavit, nor those which were made in the *ex parte* proceedings at Red Lake.

The affidavit in the Beltrami County Courthouse files, notarized by Don Jr.'s attorney, is clearly dated July 16th, 2000—almost a month after Judge Holter's Order "based on the Affidavit" was filed.

In his June 19, 2000 Order, Judge Holter finds that "the child was involuntarily taken from the Red Lake Reservation." *Press/ON* sources state unequivocally that Jawnie retrieved her daughter at Cost Cutters,

a barbershop in Bemidji, off-reservation and under State of Minnesota jurisdiction. On June 19, 2000 *Jawnie had legal custody of her daughter in the State of Minnesota.*

Judge Holter also writes:

"7. That the issue of custody jurisdiction in an Indian Tribe is recognized by principles of commity. That by principles of commity, the Court has discretion to recognize the order of the Tribal Court and enforce it.

"8. That there are issue and fact regarding the state of the child that can be properly determined by the Tribal forum.

"9. That through Appellate decision, the Appellate Courts have been recognizing the rights of the Tribe to assert over its enrolled members and to determine their rearing.

"10. It is ordered that the Tribal Court order, dated May 22, 2000, is recognized as principles of commity and shall be enforced by this Court."

Based on his *ex parte* consideration, State of Minnesota District Judge Terrance C. Holter ordered on June 19, 2000, ordered that "the Beltrami County sheriff, or the appropriate law enforcement of the county where the child is found, is ordered to take physical custody of the child and return the child to the jurisdiction of the Red Lake Indian Nation."

Press/ON attempted to contact Judge Holter for comment, who was in Clearwater County hearing cases, and who was unable to return our phone calls shortly before press time. He stated that he would like to comment after he has had the time to review the case files.

Ex post facto crimes in the State of Minnesota?

On January 9, 2001, Beltrami County Attorney Tim Faver signed a criminal complaint against Jawnie Hough, charging her with the felony of depriving another of "custodial or parental rights." The complaint states that "the Beltrami County Sheriff's Department ... attempted," for nearly six months, "without success to located the child." *Press/ON* telephoned Mr. Faver, who stated that "law enforcement went out of their way" to find Jawnie.

Deputy Scott Winger of the Beltrami County Sheriff's Department filed a supplemental report on December 26, 2000 describing efforts to locate Jawnie—and serve the papers informing her that she had lost custody of her daughter, *ex parte*, in Beltrami County. *Press/ON* contacted Deputy Winger, who detailed some of the efforts made by the Beltrami County Sheriff's office, to locate Jawnie and her daughter: "[We] were given information by the Bruns about where she was supposed to be staying." Deputy Winger talked to the people at those addresses, who "said that [they] did not know who she was. ... [we were] given physical directions, she wasn't there. ..." Deputy Winger explained to *Press/ON* that his workload amounts to "serving a paper every 40 minutes. If people do not give enough information, I do not have a lot of time to spend" doing detective work trying to find people. According to Deputy Winger, the Bruns also gave him the name of a Leech Lake security officer, Scott Keller, who would "call ... back with some of the places he had been looking."

Basing their search for Jawnie on the information provided to them by the Bruns, the Beltrami County Sheriff's Department looked for Jawnie, "I'd try it for an hour or so when I can, went out there ..." until after Christmas, 2000.

In the meantime, according to an informed source, Director of the Leech Lake Department of Public Safety, Samuel "Rocky" Papasadora, readily contacted Jawnie, "about two days before Halloween." Mr. Papasadora "got a call from Red Lake, the courts contacted him that morning, wanted to see how Meghan was doing." Jawnie reportedly talked to "Rocky at about two o'clock—it did not take him long to find her" at her residence on the Leech Lake reservation, in Cass County. "All it would have taken was one call from Red Lake to the Leech Lake tribal police, they would have found her within hours."

The State of Minnesota "finds" Jawnie

The day after Beltrami County Attorney Tim Faver signed the criminal complaint charging Jawnie with a felony, Jawnie and her daughter were apprehended by University of Minnesota police at the Fairview University Medical Center in Minneapolis. According to a hospital staff-person who asked not to be quoted

by name, "someone came up" to Hospital security and "said, 'that lady is not supposed to have the child out of the county'." Hospital security contacted the University of Minnesota police, who reportedly detained Jawnie and her daughter until the officers from the Hennepin County Sheriff's Department arrived.

On the evening of January 10, 2001, Meghan was reportedly taken away from her mother, and placed in protective custody at St. Joseph's home for children. "Jawnie's understanding was that there would be a hearing in Hennepin County." But, sometime before the morning of January 11th, St. Joseph's released Megan to the custody of Don Brun, Jr. At press time, the Bruns had not returned *Press/ON*'s phone calls. Jawnie Haugh stated to *Press/ON* that she preferred not to comment at this time.

"A court order is a court order"

Press/ON asked Beltrami County Attorney Tim Faver about his decision to file criminal charges against Jawnie: in a county where she did not reside, and for the "crime" of retrieving a daughter of whom she had legal custody. According to Faver, it was a "case where there are battling court orders from tribal court and [Minnesota] District court." Faver explained the position of the County Attorney's office: "We do not distinguish between tribal court orders or State court orders. A court order is a court order. We do not look behind court orders in terms of the process that was used to get a court order. If [the court order is] facially valid, then we act on those orders."

Press/ON asked Faver about longstanding problems civil rights and deficiencies in due process at the Red Lake tribal courts. Faver reiterated that the County Attorney's office does not scrutinize tribal court orders, and that if court order is "facially valid," the County acts on it. *Press/ON* asked Faver about the legal basis for his interpretation of the validity of Red Lake court orders. Faver explained that the Indian Child Welfare Act requires that the State give "cognizance" to tribal court orders, and that the Violence Against Women Act also requires the State to recognize tribal court orders.

Press/ON asked how the extremely limited instances specified in these two federal laws compelled the District courts and the County Attorney's Office to overturn its own custody determination. Faver said that it is "not proper for me to make judgments" about the Red Lake courts, and that, "it would be paternalistic" for the County Attorney's office to "say" that Red Lake courts were "deficient." He also said that individuals affected by State recognition of tribal court orders were "free to challenge" the County's policy in court, although he acknowledged that there "might be practical problems" in doing so.

When pressed about civil rights and due process concerns, Faver said that the Red Lake courts were, "like any political system. If the citizens are dissatisfied with the government, the can exercise their rights at the ballot box to make changes." Red Lakers have been trying to change the system for over thirty years, including a revolution in 1979, and still the problem persists.

Erin Sullivan-Sutton, Assistant Commissioner of Children's Service, Minnesota Department of Human Services, indicated to *Press/ON* that a custody battle does not involve "placement," and "the ICWA does not apply."

A Public Defender

Jawnie Kay Hough's next scheduled court appearance is March 26, 2001, nine o'clock at the Beltrami County Courthouse in Bemidji. She is charged with a felony, and faces a maximum sentence of two years in prison and $4,000 in fines. She is being defended by Kristine Kolar, Chief Public Defender, Ninth Judicial District.

Press/ON visited with Ms. Kolar, who framed her words carefully: "Ms. Hough disputes not only the notification, but allegations that she abandoned the child." In response to *Press/ON*'s questions about other disputed issues of fact, she replied, "If there are falsehoods, **[Beltrami County] is compounding the falsehoods**" [emphasis added].

Jawnie's public defender indicated that, in her opinion, the custody dispute "needs to be addressed by the Red Lake courts." *Press/ON* responded, perhaps less than diplomatically, that sending Jawnie back to the Red Lake courts was unlikely to result in her regaining custody of her daughter and, in this writer's opinion, was probably "cruel."

During the ensuing conversation, Ms. Kolar acknowledged to *Press/ON* that she is married to David Harrington. Harrington is Lead Attorney for the Red Lake Band of Chippewa Indians, at a salary of $69,360.

Jawnie's public defender is encouraging her to voluntarily submit to the jurisdiction of the Red Lake tribal courts. That tribal court has already *ex parte* terminated Jawnie's parental rights, in what an Indian court insider called "illegal process." There have been serious questions about the Red Lake courts for thirty years, including those raised in law review articles and in a lengthy confidential report by the U.S. Civil Rights Commission in 1991. Over the years, there have also been many articles, editorials and letters to the editor about lack of due process and other civil rights violations in the Red Lake tribal courts.

Significantly for Jawnie Haugh and her daughter Megan, Red Lake tribal court abuses include the removal of the Director of Red Lake Family and Children Services, Rebel Gale Harjo—for her efforts to protect the rights of children—a little over a year ago. As *Press/ON* reported on December 17, 1999 and February 11, 2000, custody of a four year old boy "became politically charged when Red Lake tribal administrator Francis 'Chunky' Brun interceded on the side of [Ray] Smith, [Sr.], an old friend. ... Sources told *Press/ON* that Brun had been abusive and intimidating in phone conversations with staff and Family and Children Services ..." At a December 9, 1999 custody hearing, Chunky also used his political influence by giving tribal judge Dan Charnoski—the same judge was on Jawnie's case—"permission" to hold Harjo in contempt and to jail her. Rebel Harjo was jailed, fired, and on February 4, 2000 became at least the 6th person to be banished from the Red Lake Reservation by tribal chairman Bobby Whitefeather.

Because of her husband's position at the Red Lake legal department, Chief Public Defender Kristine Kolar has an apparent conflict of interest in her representation of Jawnie Hough.

3/30/2001

Tribal Injustice, State Courts: Jawnie Hough Custody Update

By Bill Lawrence and Clara NiiSka

Jawnie Hough appeared in the Ninth Judicial District Court in Bemidji, Minnesota before Judge Paul T. Benshoof on Monday, March 26. She is charged with the felony on "depriving another of custodial or parental rights." Ms. Hough's attorney, public defender Kristine Kolar, asked for a continuance-pending "resolution" of custody by the Red Lake tribal court. Ms. Hough, a Leech Lake enrolled, resides on the Leech Lake reservation.

Press/ON attempted to contact Ms. Kolar and ask her why she decided to ask for a continuance, and subject her client Ms. Hough to the jurisdiction of the Red Lake tribal court, but Ms. Kolar was out of town until Friday.

Press/ON contacted prominent Twin Cities defense attorney Frederic Bruno, and asked how he would advise a client under similar circumstances. he responded that his advice to his client would be to get the felony charges dismissed a soon as possible, and to appeal the Beltrami Court order giving custody to the father, Donald Brun, Jr. Defense attorney Bruno also told Press/ON that from what he had read about the Red Lake tribal court, he would never advise a client who was not a Red Lake tribal member to subject themselves to Red Lake jurisdiction.

Jawnie Hough was awarded primary custody of her 4 year old daughter Megan Brun in June 1999 by a divorce decree from the district court in Beltrami County. Both parties were residing in Bemidji, Minnesota when Jawnie Hough filed for divorce. It is clear from the court records and informed sources that Ms. Hough complied with the provisions of the divorce decree and made reasonable accommodations for visitation. Then, after a weekend visitation in April 2000, the paternal grandparents, who had taken Meghan with them to Red Lake, refused to return the little girl to her mother. While Ms. Hough was unsuccessful in her attempts to recover her daughter or serve legal process on the Red Lake reservation, her ex-husband was taking legal action in the Red Lake tribal court-in which his family has undue political influence.

In July 2000, by an ex parte order of the same Minnesota district court which had originally granted her custody, Ms. Hough's custody of her daughter was taken away. The State court reversed itself by recognizing a May 2000 Red Lake tribal court order granting custody to Meghan's father and his parents, who

were the sole parties present at the Red Lake tribal court proceedings. Beltrami County's recognition of Red Lake's assertion of jurisdiction over Meghan was in violation of the State court's own order: that the Bruns not be allowed to remove the child to Red Lake "for the purpose of changing her place of residence."

Ms. Hough was reportedly not properly notified of the Red Lake tribal court hearing, and show was not informed of the State court's ex parte proceedings. The State's recognition of the Red Lake court order was based on "principles of comity": the principle by which courts of one state or jurisdiction recognize the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect.

In a telephone interview on March 27, 2001, Press/ON asked Beltrami County Attorney Tim Faver how he could prosecute a young mother for taking her own child-while she still had State custody of her daughter. Faver explained that parental and custodial rights were "ongoing," and that the statute could apply to a situation in which one parent is "not able to exercise rights because the other parents has secreted the child." He commented, "had the Bruns said, 'we know where she is'," then they would have been required to resolve the custody dispute through "civil remedies"-and that warrants are not issued unless there is an "emergency situation." Faver stated that the "Bruns indicated that they had not been able to locate the child and her mother...there was no reason to disbelieve" them. (Jawnie Hough was openly residing on Leech Lake reservation, and employed at the same place she had worked since her divorce in 1999.)

When asked about the apparent unfairness of Beltrami County's ex parte custody reversal and subsequent criminal prosecution of Jawnie Hough, the Beltrami County Attorney explained that "a Court order is a Court order...Until the Court of Appeals says that it is inappropriate to recognize tribal court orders, unless [its] validity is questionable on its face," Beltrami County "will continue to recognize" tribal court orders. he appointed out that there were "two courts orders at the time she took the child-two conflicting orders."

Faver commented that, "...the Court ought to be inquiring as to the existence of orders from other courts." The courts should not be issuing" competing orders without the knowledge of the Judge." Judges in cases involving potentially competing jurisdictions should be asking, "Are there other orders should be affecting this?'...Judges should be asking those questions."

When presses about Beltrami County's continuing prosecution of Jawnie Hough, the County Attorney said, "the defense has not filed a motion to dismiss for lack of probable cause." Jawnie Hough's defense attorney has not appealed Beltrami County's ex parte court order reversing State jurisdiction-nor has she sought reconsideration of the custody issue in the State courts based on the State Court's assertion of ongoing jurisdiction in the original custody determination.

Meghan Brun is still at Red Lake-and the State of Minnesota would not have the authority to retrieve her from Red Lake if Jawnie Haugh were to regain legal custody of her daughter in State Court. According to documents obtained by Press/ON, the little girl has medical problems requiring ongoing treatment-there are concerns about her health without the medical care only available to her off-reservation. The Red Lake tribal courts have, at least twice, issued court orders based on proceedings in which Jawnie Hough was not accorded due process. And, the Red Lake tribal courts have a long history of civil rights abuses and other problems.

6/1/2001

Injustice: the Red Lake tribal court and the Beltrami County legal system
Jawnie Hough update

by Clara NiiSka

On Monday, May 23, Jawnie Hough appeared before Judge Terrance Holter at the Ninth District Court in Beltrami County. She faced felony charges deriving from the Minnesota court's *ex parte* acceptance of an April 2000 Red Lake tribal court order. The tribal court order, also made *ex parte*, reversed a child custody determination which was made by the state court in June 1999.

Jawnie, a Leech Lake enrollee, was formally informed of the State's custody reversal on January 10, 2001, when she and her four year old daughter Meghan Brun were apprehended while with a family member undergoing cancer treatment at the Fairview University Medical Center in Minneapolis. Meghan was taken

from her mother by police, and released to the custody of Jawnie's ex-husband, Donald Brun, Jr., and his parents, Donald "Dutch" and Geraldine Brun.

The last time Jawnie saw her daughter was as the little girl was being taken away by police on January 10. The Red Lake court order—made pursuant to a hearing at which Jawnie was not allowed to be present—directs that "any visitation can only be through petition and order of the court or by direct consent of the legal custodial parent, Donald Brun, Jr." Jawnie requested visitation; her ex-husband reportedly responded, "get on with your life, because you will never see your child again."

An attorney who asked not to be identified, who spent years prosecuting domestic abuse cases on another reservation, commented to *Press/ON* that abusers' continuing to batter by manipulating the legal system is a tragically common pattern. Unfortunately for Jawnie, the Beltrami County legal system fell prey to such abusive exploitation.

The May 21 hearing

Jawnie Hough went to court in Beltrami County on May 21, accompanied by public defender Kristine Kolar, and by Sonny Johnson, a lay advocate at the Red Lake tribal court who was recommended by Ms. Kolar.

The public defender reportedly had arranged a plea bargain for Jawnie, and directed her to plead guilty. Jawnie refused to do it. When *Press/ON* contacted her, Jawnie explained, "I'm not going to plead guilty to a felony, especially when I'm not in the wrong ... I am not guilty."

After further consultation—Ms. Kolar left the courtroom for fifteen or twenty minutes—Jawnie pled "not guilty" in exchange for a deferred sentence. If she does not physically remove her daughter from Red Lake reservation and the Bruns' custody, in six months the criminal charges against Jawnie will be dismissed and expunged from her record. *Press/ON* contacted both Ms. Kolar and Beltrami County Attorney Tim Faver for comment; at press time neither had responded.

The court file "for May 21, 2001" reads simply, "TF 6 mo deferred no s/s. KK-agree. Ct. 6 mo. Defer no s/s." Translated from court reporter Kathleen Cundy's abbreviations, prosecuting attorney Tim Faver proposed that the felony charges be deferred for six months, contingent on no 'same or similar' offenses. Defense attorney Kristine Kolar agreeded. The court thereupon resolved the case as agreed upon by the attorneys. Transcripts were not yet available at press time.

Custody of Meghan: whose jurisdiction?

With state criminal charges—depriving another of parental or custodial rights—more-or-less resolved, Jawnie Hough still faces painful legal dilemmas involving custody of her daughter. Jawnie is presently barred from visiting her daughter at Red Lake; *Press/ON* has learned from sources who asked to remain anonymous that Jawnie is barred from Red Lake by an alleged "order for protection" obtained by her ex-husband.

Jawnie was initially awarded primary physical custody of Meghan, subject to liberal paternal visitation, as a part of the divorce proceedings in Beltrami County. In the June 19, 1999 divorce decree, the Minnesota court asserted "continuing, exclusive jurisdiction."

Her ex-husband, Donald Brun, Jr. responded with a June 25, 1999 Order for Protection from the Red Lake tribal court, in which the Red Lake court asserted both subject matter and personal jurisdiction. Nearly a year later, in May 2000, the Red Lake tribal court exercised its assertion of jurisdiction with an Order of Custody, heard with only Donald Brun, Jr. and his parents present. The Red Lake tribal court order was then entered into the state of Minnesota legal system through *ex parte* legal action initiated by Donald Jr. in June 2000.

The four year old Meghan Brun, enrolled at Red Lake but enrollable at Leech Lake, is currently in the physical custody of her paternal grandparents, Dutch and Geraldine Brun—at Red Lake.

Both Red Lake lay advocate Sonny Johnson and state public defender Kristine Kolar, whose husband is Red Lake attorney David Harrington, urged Jawnie Hough to go to the Red Lake tribal courts and seek

custody, or at least visitation, of her daughter, rather than filing in the Minnesota courts to reverse the Ninth District Court's *ex parte* rubber-stamp of the Red Lake tribal court order.

Jawnie Hough is a Leech Lake enrollee residing on Leech Lake reservation, and pursuant to federal Public Law 280 is subject to state of Minnesota jurisdiction.

Jawnie's experiences with the Red Lake tribal courts to date are a chronicle of injustice: in-court threats to jail her legal services attorney Amber Ahola in June 1999, and since then, one-sided hearings and *ex parte* determinations made in Jawnie's absence. Paternal grandfather Dutch Brun's first cousin, Francis "Chunky" Brun, is tribal administrator and has undue influence over the Red Lake tribal court system. As *Press/ON* reported on December 17, 1999 and February 9, 2000, Chunky Brun has previously been involved abusive child custody determinations by the Red Lake tribal court.

After the hearing in Beltrami County on Monday, May 21, *Press/ON* contacted Jawnie Hough. She was obviously deeply concerned about her daughter Meghan, but said that she saw "no point" in going to the Red Lake tribal court, that she "knew what would happen," and that her main concern was to find an attorney to help her with civil litigation to regain custody of her daughter through the state of Minnesota courts.

Press/ON telephoned Sonny Johnson on Wednesday. He said that he had filed a petition in the Red Lake tribal courts on May 22, seeking "visitation ... then we work toward custody." He also said that he would receive service of legal process at Red Lake on Jawnie Hough's behalf. When *Press/ON* asked Johnson about the Red Lake tribal court's previous abuses of Jawnie Hough, Johnson said that he "knows how to handle" the Red Lake tribal courts.

Press/ON contacted Jawnie Hough again on Wednesday, May 23. She said that although she very much wanted to get her daughter back, she was quite skeptical about getting a fair and impartial hearing at the Red Lake tribal courts. "I just don't trust that court system at all," she said.

When asked about lay advocate Sonny Johnson's having submitted her into the jurisdiction of the Red Lake tribal courts, Jawnie explained that she signed "papers to get supervised visitation" with her daughter. *Press/ON* was the first to inform her that Johnson had filed for legal action in the Red Lake tribal courts.

Jawnie Hough is a young mother who has been barred from seeing--or even speaking to—her four-year-old daughter for the past six months. "The way it looks now," Jawnie said on May 23, "I may not see my daughter until she turns 18 ... until she's old enough to say, 'I need to go look for my mom and see exactly what happened.' She's four now. ..."

Early during the week of May 29, Jawnie Hough reportedly met with another attorney to explore the possibility of addressing the custody of her daughter Meghan as a civil matter in the State courts.

7/27/2001

Small Legal Step to Regain Custody: Jawnie Hough Update

by Clara NiiSka

About a month ago, Jawnie Hough had a court appearance scheduled on Monday, July 30. The court appearance was another small legal step in regaining custody, or even visitation, of her four year old daughter whom Jawnie has not seen—nor even heard on the telephone—for more than six months. The Ninth District Court, Beltrami County, was scheduled to hear a Motion to Vacate that court's Ex Parte decision to reverse its adjudication of custody Jawnie's daughter Meghan Brun to her mother. (*Black's Law Dictionary* defines "vacate" as: to annul; to set aside, to cancel or rescind, to render an act void.)

As *Press/ON* reported on March 16, 2001, Jawnie was awarded primary custody of her young daughter Meghan in a Beltrami County divorce decree on May 5, 1999. Although Beltrami County had asserted ongoing jurisdiction over Meghan's cutody, the Red Lake Indian court issued its own custody determination on May 22, 2000. The Red Lake hearing was sought by Jawnie's ex-husband, Donald Brun, Jr., a Red Lake enrollee, and Jawnie was not properly notified of the Red Lake hearing.

Four weeks later, on June 19, 2000, the Beltrami County Court acted on Donald Jr.'s "Application for Ex Parte Relief," and reversed its own custody determination by rubber-stamping Red Lake's order into Minnesota jurisdiction. Jawnie Hough was, again, not notified of the proceedings.

Donald Jr. sought criminal charges against his ex-wife—for violating a Red Lake – turned Minnesota custody reversal about which she never been informed. On January 9, 2001, Beltrami County Attorney Tim Faver signed a criminal complaint against Jawnie Hough for the felony of depriving another of "custodial or parental rights," even though Jawnie had still not been notified of the State's having—ex parte—deprived her of State-awarded custody. The very next evening, acting on a tip from one of Donald Jr.'s relatives, Jawnie and her daughter were detained by police at Fairview University Hospital in Minneapolis. Meghan was taken from Jawnie's arms, released into the custody of Donald Jr. and his parents, and taken to Red Lake.

On May 23, 2001, Jawnie Hough faced the criminal charges deriving from Beltrami County's rubber-stamp "comity" of the Red Lake court order. She pled "not guilty," and the criminal charges against her were "deferred"—if she is not convicted of the same or similar charges for six months, the charges will be dismissed.

Jawnie Hough then began the process of legally regaining custody--or even visitation—with her four year old daughter Meghan, whom she has not seen for more than six months. A hearing on her Motion to Vacate Beltrami County's ex parte custody reversal had been scheduled for Monday, July 30th.

Donald Jr.'s attorney, Michael Ruffenach, asked for a "continuance"—that the hearing be further delayed. Ruffenach reportedly told Beltrami County Judge Terrance Holter that he had "four other hearings" in which he was to represent other clients on July 30th, all of them in Crookston, Minnesota. *Press/ON* contacted Ruffenach, and asked him about the unusual number of hearings he had scheduled in Crookston (about 80 miles west of Bemidji).

Ruffenach told this writer that the cases in which he was scheduled to appear in Crookston were a matter of "attorney-client privilege." Although Ruffenach assured *Press/ON* that the "vigilance of the press" was important in protecting the rights of Americans, he also said that he "didn't need to have to confirm" the grounds on which he requested a continuance.

Press/ON accordingly contacted Polk County Court Administration in Crookston on July 24, and asked about the court appearances at which attorney Michael Ruffenach was scheduled to represent clients there on July 30th. The Deputy Court Administrator checked the court calendar, and told *Press/ON*, "I don't see him as an attorney for anyone on Monday, July 30th. I ran through the entire calendar ... I do not see his name at all."

Press/ON then telephoned Ruffenach again, and asked him about the apparent discrepancy between the grounds upon which he made his request for a continuance to Beltrami County Judge Holter—and the court calendar in Crookston. Ruffenach replied that he was not going to "disclose the nature" of his alleged commitments in Crookston, and pointed out that the continuance had been granted by the Judge. In response to Ruffenach's statement that he "did not care to discuss the matter any more with you," *Press/ON* publisher Bill Lawrence asked Ruffenach, "do you have anything to hide?"

Ruffenach responded by hanging up on the newspaper publisher.

Jawnie Hough's Motion to Vacate is presently scheduled to be heard by Judge Terrance Holter in the Beltrami County Courthouse on August 7th at 11:00 a.m.

August 10, 2001

Mother challenges state enforcement of tribal court order which led to seizure of child, kidnapping charges

By Jeff Armstrong

Leech Lake mother of two Jawnie Hough, whose 4-year-old child was seized by state police enforcing a Red Lake court order last March, appeared in Beltrami County Court Tuesday to petition Judge Terrance Holter to rescind his prior decision recognizing the tribal court order.

Representing Hough, Anishinaabe attorney Frank Bibeau said legal misconduct and blatant disregard for the parental rights of his client in the case put reservation courts into disrepute and complicated efforts to negotiate a procedure for mutual recognition of tribal and state court orders.

"This case, the way it's turned out, is one of the cases they'll look at to see it never happens again," said Bibeau. "It's a form of abduction that's occurred."

Divorced in 1999 from an abusive relationship with Donald Brun, Jr., Jawnie Hough lost custody of her daughter Meghan Brun when her former in-laws failed to return the girl from a visit to their Red Lake home in March of last year, instead suing for custody in tribal court. Hough maintains that she was never notified of the May 9, 2000 Red Lake hearing or informed of the outcome. Tribal judge Dan Charnoski awarded custody to Geraldine and Donald Brun, Sr. and the child's father on May 22, based on testimony that Hough "was aware of the hearing and had also called [Brun] and wished for him to have full custody."

Bibeau contended that the Bruns waited until April 13 to file the tribal court action because it was just days after Hough's Order for Protection against Donald Brun had lapsed.

When Hough took back her daughter after spotting Meghan at a Bemidji barbershop last June, the Bruns reported the incident to Bemidji police as a kidnapping. However, Hough still had legal custody under state law, so the Bruns hired attorney Michael Ruffenach to seek a state court ruling adopting the tribal court order under the legal doctrine of comity. Judge Holter granted the application for comity June 16, 2000, but Hough again said she did not receive the court order.

On Jan. 10 of this year, a relative spotted Hough and her daughter at Fairview University Medical Center. After confirming that the child had a pick up and hold order from Beltrami County, University of Minnesota police took the young girl away from her emotionally devastated mother and maternal grandmother. Less than a week later, Hough was charged with felony child abduction.

Hough's motion to vacate the Beltrami County ruling is the first step in what the mother says is an effort to rescue her daughter from an unsafe environment. The girl suffers from a neurological disorder, and Hough worries about the conduct of her ex-husband.

In a 1999 affidavit submitted with an Order for Protection request, Hough alleged Brun was prone to violent behavior. Over a period of just three months, Hough charged, Brun choked, punched and aimed a gun at her. On April 12, 1999, he was convicted of fifth degree domestic assault. Yet barely one month later, on May 17, Brun was granted a protection order *against Hough* in Red Lake Tribal Court by Judge Bruce Graves, an order Brun first requested nine days after pleading guilty to assault.

In this week's court hearing, Ruffenach contended that Hough had abandoned the child in Red Lake and intentionally refused to accept legal notices. The attorney argued that the state court had no authority to reverse its comity decision.

"The Red Lake court took jurisdiction over the child based on its finding that the child had been abandoned to the court," said Ruffenach. "There is no showing that the Red Lake court does not have jurisdiction."

Accusing Ruffenach of falling short of ethical and legal standards by submitting internally contradictory statements to the court and failing to provide adequate notice of vital hearings, Bibeau retorted that the notion the judge could not reevaluate his comity ruling in light of the facts was "arrogant."

Donald Brun, Jr.'s affidavit opposing the effort to vacate the order, presumably drafted by his attorney, states: "When the Petitioner (Hough) left we did not know her whereabouts, she did not state when she would return, and that she had no job. I did not hear from her until after the commencement (sic) the Red Lake Tribal Court proceedings."

However, the next sentence alleges the complete opposite: "I received a collect call from the Petitioner. Enclosed is a copy of the MCI World Com statement showing that she called collect. At that time, I told her about the Red Lake Tribal Court proceeding."

"The statements themselves are conflicting," said Bibeau. "It puts the credibility of the affiant in question."

10/12/2001

Beltrami County judge upholds decision enforcing tribal court custody ruling against mother

By Jeff Armstrong

Apparently basing his ruling on contradictory statements by Donald Brun, Jr., father of four-year-old Meghan Brun, Beltrami County district judge Terrance Holter refused to rescind his

previous decision to enforce an ex parte Red Lake Tribal Court order revoking state court custody from the mother, Jawnie Hough.

Hough, who says she has been denied all contact with her daughter since Meghan was taken from her last January, termed the decision "heartbreaking."

In an Oct. 3 ruling, Holter concluded that Hough "took the parties' child ... to the reservation and freely and willingly left it there for quite some time in the custody of the Respondent's grandparents. In short, she submitted herself to another jurisdiction, as any person does when he/she crosses state boundaries."

Contrary to the court's assumptions, however, Hough says she did not bring the child to Red Lake but rather met the grandparents in Bemidji. She said the visit was intended to be for two days, as Hough had to work a weekend double shift.

Hough further maintains that she was notified of neither the May 8, 2000 tribal court process nor the June 19, 2000 state court "comity" proceedings. The Leech Lake mother of two says Brun's parents, Donald, Sr. and Geraldine Brun, refused to return Meghan from a routine visit to their Red Lake home in March of last year.

When Hough reclaimed the child during a chance encounter in Bemidji--a jurisdiction to which the grandparents had willingly submitted themselves--the mother had undisputed legal custody under state law. However, the child was subsequently seized and Hough charged with felony kidnapping after the Bruns obtained state enforcement of the tribal order.

Saying he was "flabbergasted" by the reasoning of the court, Hough's attorney Frank Bibeau said he would file a motion within days requesting the judge amend his ruling before submitting the case to the state appeals court.

"Brun's inconsistencies in sworn affidavits would constitute perjury in most courts," said Bibeau.

On April 13, Brun, Jr. filed suit in tribal court seeking sole custody of the child, claiming the mother had abandoned Meghan to her paternal grandparents, whom Hough had allegedly failed to contact. Brun claimed that Hough was aware of the tribal court hearing but wished to relinquish Meghan's custody to him. The Red Lake court on May 22 awarded legal custody to Brun, with physical custody to remain in the hands of Brun's parents.

The only alleged notice of the original state court hearing presented at a July 31, 2001 review of the June 19, 2000 comity order was a letter faxed the day of the hearing to two legal aid organization which were not currently representing Hough, who quite reasonably suggests that she would have obtained a lawyer had she known of the need to do so.

Yet Holter identified no due process violation in a same-day notice to the incorrect location of a person without legal representation.

"Of all the reasons offered by the Petitioner, the only one having any credibility concerns insufficiency of notice," the district judge wrote. "On the evidence before it, the Court has no basis to conclude that the Petitioner did not have notice of the pendency of either the Red Lake custody Motion or the later Motion before this court to have the Red Lake custody Order recognized."

In his most recent affidavit to the court, Brun claims, "I did not hear from [Hough] until after the commencement the [sic] Red Lake Tribal Court proceedings," but goes on to state that Hough called him collect prior to the May 9, 2000 court date, at which time "I told her about the ... proceeding."

Remarkably, Holter suggests that justice cannot wait for notice to both parties of a civil dispute.

"Decisions by this court are not held in abeyance simply by virtue of the fact that a party cannot be found," wrote Holter. In fact, the judge says his ruling is "predicated on the facts surrounding Petitioner's non-inquiry concerning potential court action affecting her."

In other words, Bibeau says, Hough was responsible for regularly contacting state and tribal courts to ascertain if anyone had filed suit against her. The Anishinaabe attorney said there was no evidence to support Holter's opinion that Hough merely "disliked the tribal court and refused to present her side of the story."

"I don't know how you can disregard or dislike something if you haven't seen it," said Bibeau.

Hough contends that the Bruns essentially abducted the child and fraudulently used state and tribal legal process to deprive her of her inherent rights as a mother without her knowledge. Hough maintains that she was unaware of any court orders she may have violated until she was herself charged with kidnapping.

"They're the ones that took her away from me," said Hough. "I didn't even get to testify in court."

The 25-year-old Anishinaabe woman said she took offense at Holter's statement that both parties "have and/or have had serious problems with alcohol and anger."

"I've got nothing on my record except a speeding ticket," retorted Hough. "I don't know how they can give someone who's got a track record like him a child."

Brun petitioned Red Lake for a protection order against Hough barely one month after pleading guilty to fifth-degree assault against the Anishinaabe woman in 1999.

10/26/2001

Judge asked to review court-assisted abduction ruling

By Jeff Armstrong

Jawnie Hough has filed a motion asking Beltrami County district judge Terrance Holter to set aside his Oct. 3 ruling in favor of Hough's ex-husband's family, whom she alleges misused tribal and state courts to legalize the abduction of her four-year-old daughter.

"[M]y child was with me essentially every single day for 3 years until taken away by this court and given to my ex-in-laws in Red Lake, Minnesota, without my knowledge or consent," said Hough in an affidavit in support of her motion, a preliminary step toward appealing to a higher court.

Four-year-old Meghan Brun was seized from her mother Jan. 10, 2001 by University of Minnesota police at a campus hospital on the basis of a Beltrami County order enforcing a Red Lake tribal ruling. The child suffers from a serious neurological condition, compounding her mother's fears for the child's well-being and safety.

The father, Donald Brun, Jr., pled guilty to fifth degree domestic assault against Hough on April 12, 1999 for allegedly shattering the passenger window of her sister's truck and punching Hough repeatedly. The Beltrami County court granted the Leech Lake woman temporary custody of her child in an April 19, 1999 preliminary restraining order.

According to Hough's motion, Judge Holter extended the protection order on May 5, 1999 and strictly curtailed paternal visitation rights to prevent the very circumstances which were to follow:

"The Court would like to order some visitation for the respondent, but [the Court] is afraid that if respondent chooses to take the child and flee to the Red Lake Reservation, petitioner will be unable to secure [the child's] return. At this time the only visitation permissible is supervised with someone who petitioner approves of."

Awarding physical custody of the child to Hough in a June 14, 1999 decision, Holter took care to require that "Neither party shall remove the minor child of the parties from the State of Minnesota for the purpose of changing her place of residence without the written consent of the other party."

Hough's recent motion alleges Donald Brun, Jr. and his parents "held the subject child on Red Lake Reservation, aided and abetted by his parents, against the primary custodial parent's intentions and known wishes, and subsequently obtained a Red Lake Tribal Court Order, in violation of this Court's then existing order."

Although Brun raised the issue of the Red Lake ruling through the divorce case file, Hough contends that Holter failed to properly consider his prior deliberations or to require that the mother be given notice of the hearing.

"[T]he Order of October 3, 2001 clearly remarks that `[m]erely disliking the first forum addressing the issue of custody and choosing to disregard proceedings in this court concerning the issue is insufficient to vacte[,]' which is in fact what Respondent has done by filing for custody in Red Lake to circumvent and reverse the custody determinations of this court, the first forum, by using a foreign forum, place and time which greatly favored Respondent," states Hough in her brief.

In his successful brief opposing Hough's initial motion to vacate Holter's comity ruling, attorney for the Bruns Michael Ruffenach argued that the state had jurisdiction to issue the enforcement ruling but not to reconsider it.

"This Comity case was filed in the same file as the Dissolution of Marriage file and this Court had continuing jurisdiction over the parties and the child...[However,] [o]nce a court grants Comity to a Tribal Court Order it has no jurisdiction to un-grant it," the memorandum states.

12/7/2001

Mother asks court to amend previous motion: Seeks to regain custody previously granted by dissolution order

By Jean Pagano

The matter of Jawnie Hough and her daughter Mehgan was once again in front of Beltrami County Judge Terrance Holter on Monday December 3rd. Ms. Hough is asking the court to amend its previous denial of Hough's Motion to Vacate.

As previously reported in PRESS/ON, Jawnie Hough was granted custody of her 4 year old daughter in June 1999 divorce from an abusive relationship with Donald Brun, Jr., of Red Lake. Hough lost custody of her daughter, Mahgan, when her former inlaws failed to return the girl from a visit to their Bemidji home in March 2000. Jawnie Hough maintained that she never received notification of the May 9, 2000 Red Lake hearing nor was she informed of the outcome. Tribal judge Dan Charnoski awarded custody to Geraldine and Donald Brun, Sr. and the father Donald Brun, Jr. on May 22 based in part upon conversations that Donald Brun, Jr. reported having with Hough. Jawnie Hough was not present at the hearing.

When Hough took back her daughter in June of 2000, the Bruns reported the incident to the Bemidji police as a kidnapping, even though Hough still had legal custody under state law. A comity hearing was held on June 16, 2000, in which Judge Holter granted the application for comity, though Hough later claimed she did not receive the court order.

On January 10th of this year, the child was taken from her distraught mother after being spotted at the Fairview University Medical Center. Hough was subsequently charged with felony child abduction.

Hough's Motion to Amend is an attempt to get Judge Holter to rescind his previous denial of Hough's Motion to Vacate. In the the Motion to Amend, Hough maintains that she has been the primary caretaker for most of the child's life since the father never paid support and that she is being denied visitation rights for her child. She further claims that her ex-husband and his parents did conceal the child from the rightful custodian, namely herself, and then used the Red Lake Court to grant custody to Donald Brun, Jr, in a default judgment. The judgment was issued in default because Hough claims to have never received proper notice from the tribal court.

Jawnie Hough further tried to petition the Red Lake Court by a Red Lake Lay Counsel to seek visitation, but was informed that the Court would not hear the matter. A Red Lake Civil Summons was issued in the matter of visitation against Donald Brun, Jr. on June 28th, 2001 but was not served on him until November 12th, 2001.

Hough is asking the court to vacate the previous Court Orders of October 3, 2001 and June 19, 2000. She is claiming that since she was not given proper notice that only temporary comity of the Red Lake Order should have been granted, pending a full hearing with Jawnie Hough present, based upon appropriate notice.

The Respondent's Reply to the Motion states that the mother, Hough, abandoned her child on the Red Lake Reservation. Hough has previously stated that she brought the child to Bemidji to visit the grandparents and that the grandparents brought the child to Red Lake without her knowledge or consent. The divorce decree specifically states that "supervised visitation shall be permissible when Petitioner approves of the supervisor and Petitioner can be assured that Respondent will not flee with the child to Red Lake" (emphasis added). Attorney Michael Ruffenach uses a grand portion of his reply in justifying his client's action under the guise of abandonment. Further discussion states that "counsel for the father faxed the application for comity to both legal services programs in the area before any application was made to the court ... Counsel for the father could infer that the mother might use the alternative legal services program in the area as well. Also, counsel for the father mailed the application for comity to the mother at her last known address that was available with the district court". Unfortunately, none of these locations were the legal address of the mother and she was not issued notice before the proceedings occurred. It is additionally ironic that less than a month passed in May 2000 before the Red Lake Court issued a default judgment in favor of Donald Brun, Jr., but

five months pass between the time a Red Lake Civil Summons was issued and the time it was served and the Respondent still has an additional twenty days to respond.

Judge Holter listened to arguments from both sides on Monday and has taken the matter under advisement. Sadly, mother and daughter have not been allowed visitation in over 10 months. As stated in Hough Affidavit "(Hough) dearly misses her child, and has missed the child's birthday, holidays and other usual events".

State district judge orders child returned to mother, says Red Lake Tribal Court violated constitutional rights

By Jeff Armstrong - March 8, 2002

In a dramatic reconsideration of his earlier ruling, Beltrami County district judge Terrance Holter this week struck down a state judicial order enforcing a Red Lake court judgment which ultimately led to the arrest of Jawnie Hough on felony charges and the seizure of her four-year-old child.

Holter found that the father, Donald Brun, Jr., knowingly violated standing state court orders--a divorce decree and an order for protection--when he "failed to procure written consent from Petitioner to remove the subject child from the state of Minnesota" to the Red Lake Reservation. The judge further ruled Brun "did perpetrate misconduct on this court" by obtaining a tribal court order revoking the mother's legal custody of the child and failing to inform Hough of a state court comity petition to enforce the order.

"As a parent and primary physical custodian, the Petitioner has important and substantial legal rights which are constitutionally protected and require due process to alter or change," the judge wrote. "This court recognizes that parental rights are a fundamental right under the United States Constitution, which requires a reliable due process prior to depriving a citizen of those substantive rights."

Holter expressed "serious doubts as to the impartiality and/or due process protection afforded Petitioner in Red Lake Tribal Court."

The court ordered that Meghan be returned to the care of her mother before 5pm, March 10.
Hough had contended that she was never informed of the Red Lake hearing or the state comity proceeding until her daughter was taken from her at a University of Minnesota hospital Jan. 10, 2001. The Leech Lake woman maintains that she was never allowed to defend her rights or to question the parenting abilities of her ex-husband, who has been convicted of domestic assault.

Felony charges against Hough of deprivation of parental rights were conditionally dismissed Jan. 28, 2002. Judge Holter implied that Beltrami County Attorney Tim Faver may have filed a criminal case against the wrong party, accusing Brun of violating the statute under which Hough was charged.
Faver said he was unaware of the ruling and expressed no regrets for his criminal prosecution of the mother.

"The idea behind this statute is that people not resort to self-help," said Faver. "Instead of parents pulling kids back and forth, if you've got a beef let the court settle it."
The county attorney said judges should be responsible for ascertaining in such cases whether there is a contrary ruling in effect from another jurisdiction.

"The courts, in my mind, should require people to tell them whether there are any outstanding court orders from a different court," Faver said.

Judge Holter also issued the unusual directive that the Bruns not utilize the Red Lake court in any future custodial motions.

"While the practices of the Red Lake Tribal Court may be indicative of tribal notions of self-government and sovereignty, these procedures are seriously defective if the Tribal Court seeks to have its judgments enforced and recognized by other tribal courts, other state courts, or federal courts. The circumstances as they have developed mandate that subsequent proceedings take place in a neutral forum providing appropriate due process protections for all contestants," Holter wrote.

Faver said he did not know if the ruling would influence the light in which the county viewed future comity requests from Red Lake. If the Bruns failed to comply with the court order, he said, they could be held liable for charges of contempt of court or deprivation of parental rights, a felony.

Red Lake family refuses to comply with state court order to return child to mother
By Jeff Armstrong - March 15, 2002

A Red Lake family has defied a state judge's order to return a child whose custody they acquired through dubious tribal and state court motions to the care of her mother.

In a March 4 ruling, Beltrami County district judge Terrance Holter ordered Donald Brun, Sr., his wife Geraldine Brun and his son Donald Brun, Jr., the girl's father, to return custody of five-year-old Meghan Brun to her mother, Jawnie Hough, before 5 p.m. March 10.

Invalidating an earlier ruling, Holter held that Donald Brun, Jr. "did perpetrate misconduct on this court" by obtaining a state court order enforcing a tribal court judgment without providing notice to Hough or informing either court of two previous orders granting her custody. Holter found that the tribal court failed to provide for due process in depriving the mother of "a fundamental right under the United States Constitution" and ordered that any future proceedings be held "in a neutral forum."

Hough said she waited for the Bruns in the company of a Bemidji police officer at a pre-arranged meeting place until well past the hour of the court's Sunday deadline. The Anishinabe woman said she was disappointed--but not surprised--by the family's failure to comply with the judicial order.

" I figured they wouldn't show up," said Hough. "They still think they can run and hide behind reservation lines."

Anticipating such a response by the Bruns, the district court order had directed "the Beltrami County Sheriff...to take physical custody of the child and return the child to the jurisdiction of this county and Petitioner" in the event of the paternal relatives' non-compliance.

Beltrami County sheriff Keith Winger could not be reached for comment, but other county law enforcement staff said they were unaware of either the order itself or any attempt to enforce it.

Red Lake director of public safety Pat Mills, whose cooperation would likely be needed to enforce the court's directive, said he had received no request for assistance from county officials.

"I have had no contact with the County Attorney or law enforcement personnel on this matter," said Mills. "If they call us, we will refer them to the tribal court."

Donald Brun, Jr. could not be located for comment. His father hung up the phone when this reporter identified himself.

Brun's attorney, Michael Ruffenach, denied any role in his client's refusal to return the child or any other alleged misconduct.

"How am I a party to the misconduct of my client?" asked Ruffenach, accusing Press/ON of biased coverage of the case.

Ruffenach wrote to judge Holter on March 7, requesting a stay of his custody order which the attorney concedes was not granted. The following day, Ruffenach wrote to opposing counsel Frank Bibeau, stating that "my client is not going to return the child." According to the March 8 letter, Meghan Brun, whom Ruffenach refers to as "Agnus" in his previous letter, "is under the jurisdiction of the Red Lake Juvenile court." Ruffenach said Red Lake social services called his office March 7 to inform the attorney that the tribal agency had taken custody of the child without providing further details.

Willa Beaulieu, a tribal court employee named by the attorney in his March 8 letter, failed to return a call from the press to confirm the assertion.

Ruffenach maintains the central issue in dispute is the jurisdiction of the state court to reconsider its comity order, which the attorney claims has never been explored by the courts. He said no determination has been made whether to appeal the state decision.

"If the Red Lake court had authority to issue its decision, what jurisdiction does Minnesota have to lift it?" the attorney asked.

Beltrami County attorney Tim Faver said the county has no written extradition agreement with Red Lake, only an informal arrangement pertaining to criminal matters. Faver said he would review the case for potential criminal offenses if a formal complaint is filed, but he also expressed confidence that the two law enforcement agencies would jointly resolve the dispute.

"I assume the Sheriff's Department would ask for the cooperation of the Red Lake Police Department and I assume that they would receive it," said Faver.

Faver said any contempt of court charges would have to be initiated by Hough or her attorney in a motion to judge Holter.

Coleen Rouley, a legal adviser to the Minneapolis FBI, said state criminal charges would likely have to precede a federal indictment. However, Rouley said the Bureau would examine the state court files on the case to assess whether it had jurisdiction in the matter.

March 29, 2002

Red Lake actions in child custody dispute may violate Violence Against Women Act

By Jeff Armstrong

Despite receiving at least $298,000 in grants under the federal Violence Against Women Act (VAWA), Red Lake officials appear to be in violation of provisions of the act by failing to enforce a state court order against a tribal member who wrongfully took custody of his daughter.

Donald Brun, Jr. was ordered by Beltrami County District Judge Terrance Holter March 4 to return five-year-old Meghan Brun to her mother, Jawnie Hough no later than March 10.

Hough was first granted sole physical custody of Meghan in a May 5, 1999 state court Order for Protection filed against Brun for alleged domestic violence. In effect for one year, the OFP specifically states that the order is enforceable on the reservation.

After his parents took Meghan to the reservation March 15, 2000 and failed to return the child, Brun petitioned the Red Lake Court for custody without notifying Hough on April 13 of that year - while the protection order was still in effect.

Under the terms of VAWA, the reservation is obliged to apply state protection orders to the same extent as a tribal court judgment:

"Any protection order issued by a state or tribal court...shall be accorded full faith and credit by the court of another State or Indian Tribe...and enforced as if it were the order of the enforcing State or Tribe," the statute stipulates.

The law also bars courts from granting retaliatory protection orders to spouses who had such orders filed against them, unless both parties were allowed to testify and the court found there was no self-defense involved. Brun requested an Order for Protection against Hough on May 17, 1999 - less than two weeks after he was ordered to refrain from contact with his ex-wife - without apparently explaining the cause for his action. Although Hough was not notified of the hearing, Judge Bruce Graves granted Brun's request June 16, 1999.

In fiscal year 1998, Red Lake received a $214,392 grant for its Women's Advocacy Program/Shelter to "address the legal issues associated with facilitating interjurisdictional enforcement of protection orders for Native American Reservations in Minnesota...and policy implications of complying with the full faith and credit provision of the Violence Against Women Act."

That same year, the reservation was awarded $84,000 under VAWA's Stop Violence Against Indian Women program. Tribal council chairman Bobby Whitefeather is listed as the contact person for both efforts.

Timeline of Hough Case:

* May 5, 1999 Hough granted custody of Meghan Brun in OFP limiting paternal visitation due to concerns father would flee with child.

* May 17, 1999 Brun files for restraining order in RL Court against Hough without serving notice upon her.

* June 14, 1999 Divorce order reaffirms Hough's custody of daughter.

* June 17, 1999 RL Court grants Brun's OFP request, sends copy to Beltrami County district judge Paul Benshoof.

* March 15, 2000 Brun's parents pick up Meghan for routine visit, take child to reservation and refuse to return.

* April 13, 2000 Brun petitions RL Court for custody of daughter, claiming she wishes him to take

custody. Fails to notify Hough.

* May 9, 2000 Ex parte hearing held in RL for custody of Meghan. Hough not notified.

* May 22, 2000 RL court grants Brun and parents sole custody of Meghan.

* June 6, 2000 Hough spots daughter at Bemidji barber, takes her home. Bruns report incident to Bemidji police.

* June 16, 2000 Attorney Michael Ruffenach files motion for Brun under Beltrami County divorce file for enforcement of RL Court custody ruling. No notice given to Hough.

* June 19, 2000 Judge Holter grants comity request in Hough's absence, orders law enforcement to return child to Bruns. Arrest warrant subsequently issued for Hough on parental abduction charges.

* Jan. 10, 2001 Hough arrested and daughter seized at U of M hospital.

* July 30, 2001 After lengthy search, Hough obtains lawyer and files motion to vacate state court order enforcing tribal court ruling.

* Oct. 3, 2001 State court denies Hough's motion.

* Jan 28, 2002 Criminal charges dismissed against Hough.

* March 4, 2002 State court finds Brun "perpetrated fraud upon the court" and orders Meghan's return to mother.

* March 8, 2002 Ruffenach writes to Hough's attorney, Frank Bibeau, informing him client refuses to comply with court order; writes to judge Holter asking for reconsideration.

* March 14, 2002 Judge Holter denies Brun's motion as moot.

* March 15, 2002 Ruffenach informs court of resignation as counsel for Brun.

Jawnie Hough update: Red Lake tribal council tries to rewrite federal law for state court
By Clara NiiSka - April 26, 2002

On March 4th, 2002, Judge Terrance C. Holter of the 9th District Court of Beltrami County ruled in the case Jawnie Kay Hough vs. Donald James Brun, Jr. He found in his Conclusions of Law that "parental rights are a fundamental right under the United States Constitution, which requires a reliable due process prior to depriving a citizen of those substantive and important rights."

Pummeled by a legal nightmare which took root in the jurisdictional interface between state and tribal courts, Jawnie has not seen her daughter, Meghan Brun, for over fifteen months. The three year old child was ripped from her arms by University of Minnesota police on the evening of January 10, 2001. Jawnie was at the U of M hospital with a family member undergoing cancer treatment; the police were acting on an ex parte Red Lake tribal court order rubber-stamped into state jurisdiction under "principles of comity."

Jawnie Hough had been awarded custody of her daughter Meghan as a part of June 1999 divorce granted by the Beltrami County court. Despite the state court's having asserted ongoing jurisdiction over Meghan's custody in that divorce judgment, Donald Brun, Jr., sought reversal of state-ordered custody in the Red Lake tribal court. The Red Lake tribal court – administered by Donald's uncle Francis "Chunky" Brun – unilaterally asserted its own jurisdiction after the child's paternal grandparents removed Meghan to Red Lake reservation in direct violation of the state court order prohibiting the removal of the child to the Red Lake reservation. The tribal court granted Donald custody in ex parte proceedings. The tribal court order was dated May 22, 2000.

In his March 4th ruling, Judge Holter found that the Red Lake tribal court had "created a substantial deprivation of parental rights" through those ex parte tribal court proceedings, which disregarded both state court orders and rudiments of due process. Judge Holter ordered that Meghan "be promptly returned to the proper custody" of Jawnie Hough "before 5:00 p.m., March 10, 2002."

Communicating through his Bemidji attorney, Michael Ruffenach, Donald informed Jawnie and her attorney that he did not intend to return the child in accordance with the state court's order. Jawnie's attorney responded with a letter urging the Court to "please encourage counsel to assist with the enforcement of the March 4, 2002 Order." Ruffenach resigned as Donald's attorney.

Apparently depending on legal precedents indicating that he would not be subjected to state criminal penalties as long as he remains within the external boundaries of Red Lake reservation, Donald has refused to return the child.

There is another hearing scheduled on May 20th in Beltrami County, in which Donald is requested to "show cause" as to "why the Court should not hold you in contempt" for violating the court's March 4, 2002 order, as well as for "perpetuating misconduct on the District Court of the County of Beltrami ... when you used a tribal court Order under a de facto Ex Parte comity recognition process."

In state court – unlike the Red Lake tribal court – constitutionally mandated standards of due process require that all parties be properly notified prior to a court hearing. Donald's household avoided personal service of the recent court papers by sending a young child to answer the door (state rules require that court papers be handed to an adult).

Jawnie's attorney then served the legal notices and other court papers to Donald by U.S. mail. After receiving the papers, Donald gave them to Willa Beaulieu, a Red Lake Comprehensive Health Services employee who told Press/ON that she heads the "Red Lake Nation child protection team."

According to Beaulieu, "the child is here, and [the Red Lake tribal council] passed a resolution saying that [Meghan] cannot be removed from the reservation." Beaulieu said that the tribal council has the authority to flout the State court order because of the Indian Child Welfare Act (ICWA). The Red Lake tribal council passed a resolution putting the children under ICWA, Beaulieu said, "I think in September." She added, "they are our children," and "under ICWA [we] have the authority to make decisions over children."

Press/ON asked for a copy of the tribal council resolutions. Beaulieu said that she would fax them. When the promised fax did not arrive, Press/ON called Beaulieu again. She then said that she would have to get the permission of her boss – Red Lake Comprehensive Health director and Willa's slightly younger brother Oran Beaulieu – to release the alleged tribal council resolutions, which are not mentioned in the published tribal council minutes. Press/ON's calls to the Red Lake tribal council had not been returned by press time.

Press/ON asked Willa Beaulieu how ICWA, which Congress enacted to address historical problems of "adopting out" numerous Indian children, could be applied to a custody case. The statute clearly applies to out-of-home placement of children, not custody disputes between parents. "I'm going to change that," Beaulieu said, we "have a committee statewide [which] met in the 7 Clans casino about a month ago."

Both Jawnie Hough and Donald Brun, Jr. are Indians: Jawnie is enrolled at Leech Lake and Donald at Red Lake. Beaulieu did not clarify how ICWA could be interpreted to establish custodial preference between Indian parents, nor how any U.S. law could support flagrant disregard of the due process protections in the U.S. constitution. Instead, Beaulieu said that she had talked with the chief judge at the Red Lake tribal court, Wanda Lyons, and "she said that jurisdiction is in Red Lake."

It is fairly broadly acknowledged that the Red Lake tribal courts are biased toward Red Lake enrollees. As tribal council chairman Bobby Whitefeather emphatically explained to this writer and Minnesota Lieutenant Governor Mae Schunk last year (in reference to another ex parte Red Lake tribal court case), "we have to stand up for our members."

Willa Beaulieu stressed to this writer that, "I have to look at the best interests of the child." She added that "all of the professional people" on the staff at Red Lake Comprehensive Health Services, "they look at the best interests of the child, they know what is going on."

The Red Lake child protection team has apparently made no effort to contact the child's mother, Jawnie. Beaulieu said that although "I do not know the mother," she would be willing to "meet with" Jawnie. "I will take Joyce Roy with me, who is with the U.S. Attorney's office. ... I'm willing to meet with her, arrange for therapy for her," Beaulieu said.

According to Willa Beaulieu, the Red Lake child protection team handled somewhere between 525 and 575 child protection cases last year. Press/ON asked the team chair if she intends to attend the May 20th hearing at the Beltrami County Courthouse in Bemidji. "Absolutely," Beaulieu said, she will be in court on behalf of Red Lake child protection. Red Lake attorney Michael Harrington had not returned Press/ON's calls by press time, so it is not clear whether the tribal attorney will also make an appearance.

Editor's note: a few minutes before this issue of Press/ON went to the printer, the Red Lake tribal secretary's office returned our call. According to tribal Secretary Judy Roy, the Red Lake tribal council has not passed any resolutions affecting the Jawnie Hough case, nor has the tribal council passed resolutions redefining Red Lake's application of the Indian Child Welfare Act to encompass child custody cases.

Willa Beaulieu thus apparently did not fax the tribal council resolutions to Press/ON because they do not exist. That the chair of the Red Lake child protection team would misrepresent the Red Lake tribal council's position on this matter is troubling.

5/17/2002

Jawnie Hough update: Attorney Nichols tries to reassert jurisdiction of Red Lake Indian court in Minnesota court case

On May 10, 2002, Donald Brun, Jr.'s new attorney, Lawrence Nichols of the Twin Cities' suburb Eagan served Jawnie Hough's attorney with a motion to vacate Bemidji Judge Terrence Holter's March 4th order acknowledging Hough's custody of her daughter, Megan. In his motion, Nichols argues that the Beltrami County District Court did not have the jurisdiction to hear the case "with respect to child custody issues and all other issues ... pursuant to Public Law 280 (28 USC 1360(a))."

Press/ON telephoned Nichols, and asked him about the motion. Nichols said that "the Brun case" involves the "exact same issues" as State v. Reynolds, a custody dispute involving the child of Shillo Reynolds. Reynolds, the daughter of Norine (née Beaulieu) and Paul Smith of Red Lake, "married a guy from Prairie Island" and, according to Nichols, after her divorce "found herself in jail in on a criminal charge" in Dakota County because she evaded State custody jurisdiction by taking her child to Red Lake.

As Reynolds's attorney, Nichols argued to Judge Duane Harves of Dakota County that "Indian law does not apply" with reference to Red Lake. The reservation, he told Press/ON, is an "insular possession of the United States." Nichols convinced the Dakota County Judge that because Red Lakers are `immune' from service of state process at Red Lake -- Commissioner of Taxation v. Brun - the state court's determination of custody in the Reynolds's divorce was not valid, and the Red Lake "tribal court's" granting of custody to Shillo Reynolds was the applicable law in Dakota County. Willa Beaulieu, who at that time headed the Red Lake child protection team, is the sister of Shillo Reynolds's mother Norine Smith, and during an interview for an article published in Press/ON on April 26th, Beaulieu cited State v. Reynolds as precedent supporting her claims that the Red Lake court had custody jurisdiction over Jawnie Hough's daughter Meghan Brun.

Nichols says that most of his legal practice is in criminal defense, although he takes a smattering of other cases. When Press/ON asked Nichols for an interview, he agreed to meet in `neutral territory' and suggested an upscale bar on Grand Avenue in St. Paul. Nichols has the feral, aggressively handsome demeanor of several other successful Twin Cities criminal defense lawyers, and answered the cell phone he carried in the pocket of his immaculately tailored suit, "law office."

While setting up the interview, Nichols told Press/ON that Beltrami County Judge Holter "analyzes the [Meghan Brun custody] case under Indian law," and sharply criticized Judge Holter, saying that he "appears to be racist and insane." Nichols said that In Re the custody of K.K.S. was among the precedents controlling determination of the custody of Meghan Brun. In that case, the Red Lake Indian court's assertion of custody jurisdiction over K.K.S. was upheld by the Minnesota Court of Appeals. The syllabus of Minnesota Court of Appeals Judge Short's November 1993 opinion reads: "A state trial court does not have exclusive jurisdiction over a custody dispute where a non-Indian parent flees the jurisdiction of a tribal court."

K.K.S. is the child of Patricia Neadeau, enrolled with a blood quantum of 13/32, and a white man - and with less than ¼ "Red Lake blood quantum," K.K.S. is legally non-Indian and thus not generally subject to Indian jurisdiction.

In the swank Grand Avenue bar, Nichols explained to Press/ON that the legal situation in the Hough v. Brun case is "indistinguishable" from the Reynolds case.

Nichols detailed the complex jurisdictional interface between the State of Minnesota, the United States Government, and residual tribal jurisdiction as he sees it. In the legal papers he has filed with the Beltrami County court on behalf of his client Donald Brun, Jr., Nichols argues that P.L. 280, which specifically excepted Red Lake from state jurisdiction, means that the State did not have "subject matter

jurisdiction" over the divorce which Jawnie Hough filed in Beltrami County, and thus that subsequent legal actions arising from that case are not valid. "If you are in excepted Indian country," Nichols told Press/ON, "you are immune from the reach of state court--clearly immune from the reach of state court," that is his reading of P.L. 280, he said. He also explained that under Commissioner of Taxation v. Brun, "people at Red Lake are immune from service of process," meaning that the legal papers necessary to initiate a state court case cannot be served on a Red Lake Indian "domiciled" on the reservation. Nichols also uses the word "domiciled" on the legal papers he recently filed in the Hough v. Brun case. The notion of "domicile" played a pivotal role in the state court's determination in another state tax case involving the Bruns, Commissioner of Revenue v. Brun (1995). In that case, the State court found that Francis "Chunky" and Barbara Brun were not liable for state taxes because - despite the indisputable fact that they resided in Bemidji - they had not "intended" to "abandon the Red Lake Reservation as their domicile." In legalese, the meaning of "domicile" can be interpreted to mean something like, "home is where the heart is."

The 1995 Brun case concerned Chunky and Barbara Brun's move to Bemidji after their house at Red Lake had been burned during the 1979 revolution at Red Lake. It rested heavily on the precedent established by the 1989 tax case, Jourdain v. Commissioner of Revenue, in which the Minnesota tax court found that tribal chairman Roger Jourdain - who also left the reservation after the 1979 revolution - and his wife Margaret were "presently residing off the Reservation temporarily until they are able to return" and thus not required to pay state income taxes. The state tax court's interpretation of "domicile" is of questionable application in the present Hough v. Brun case.

In the divorce papers that may become a pivotal issue in the custody of Meghan Brun, Donald Brun, Jr.'s address is listed as a Red Lake post office box; Donald Jr. reportedly split his time between a girlfriend at Red Lake and his parents' home in Bemidji. Jawnie Hough told Press/ON that her sister, Elizabeth Hough, physically served the divorce papers on Donald Brun, Jr.

At the time she filed for divorce, Jawnie Hough told Press/ON, she was attending school in Bemidji, and she and her daughter Meghan were living with Jawnie's mother, Leech Lake enrollee Roberta Headbird, in Bemidji. Although Jawnie Hough and Donald Brun, Jr. were married in a Catholic ceremony at Red Lake, they obtained a state marriage license and after their marriage resided off-reservation, in Sauk Rapids and in Bemidji, Minnesota.

Jawnie Hough's daughter Meghan is currently at Red Lake, in the physical custody of her ex-husband's parents, Donald and Geraldine Brun. Jawnie has not seen her daughter since the little girl was taken from her arms by University of Minnesota police - in Minneapolis - on January 10, 2001. The U of M police were acting on a Red Lake Indian court order entered into Minnesota jurisdiction, ex parte, on the affidavit of Donald Brun, Jr.

The Red Lake court claimed jurisdiction over Meghan after Donald and Geraldine took the child from Bemidji for a "visit" in March 2000, and in violation of a then-extant state court order, took her to Red Lake reservation and refused to return her. Jawnie Hough retrieved her child when the Bruns brought Megan to Bemidji for a haircut.

The Bruns responded by -- in what Judge Holter subsequently described as "perpetuating misconduct on the District Court" -- entering the Red Lake court's custody order into State jurisdiction.

Jawnie Hough told Press/ON that when she telephones the Brun's residence and asks to speak with her daughter, the Bruns tell her that the little girl isn't there. "I can hear her in the background," Jawnie said.

Will the young mother ever see her daughter again? There is a hearing scheduled at the Beltrami County Courthouse on Monday, May 20th.

On one side, Jawnie Hough's attorney has made a motion that Donald Brun, Jr., be compelled to return Meghan Brun to her mother's custody. On the other side, Donald Brun, Jr.'s attorney has made a motion to invalidate the entire State court proceedings - he says that this may include the divorce awarded to Jawnie Hough more than three years ago by the State court.

Can the Red Lake Indian court legally extend its jurisdiction over a Leech Lake Indian in Bemidji -- or Minneapolis? Donald Brun, Jr.'s attorney explained his position to Press/ON. "The Indians have been screwed for so long - what goes around, comes around," Nichols said during the May 15th interview. If you

marry a Red Laker, he added, "you take your chances, and there is not a damn thing that the State of Minnesota can do about it..."

Defiant Red Lake man asks judge to overturn custody order for lack of jurisdiction
By Jeff Armstrong - September 27, 2002

While the Minnesota Supreme Court contemplates adoption of a rule which would presumptively bind state courts to enforce tribal court orders, the justices would do well to consider the case of Jawnie Hough.

As a resident of Bemidji at the time, Hough sued ex-husband Donald Brun, Jr. for divorce in Beltrami County in 1999. Alleging several incidents of spousal violence and abuse, including one which resulted in Brun pleading guilty of fifth degree assault, Hough was awarded custody of her daughter and granted a protection order against Brun.

Unbeknownst to the Anishinabe woman, however, Brun had obtained countervailing divorce, OFP and custody orders against her in Red Lake tribal court, without apparently disclosing the existence of the conflicting state court orders.

Hough's child was taken from her and she was charged with parental abduction Jan. 10, 2001, on the strength of a state court "comity" hearing of which she had no prior notice. District Judge Terrance Holter granted the father custody based on the Red Lake tribal court order, but the judge subsequently overturned his ruling because Brun "did perpetrate misconduct on this court." On March 4, 2002, Holter ruled that Brun's actions violated Hough's fundamental constitutional rights.

"As a parent and primary physical custodian, [Hough] has important and substantial legal rights which are constitutionally protected and require due process to alter or change," the judge wrote. "This court recognizes that parental rights are a fundamental right under the United States Constitution, which requires a reliable due process prior to depriving a citizen of those substantive rights."

Holter ordered Brun to return the child to her mother no later than March 10, but Hough continues to wait for the final chapter of the nightmarish saga. Although her legal custody of the girl under state law is hardly in doubt, a Minnesota agency recently ordered Hough to pay hundreds of dollars in back child support for Meghan on behalf of the father—again under threat of criminal punishment.

"He was supposed to be paying me $290 a month," says Hough. "The state can come after me, but they can't touch him. They're trying to collect child support from me back to when I had Meghan at home. They said they couldn't collect from him because he's on the reservation. As long he runs to the reservation, he can get away with murder."

Brun appeared before Judge Holter this week--not to defend himself from contempt of court charges, but rather to ask the judge to rule that Red Lake has exclusive jurisdiction over Native families who resided there in the past.

Represented by attorney Lawrence Nichols, Brun petitioned the court--under the very divorce order he contends is invalid--to vacate the March 4 ruling and the entire divorce file because the family lived on Red Lake "as late as December 1998."

"The Respondent (sic) contends that, through the operation of Public Law 280, the District Court lacks both subject matter and personal jurisdiction over the parties in their putative dissolution, and that the Court lacked jurisdiction to award custody in the domestic abuse matter as well as the dissolution matter under Minnesota law and Federal law," Brun's brief asserts.

In the strikingly similar 1985 case of Desjarlait v. Desjarlait, however, the Minnesota court of appeals ruled that state courts have authority to rule on divorce custody proceedings initiated by tribal members living on the reservation.

"Because Stuart voluntarily invoked state court jurisdiction when he filed his petition for dissolution and because the tribal code relinquished jurisdiction over domestic matters to the state courts, the county court had subject matter jurisdiction over child custody matters of members of the Red Lake Band of Chippewa Indians. Principles of full faith and credit and comity do not require state courts to recognize a tribal custody

order when the Red Lake tribal court lacked subject matter jurisdiction and did not afford the parties due process," the Desjarlait court ruled.

Brun attempts to differentiate his case by relying on the appeals court's later ruling in In the Matter of the Custody of K.K.S.. In the 1993 ruling, the state court voluntarily declined jurisdiction in favor of a tribal court after one parent took a mutual child off the reservation and obtained an emergency custody order—almost the direct opposite of the case at hand, in which Brun and his parents kept the child on the reservation and obtained custody in an ex-parte hearing. The intention of the court was clearly to prevent "parental kidnapping."

"To hold that the state court has exclusive jurisdiction because Stensung and K.K.S. have a transient presence off the reservation would sanction unilateral movement of children to gain advantage in custody disputes," the appeals court concluded.

Hough is not optimistic that she will see her daughter off to her first day of school when she starts kindergarten soon, expressing an equal measure of confusion and fatalism.

"Even if I win in court again, there's nothing I can do about it," she says.

October 4, 2002

State court judge's orders to return child ignored by Donald Brun, Jr.

By Clara Niiska -

On September 23, 2002, Jawnie Hough went to before Judge Terrance Holter at the Beltrami County Courthouse in Bemidji yet again, seeking the return of her five-year old daughter Meghan. She and her Leech Lake attorney, Frank Bibeau, faced Jawnie's ex-husband Donald James Brun, Jr. and his Twin Cities attorney Lawrence Nichols.

Six months earlier, on March 4, 2002, Judge Holter ordered Donald Brun, Jr. to return Meghan to Jawnie. Brun ignored the state court order, and when faced with criminal contempt charges for his failure to return the child, his attorney filed papers urging that the state court invalidate all of its proceedings back to and including Jawnie's June 1999 divorce from Donald Jr., on the grounds that the state courts did not have jurisdiction over Donald Brun, Jr., a Red Lake enrollee.

In a court order issued the day after the September 23rd hearing, Minnesota court Judge Terrance Holter rejected Brun's arguments, and ordered that Meghan be returned to her mother by 5:00 p.m. on October 1, 2002.

The memorandum of law accompanying Holter's order is a forceful analysis of the jurisdictional issues involved in the case, as well as of the "fundamental rights" of all citizens. Holter writes that, "these fundamental rights require reliable due process prior to depriving a citizen of those rights."

Holter sharply points out that Jawnie Hough, a Leech Lake enrollee residing under Minnesota jurisdiction, is, even under the Red Lake tribal code, clearly not subject to Red Lake jurisdiction. He also notes that prior to the child's being sent to Red Lake pursuant to the Red Lake tribal court's ex parte custody order, Meghan had "more substantial contacts with Minnesota than [she] did with the Red Lake reservation."

Holter firmly rejected Brun's arguments that he is beyond state jurisdiction, pointing out that "respondent has ... availed himself to this Court on numerous occasions." He points out that Brun's motion to invalidate the divorce three years after it became final is too late, "far beyond the time for appeal."

On September 24th, Holter ordered that Brun's "motion to Vacate prior judgments and orders of this Court is DENIED."

As this issue of Press/ON went to press on October 3rd, the Bruns have apparently made no effort to comply with the Minnesota court's order to return Meghan to her mother. There are rumors, which Press/ON was unable to verify by press time, that Meghan's paternal grandparents Donald "Dutch" and Geraldine "Joy" Brun have obtained an 'order for protection' from the Red Lake tribal court barring the return of Meghan to her mother.

It is also rumored that Brun intends to appeal the Beltrami County court order. Press/ON made several attempts to contact the Bruns and their attorney, but calls had not been returned by press time.

Both newly-elected tribal chairman Gerald "Butch" Brun, who is Donald "Dutch" Brun's brother, and longtime tribal administrator Francis "Chunky" Brun, who is Dutch's first cousin, have previously denied influencing the tribal court's actions in the series of tribal court cases involving Meghan Brun. It remains to be seen whether or not those family ties – or the broader 'reservation elite' networks which encompass the Bruns – will play a role in any decision to appeal, and whether or not Red Lake tribal attorneys would be involved in an appeal.

The nightmare continues

Despite two court orders mandating that Meghan be returned to her mother at Leech Lake, one last March and the second last week, Meghan remains with her paternal grandparents at Red Lake. According to Leech Lake attorney Frank Bibeau, who represented Jawnie Hough at the most recent hearing, Brun's attorney is not even returning his phone calls.

Young Meghan's life has been wrenched by the Red Lake tribal court for more than two years now. Confined within the boundaries of Red Lake reservation to avoid exposing her to State jurisdiction, Meghan has matured from the toddler wrested from her mother's arms by police at the University of Minnesota hospitals and removed to Red Lake reservation, to a five-year-old girl starting school in the worst-ranked school district in Minnesota.

For the past two years Meghan's mother, Leech Laker Jawnie Hough, has endured a legal nightmare launched by Meghan's paternal grandparents taking the child for a "visit" to Red Lake in April 2000. Instead of returning the child to her mother as they had promised, the Bruns sought the jurisdiction of the Red Lake tribal court. On May 9, 2000, the tribal court issued an ex parte reversal of custody granted to Jawnie by the Beltrami County court as a part of her divorce from Donald Brun, Jr. eleven months previously.

Jawnie retrieved her daughter during the child's visit to the off-reservation town of Bemidji a few weeks later. The Bruns responded by taking the Red Lake court order to Beltrami County. Without notifying Jawnie, on June 19, 2000 the Beltrami County court ex parte entered the Red Lake court order into Minnesota state law on the grounds of "comity" and ordered that the tribal court order "shall be enforced by this court." In his June 19th decision, the state court judge ordered state law enforcement officials to take custody of Meghan and "return the child to the jurisdiction of the Red Lake Indian Nation." Jawnie, working at the Palace Casino on Leech Lake Reservation and living in Cass Lake, was not informed of the court's actions.

On January 10, 2001, Beltrami County Attorney Tim Faver signed a criminal complaint against Jawnie – who had still not been notified of the court's custody reversal. The very next day, she was arrested while with a family member undergoing cancer treatment in Minneapolis. Meghan was sent without any further hearing to Red Lake, and Jawnie faced criminal prosecution for 'deprivation of parental rights' based on the Red Lake tribal court's ex parte custody reversal and the state court's uncritical ex parte 'comity' acceptance of that tribal court order. Jawnie's public defender, the wife of Red Lake tribal attorney David Harrington, urged Jawnie to plead guilty to the felony charges and seek the jurisdiction of the Red Lake tribal court. At trial, Jawnie pled "not guilty," the criminal charges were 'deferred,' and Jawnie sought to regain custody of her daughter through the state court that had taken the little girl away from her mother.

On March 4, 2002, Beltrami County district court Judge Holter struck down the state court's judicial order enforcing the Red Lake court judgment. Holter found that Donald Brun, Jr. knowingly violated state court orders by taking Meghan to Red Lake and subjecting her to Red Lake tribal court custody re-determination. Holter also ruled that Donald Jr. "did perpetrate misconduct on this court" in obtaining the ex parte custody determinations, and expressed "serious doubts as to the impartiality and/or due process protection afforded [Jawnie Hough] in Red Lake Tribal Court."

In his March 4th decision, Judge Holter also issued the unusual directive that the Bruns not use the Red Lake tribal court for any future actions affecting the custody of Meghan. "While the practices of the Red Lake Tribal Court may be indicative of tribal notions of self-government and sovereignty, these procedures are seriously defective if the Tribal Court seeks to have its judgments enforced and recognized by other tribal courts, other state courts, or federal courts. The circumstances as they have developed mandate that subsequent proceedings take place in a neutral forum providing appropriate due process protections for all contestants," Holter wrote.

The Bruns ignored the March 4 state court order that Meghan be returned to her mother, Jawnie Hough, before 5:00 p.m. on March 10. "I figured they wouldn't show up," Jawnie told Press/ON reporter Jeff Armstrong. "They still think they can run and hide behind reservation lines."

After the state court denied his requested stay of the custody order, Bemidji attorney Michael Ruffenach, who was Brun's attorney at the time, wrote to Jawnie's attorney, Frank Bibeau, stating that "my client is not going to return the child," and asserting that Meghan was under the jurisdiction of the Red Lake tribal court system. When Bibeau responded with a letter urging the state court "please encourage counsel to assist with the enforcement of the March 4, 2002 Order," Ruffenach resigned as Brun's attorney.

On May 20, 2002, the state court heard an "Order to Show Cause" mandating that Brun either return Meghan to the rightful custody of her mother, or provide legally valid reasons why he had not done so.

Through attorney Lawrence Nichols, who was apparently advised by Red Lake tribal attorneys, Brun responded by filing a motion to vacate all of the prior judgments and orders of the state court – including the 1999 divorce and original custody determination – based on arguments that Donald Brun, Jr. was not subject to state jurisdiction, and could not even be legally served with the papers necessary to initiate state divorce proceedings while on the reservation.

Brun's "Motion to Vacate" was vigorously rejected by Judge Holter in his September 24th Order.

But, Jawnie Hough's attempts to "coordinate the return of [Meghan] ... have been resisted by the Bruns." Despite the state court orders, the little girl remains at Red Lake in the custody of Donald Jr.'s parents.

My little girl "is getting her heart broken," Jawnie Hough told Press/ON. The Bruns "are not complying with the court order ... they're going to try everything for their own selfish reasons."

"It's sad," added the mother whose child was ripped from her arms by an ex parte tribal court order enforced by the state. "They are running back to tribal court – it's not fair up there, it will never be fair for anyone that's not from there." When Jawnie called the Bruns in an effort to get Meghan back, they reportedly told her that they had gone to tribal court and "gotten a restraining order, 'we're a sovereign nation'."

Beltrami County Judge Holter, in his September 24th decision, stresses "fundamental rights," as well as the state's "compelling interest and ... duty" to provide all of its citizens access to "reliable due process."

Judge Holter also carefully distinguishes those actions between Red Lake enrollees which have no effects beyond the reservation boundaries, and those which 'cross the line' into Minnesota. He cites Minnesota State Ethical Practices Board v Red Lake DFL Committee, 303 N.W.2d 54 (1981), in which the Minnesota Supreme Court ruled that, "it is also clear that activities, even though originating on the reservation, which cause something to occur beyond the reservation boundaries fall under the jurisdiction of the State courts."

In its 1981 ruling finding then-chairman Roger Jourdain in contempt of court for failing to comply with state campaign finance laws when buying off-reservation advertising intended to influence voters in Minnesota elections, the Minnesota Supreme Court pointed out, "that while the activities of the Red Lake DFL Committee may have originated ... within the reservation boundaries, those activities also extended beyond, affecting persons outside the reservation and, indeed, were intended to do so."

Similarly, Judge Holter ruled, tribal court decisions affecting Minnesota citizens and their rights off-reservation cannot reasonably be exempt from the "fundamental rights" protected by both the U.S. and Minnesota constitutions.

How much longer until Jawnie Hough and her daughter Meghan are finally beyond the legal nightmare engendered by the Red Lake tribal court? The deadline for appeal of the Beltrami County court's order expires in late November, nearly three years after the little girl was torn from her mother's arms as she cried, "How come I have to go with the cops? What did I do wrong?"

STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF BELTRAMI **NINTH JUDICIAL DISTRICT**

Court File No. F1-99-602

Jawnie Kaye Hough, F/N/A
Jawnie Kaye Brun
Petitioner,

vs.

Donald James Brun, Jr.,
Respondent.

FINDINGS, ORDER

A hearing in the above-entitled matter was held before the undersigned on May 20, 2002 on Petitioner's Order to Show Cause. The Petitioner was present and was represented by counsel, Caryn Ye. The Respondent was not present but was represented by counsel, Lawrence Nichols. At the hearing, Respondent moved the court to Vacate the prior judgments and orders of this Court based on issues of jurisdiction. The matter was continued until September 23, 2002, and parties were requested to submit briefs on the jurisdictional issues.

At the September 23, 2002, the Petitioner was present and was represented by counsel, Frank Bibeau. The Respondent was present and was represented by counsel, Lawrence Nichols.

Based upon the all the records, proceedings, pleadings, affidavits and the arguments of counsel, the Court issues the following: FINDINGS and ORDER

FINDINGS

1. The Respondent gave reasonable excuse in response to Petitioner's Order to Show Cause by filing the Motion to Vacate.

ORDER

1. The Respondent's motion to Vacate prior judgments and orders of this Court is DENIED.

2. That the Dissolution Order for Judgment and Judgment and Decree, dated June 14, 1999, is valid and in full effect.

3. All previous Orders of this Court are valid and enforceable.

4. The Respondent shall return to the proper custody of the Petitioner the subject child of the parties, Meghan Agnes Brun, by 5:00 p.m. on October 1, 2002.

5. That in the event that Respondent fails to return the subject child as directed above, the Beltrami County Sheriff, or appropriate law enforcement of the county where the child is found, including federal law enforcement officers, is ordered to take physical custody of the child and return the child to the jurisdiction of this county and Petitioner.

6. That the attached Memorandum is incorporated by reference.

DATED: September 24, 2002

The Honorable Terrance C. Holter
Judge of District Court

MEMORANDUM

I. SUBJECT MATTER JURISDICTION

It is clear that the Minnesota courts have no jurisdiction over matters between enrolled Red Lake members residing on the reservation concerning activities that arose on the reservation and have no impact outside the external boundaries of the reservation. Sigana v. Bailey, 164 N.W.2d 886 (Minn. 1969).

It is also clear that activities, even though originating on the reservation, which cause something to occur beyond the reservation boundaries fall under the jurisdiction of the State courts. State, by Minnesota State Ethical Practices Bd. v. Red Lake DFL Committee, 303 N.W.2d 54 (Minn. 1981).

The Minnesota Supreme Court held that Minnesota does have jurisdiction over matters within the territorial limits of Minnesota and without the territorial boundaries of the reservation, even to parties who are subject to the jurisdiction of the Red Lake Band. Red Lake Band of Chippewa Indians v. State, 248 N.W.2d 722 (Minn. 1976).

The Court also noted in Red Lake Band that Minnesota, as a matter of State policy, "...should not, in the absence of some compelling state interest, impose burdens upon persons subject to the governing authority of the Red Lake Band when such burdens will undermine the effectiveness of the band's efforts to achieve effective self-government." Red Lake Band at 727.

This Court recognizes that it has a compelling state interest in and a duty to provide Minnesota citizens access to Minnesota District Courts for civil lawsuits. The United States Supreme Court has held that marital rights are fundamental under the penumbral rights of

privacy. Griswold v. Connecticut, 381 U.S. 479, 485, (1965). These fundamental rights require reliable due process prior to depriving a citizen of those rights.

A marriage is the union of two people and is inherently mobile because the parties can and do change their residences and still remain married. The marriage is not an activity exclusive to an area or location it moves as the parties move. The Petitioner in this case moved off of the reservation and thus brought the activities into the jurisdiction of Minnesota. She sought a dissolution of marriage. The marriage clearly reached out beyond the external boundaries of the reservation, and, following Red Lake DFL Committee, this Court properly exercised subject matter jurisdiction.

In addition, Minnesota properly exercised subject matter jurisdiction over the dissolution of marriage because Petitioner would not otherwise have had a forum to bring such an action. Red Lake Tribal Code, section 100.01 Extent of Sovereignty and Jurisdiction, only provides for jurisdiction within the boundaries of the Red Lake Indian Reservation. Red Lake Tribal Code, section 200.06, provides that a summons be served "...within the boundaries of the Red Lake Indian Reservation shall be made upon an individual residing or physically present on the Red Lake Indian Reservation...." Under its own code, Red Lake Band does not have jurisdiction over Petitioner. Therefore, this Court exercising *jurisdiction by necessity* over this matter was proper because no other jurisdiction could hear the matter.

With regard to subject matter jurisdiction over child custody, the Minnesota Court of Appeals held that state and tribal courts have concurrent jurisdiction over custody matters involving children. In re the Matter of Custody of K.K.S., 508 N.W.2d 813 (Minn.App. 1993), review denied. In K.K.S., the court noted the pertinent facts that it relied on in declining jurisdiction in favor of the tribal court:

> (a) K.K.S. was conceived and born on the reservation; (b) K.K.S. was domiciled on the reservation with her Indian mother; (c) Stenseng resided with Neadeau and K.K.S. within the boundaries of the reservation; (d) K.K.S. has familial and social relationships with tribal members; (e) the controversy causing this custody dispute arose on the reservation; (f) Stenseng removed the child from the reservation without Neadeau's permission; and (g) Stenseng alleges Neadeau is incapable of caring for K.K.S., Neadeau's apartment is a dangerous environment, and K.K.S. is in immediate danger of harm without him in the home. Id. at 815.

In contrast, the child in this matter was conceived and born off of the reservation. The child lived off of the reservation with her parents for two years before moving to the reservation. Petitioner lived on the reservation only a few months before moving off of the reservation with the child. It is not determined that the child has any familial or social relationships with tribal members different from her familial and social relationships off the reservation. It would stand to reason that her relationships off the reservation are stronger as she lived off the reservation most of her life. The controversy causing the custody dispute, namely the dissolution action, did not arise on the reservation. Finally, it has not been determined that Petitioner fled the reservation she merely moved from the reservation where she had lived with the child for only a few months.

In K.K.S., the Court noted that the UCCJA §518A.03 (1992) provides jurisdiction based on contacts rather than mere presence to deter abductions. The child in this action has more substantial contacts with Minnesota than it did with the Red Lake reservation. Petitioner lived on the reservation with the child for only a short period of time and moved back to the area where she had been living during the most of the marriage. It is clear that the case at bar is distinguishable from K.K.S..

It is abundantly clear that this Court has subject matter jurisdiction over marriage dissolutions and of child custody matters within its' borders. Both participants in this matter are citizens of Minnesota. The parties lived in Minnesota the majority of their marriage. Petitioner

lived outside the Red Lake Indian Reservation when the dissolution was granted and the custody determination was ordered. Exercising jurisdiction in this matter is not inconsistent with the holding in K.K.S..

a. Service of Process

Respondent argues that service of the Summons and Petition for Dissolution of Marriage were ineffectual because there was no personal service on the Respondent. Personal service is required by Minn. Stat. §518.09 in marriage dissolution proceedings. The Summons and Petition were properly mailed to the Respondent on the Red Lake reservation pursuant to Minn. R. Civ. Pro. 4.05. Respondent signed and returned the acknowledgment form. The Minnesota Supreme Court is clear on the rule and the rationale behind the rule that, "...even where personal service is required by a statute, we have long held that, where service is made by mail and actually reaches the party to be served within the required time, it is equivalent to personal service." State v. Pierce, 100 N.W.2d 137, 138-139 (Minn. 1959).

In light of Pierce, service in this case was equivalent to personal service and was effective.

In addition, the Minnesota Supreme Court held that, "'[a] voluntary general appearance by a defendant is equivalent to a personal service of the summons upon him'" Montgomery v. Minneapolis Fire Dept. Relief Ass'n, 15 N.W.2d 122, 125 (Minn. 1944). (citing 1 Dunnell, Dig. & Supp. §476, and cases in note 12; Id. §475, and cases in note 9. On April 28, 1999, the Respondent, after receiving the Summons and Petition on April 1, 1999, personally appeared before this Court on an Order for Protection hearing and requested visitation with the child. He voluntarily appeared just sixteen days before the hearing on the dissolution of marriage. The Respondent's general appearance was without objection to service of process or jurisdiction, thus

he waives any right to argue this later and personal service was effectual under the decision in Montgomery.

b. Deficient Orders

Respondent argues that the Ex Parte Restraining Order of April 19, 1999 and the Domestic Abuse Order for Protection of April 28, 1999 were void for procedural and substantive defects. The Minnesota Court of Appeals held "[e]xpiration of the time for appeal precludes the losing party from seeking to modify or vacate the judgment because of judicial error. Erickson v. Erickson, 506 N.W.2d 679, 679 (Minn.App. 1993) (citing Anderson v. Anderson, 179 N.W.2d 718, 722 (1970). Respondent is attempting to vacate these two orders far beyond the time for appeal.

II. PERSONAL JURISDICTION

Personal jurisdiction over an individual is subject to and is dictated by the defendant's right to due process. Jurisdiction may be either general or specific. Courts can exercise general jurisdiction over a defendant, "[w]here the defendant had 'continuous and systematic' contacts with the forum state, ... for all purposes, even for a claim that is not related to the defendant's contacts with the forum state." Griffis v. Luban, 646 N.W.2d 527 (Minn. 2002), rehearing denied (Aug 14, 2002) (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, (1984) (quoting Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952))).

The Respondent's contacts with Minnesota are numerous. The Respondent in this case is now and has always been a Minnesota resident. He is eligible to run for office and vote in elections. He has lived outside the Red Lake Indian Reservation and within the boundaries of Minnesota for at least two years prior to this action. Respondent applied for and obtained a marriage license from the State of Minnesota and was married under that license. Respondent

has arguably worked, shopped and sought entertainment in Minnesota for a substantial period of time. Respondent has personally appeared in Minnesota District Court, in Cass County, on a 5th Degree Assault-Domestic. He did not contest personal jurisdiction, pled guilty, and paid the fine imposed by the District Court Judge.

Respondent has also availed himself to this Court on numerous occasions. First, the Respondent has been personally served with legal papers on numerous occasions concerning these matters. Second, he has filed no less than three affidavits to this Court in support of his position in the proceedings. Third, he has appeared in this Court, through his attorney, no less than three times. Fourth, he has requested and was granted permission to proceed in this Court in forma pauperis. Fifth, Respondent has appeared in this court personally concerning matters associated with the Respondent and Petitioner's relationship. Finally, Respondent signed and returned the "Acknowledgment and Receipt of Summons and Petition for Dissolution of Marriage." In all of the above contacts with this Court, at no time did the Respondent challenge personal jurisdiction. Even though the Respondent was living on the Red Lake Indian Reservation at the time of the Petition for Dissolution, he lived outside of the external boundaries of the Red Lake Indian Reservation for the majority of the duration of the marriage. Clearly, the Respondent has had continuous and systematic contacts with Minnesota and would be subject to general jurisdiction of the Minnesota Court System for all purposes.

If, however, the Respondent were not found to be subject to general jurisdiction, Minnesota courts could exercise specific jurisdiction over him. The case law is clear that to acquire specific jurisdiction,

> "...due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" International Shoe Co. v.

Washington, 326 U.S. 310, 319 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

The Minnesota Supreme Court has held that, "[w]here the nonresident defendant's contacts with the forum state are not sufficient for general jurisdiction, the defendant may nonetheless be subject to 'specific' jurisdiction--that is, jurisdiction over a claim that allegedly arose out of the defendant's contacts with the forum." Griffis v. Luban, 646 N.W.2d 527 (Minn. 2002), rehearing denied. (quoting Valspar Corp. v. Lukken Color Corp., 495 N.W.2d 408, 411 (Minn.1992)).

The specific contacts the Respondent has had with Minnesota include obtaining a Minnesota marriage license. He is also a Minnesota resident who lived and worked in Minnesota for the majority of his marriage. He was then and is now eligible to vote and run for office. He has availed himself to the Minnesota Court System on criminal as well as civil matters pertaining to the marriage. At no time did the Respondent challenge personal jurisdiction. Clearly, the Respondent has had sufficient minimum contacts with this jurisdiction "...such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." International Shoe at 319.

Additionally, the Minnesota Supreme Court has "...observed on several occasions that the jurisdictional statutes of Minnesota, including Minn. Stat. §543.19, extend the jurisdiction of Minnesota courts to the maximum limits consistent with due process, [footnote omitted] A necessary corollary of this principle is that in doubtful cases, doubts should be resolved in favor of retention of jurisdiction." Hardrives, Inc. v. City of LaCrosse, Wisconsin, 240 N.W.2d 814, 818 (Minn. 1976).

Finally, Minnesota case law is clear that voluntarily submitting to a court in any manner and at any step in the legal process gives that court jurisdiction over that person. The Supreme

Court held "[t]he rule is that an appearance for any other purpose than to question the jurisdiction of the court is general." St. Louis Car Co. v. Stillwater St. Ry. Co., 54 N.W. 1064 (Minn. 1893). The Respondent in this matter has appeared personally and through his attorney on numerous occasions. He also signed and returned the "Acknowledgment and Receipt of Summons and Petition for Dissolution of Marriage." Additionally, the Supreme Court held that "[a] party who takes or consents to any step in a proceeding which assumes that jurisdiction exists or continues has made a general appearance which subjects him to the jurisdiction of the court." Slayton Gun Club v. Town of Shetek, Murray County, 176 N.W.2d 544 (Minn. 1970) (citing State by Lord v. Rust, 98 N.W.2d 271 (Minn. Jul 17, 1959).

It is indisputable that this Court has personal jurisdiction over the Respondent for the dissolution of marriage and child custody determinations.

T.C.H.

STATE OF MINNESOTA
FOURTH JUDICIAL DISTRICT COURT

ROBERT A. BLAESER
JUDGE
HENNEPIN COUNTY GOVERNMENT CENTER
MINNEAPOLIS, MINNESOTA 55487-0421
(612) 348-4964
FAX (612) 348-2131

November 1, 2002

Mr. Fred Grittner
Clerk of the Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Re: Post-Hearing Submission on Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments

Dear Mr. Grittner:

At the oral hearing on October 29, 2002, Chief Justice Blatz indicated that the Supreme Court would take additional written comments on the proposed rule. I thought it would be helpful to point out a couple of additional items that were not able to be addressed in the oral presentation.

1. Many of the speakers opposed the rule because they had personal issues with their own tribes. They either felt that tribal courts should not exist, the tribes did not have the right under their own constitution to set up tribal courts, or that the tribes themselves should not exist. One of them was concerned about the denial of his membership application.

   This Court is aware of the long-standing federal doctrine that recognizes tribal sovereignty. With that goes the right to select a form of government. Whether the tribes are organized under the Indian Reorganization Act or not, they need a system of dispute resolution. Whether the system they select consists of a council of elders or a system modeled on the U.S. judicial system, that is not something that affects the application of the proposed rule. That is totally within the sovereign discretion of the tribe and is not something that we normally inquire into. Likewise, membership is within the exclusive sovereign discretion of the tribe and is not inquired into even on ICWA cases by the state courts.

   This Court does not have to set foot on any of the ground involved in internal tribal political disputes. This rule is set up so that whatever

system the tribe has, the rule is there so that when the systems interact that people and children are protected.

2. Secondly, concerns were made about the rule being over-broad. The rule with regard to recognition of tribal orders is only as broad as the tribal jurisdiction. Several statements were made concerning potential tribal court orders being enforced in state court for pick-up of adults. The concern alluded to by the speakers was that a white person might be subject to an arrest warrant by a tribal court. Without going into a treatise on tribal court jurisdiction, tribal courts for the most part exercise civil jurisdiction over tribal members in acts that occur within the reservation boundaries.

   The proposed rule specifically excludes tribal court judgments where they lack personal or subject matter jurisdiction. Therefore, if a tribe were attempting to assert criminal jurisdiction over someone whom they did not have subject matter jurisdiction, that order would be void. I do not believe that tribes attempt to assert jurisdiction they do not have and are content to exercise and deal with the expanding caseload that they do have. Similarly under the Rule A(4), the non-final order is specifically to be a non-criminal order for protection or apprehension. The Rule C(2) specifically excludes criminal orders issued by Red Lake and Boise Forte. As this Court is aware, those two reservations are non-public law 280 reservations and there is no state jurisdiction on those reservations.

3. Third, there was a lot of misinformation given without any supporting documentation. The tribes, with the exception of Red Lake, have already indicated that they will give effect to state court orders once there is reciprocity by the state. Chairman DeSchampe of the Minnesota Chippewa Tribe was there to provide that information. Contrary to some representations, many of the attorneys who regularly practice in tribal court were in the audience. There is no separate requirement for them to be admitted into tribal court, other than requesting admission.

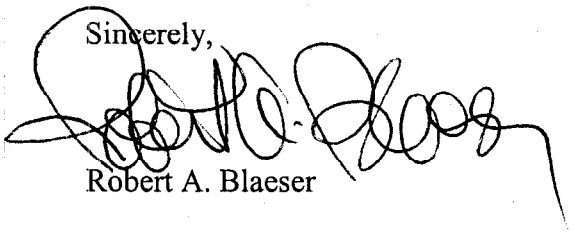
4. Lastly, as to why this is more properly the subject of a rule than a piece of legislation, there are three reasons. First of all, this is something that occurs totally within the judicial system. When and how a tribal court judgment is to be given effect in state court occurs inside our judicial system, and should be governed by a procedural rule of court. Second, from a purely selfish standpoint as a state court trial judge, we do not like to see the independence of the judiciary chipped away by legislative action. If the Legislature is to tell us when and how tribal court judgments are to be given effect inside state courts, it would seem to be an invasion of the province of the judiciary. Third, the Legislature is subject to forces in the community that may result from certain political disputes with tribes that have nothing to do with the merits of the issue. There are certain

disputes going on within the state of Minnesota in which the racial tensions are severely heightened. That is not an atmosphere in which we could expect to receive the same type of reasoned analysis excluding all prejudices that we can expect from this Court.

5. Finally, many of the tribes currently recognize state court judgments to collect monies, including levying on per capita payments to members. So far, one tribe has refused to recognize state court judgments where there is no reciprocity by the state for tribal court judgments. We are the only state in the Midwest that does not recognize tribal court judgments. In this era of expanding tribal court jurisdiction, those who prevail in state court litigation may have no remedy for the collection of their judgments if tribal courts refuse to enforce them. The proposed rule contains ample protection in enforcing a tribal court judgment for a trial judge to examine whether or not due process was accorded the litigants, whether they had fair notice and hearing, and is based upon the tribe having had appropriate jurisdiction of the matter in the first instance.

I would urge the Supreme Court to adopt this rule. Thank you.

Sincerely,



Robert A. Blaeser

RAB/cw

January 13, 2003

Honorable Steven Ruble
Seventh Judicial District
635 2nd Street SE
Milaca, MN 56353

Re: Petition for Adoption of a Rule of Procedure For The Recognition of Tribal Court Orders and Judgements

Dear Judge Ruble:

You may recall in my July 5, 2002 letter to you that I referenced the tribal reaction to recent United States Supreme Court decisions. To summarize and briefly re-state, tribal governments are very unhappy with how the United States Supreme Court has ruled on the law (see especially 2001 cases "Atkinson" & Hicks") and have undertaken a broad Initiative in response in an attempt to get Congress to change the law. This is colloquilly referred to as the "Hicks Fix", as I previously mentioned.

Attached please find additional information concerning the Initiation, including a news report on the November annual meeting of the National Congress of American Indians (NCAI) held in San Diego, and also draft "Hicks Fix"legislation that has been formulated and was recently supplied to me.

I believe Minnesota citizens would be well-served, and fairly so, if both the Committee and the Court would please take time to review these documents during the process of petition review. Given the gravity of the draft legislation I respectfully request that the petition, considered in light of the foregoing, is premature and that it should be withdrawn.

Sincerely,

Frank Courteau

Frank Courteau
Mille Lacs County Commissioner
10654 390th Street
Onamia, MN 56359

cc (w/attach): Honorable Kathleen Blatz
Honorable Robert Schumacher
Honorable R.A. Randall

cc (con't): Honorable Vicki Landwehr
Ken Peterson, Deputy Attorney General
Senator Betsy Wergin
Representative Sondra Erickson
Commissioner Robert Hoefert
Commissioner Roger Neske
Commissioner Dick Satterstrom
Commissioner Phil Peterson
Jan Kolb, Mille Lacs County Attorney
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Trust Reform, Sovereignty Top NCAI Agenda

By Rob Schmidt
November 25, 2002

The mood was convivial but businesslike at this year's National Congress of the American Indian meeting Nov. 11-15. Thousands of representatives from hundreds of tribes gathered in San Diego to set priorities and draft initiatives for the coming year.

Speaking Monday morning was Representative Frank Pallone (D-NJ), a member of the House Resources Committee and the Native American Caucus. Pallone enumerated his priorities for the 108th U.S. Congress next year:

1) The Tribal Sovereignty Protection Initiative.
2) An independent commission on trust accounting.
3) Guarding against obstructions to the tribal recognition process.

He also outlined several initiatives for the NCAI to consider and support if possible:

· A tribal government homeland security department.
· A sacred lands bill at the federal level similar to the one Governor Gray Davis of California vetoed.
· The NATIVE (Native Act to Transform Images in Various Environments) Bill to fund changes to mascots and other Native imagery.
· The Great Plains Historical Wilderness Act.
· Renewal of the Indian Health Improvement Act.

Pallone noted that Indians have increased their clout in Congress. As someone said, the Native American Caucus is the largest minority caucus in the House, with 86 members. Representatives have begun to notice how Natives are supporting candidates financially and swaying close elections.

Pallone warned the NCAI not to assume Democrats or Republicans would serve Indians best. He urged members to stick to their principles and not bow to expediency. "Most of the time you have right on your side," he said.

President Reports Progress

NCAI president Tex Hall followed with a report on the past year's accomplishments. The Department of the Interior's ill-fated BITAM (Bureau of Indian Trust Asset Management) proposal brought 3,000 members to the NCAI conference in Spokane in 2001, where they denounced the proposal.

Another highlight was the Sovereign Protection Run, which ended in Washington D.C. with Senate Majority Leader Tom Daschle (D-SD) addressing a rally. Yet another was the Economic Development Summit in Phoenix, which established a goal of creating 100,000 jobs in Indian country by 2008.

Hall was proud of how Indians made a difference in November's mid-term elections. He called it "the power of the Native vote." Among the winners put over the top by Natives were Sen. Tim Johnson (D-SD), Gov. Brad Henry of Oklahoma, Gov. Janet Napolitano of

Arizona, and Rep. Earl Pomeroy (D-ND).

Hall listed the challenges facing this year's NCAI. They included budget prioritizing, judicial nominees, sovereignty protection, and trust reform.

He finished with a plea echoed over the week by others: the need for unity. "We must stand together or face losing everything that keeps our tribes and communities strong," he said.

McCaleb on the Hot Seat

Up next was Neal McCaleb, the Assistant Secretary for Indian Affairs. McCaleb seemed caught between a rock and a hard place: expected to carry Indian proposals to the government but also to implement the will of the Bush administration. That may explain why he tendered his resignation soon after the conference, citing how "the constraints imposed by ever-present litigation have taken their toll."

People waited expectantly to see what McCaleb would say about the issues swirling around him.

McCaleb stuck to his longstanding theme of economic development. The White House's priorities were the war on terrorism and the war on poverty, he said. He offered several pithy maxims, such as:

- "When there's no choice, there's no freedom."
- "You only fight poverty with prosperity."
- "Education will differentiate those who fail from those who succeed."

On the economic front, McCaleb said he was pleased with the Phoenix summit. But it was only the first step, he added. More enterprising efforts are needed. On education, McCaleb reiterated President Bush's pledge not to leave any child, whether Indian or not, behind. He mentioned how spending on Indian school construction has increased from $60 million in the late 1990s to $300 million in 2003.

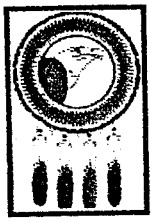
McCaleb's prescription for busting poverty was to build strong tribal governments that would treat investors fairly, keep money on the rez, create jobs, and bring markets to Natives' doorsteps. He recommended that Natives make like Disney and "imagineer" economic opportunities.

Nobody Happy with Trust Reform

On the issue of trust reform, McCaleb avoided confrontation. "The one thing we all agree on," he said, is that "the status quo is unacceptable." He noted that Secretary Gale Norton had announced BITAM a year ago and Indians had said "no" to it loud and clear.

McCaleb told how subsequent negotiations between the DOI and the Tribal Trust Reform Task Force had broken down. The tribes had insisted the DOI accept financial responsibility for its breach of trust, he said. That was unacceptable to the government. The move would impose tribal sovereignty on U.S. sovereignty and thus be unconstitutional.

McCaleb said he was under pressure to present a strategic plan to Judge Royce Lamberth by Jan. 6, 2003. The looming deadline would make consultation with tribes impossible, he asserted. He urged Natives to lobby for a deadline extension and asked anyone with a proposal to contact him.



McCaleb then faced some tough questions from NCAI members. "My elder people say Gale Norton should go to jail," said Dotti Chamblin of Makah. She wanted to hear that Indian health was a trust responsibility. The DOI was funding only 48-52% of her people's health services, and she insisted the funding be restored to 100%.

Other audience members expressed the following:

- Trust reform should be an add-on to the DOI's budget. It shouldn't take priority over the regular budget.
- The DOI and the Department of Justice shouldn't file amicus briefs for the kitty-litter mine in Nevada against tribal interests. The government has a trust responsibility to take the tribes' side.
- The DOI also has a trust responsibility to transmit cultural knowledge and values as well as subjects such as math and English.
- Indians object to legislative language that would extinguish trust accounts before 1985.

McCaleb listened respectfully but didn't make any promises. He said he'd consider the NCAI's views and share them with his colleagues.

Sovereignty in the Spotlight

The theme for the first afternoon's assembly was "United for Sovereignty: Our Right—Our Destiny."

Deron Marquez, chairman of the San Manuel Band of Mission Indians, kicked off the session with a spirited speech. "As American Indians, we were born into politics," he began.

Marquez gave a brief overview of the battle for sovereignty. Europeans called all the indigenous Americans "Indians" even though the people had little or nothing in common. The newcomers practiced divide-and-conquer techniques to keep Natives disorganized.

Native people have found unity on many levels, said Marquez. "It doesn't mean we're all the same." He suggested Indians need to embrace the concept of strategic unity, or uniting when it makes sense. Indian nations are strong when they aggregate their sovereignty, he said.

Tex Hall showed a video that explained how the courts have weakened sovereignty by favoring states rights over tribal rights.

Hall and other panelists then presented a solution: the Tribal Sovereignty Protection Initiative. Its goal is to pass legislation affirming that "Indian tribes retain their inherent right to govern all people and places within Indian country unless that power has been specifically limited by treaty or federal statute." (See the accompanying article for details.)

John Echohawk, executive director for the Native American Rights Fund (NARF), spoke on two other judicial projects. One is a plan to coordinate tribal litigation before the Supreme Court, much as the states did in their antitrust suit against Microsoft Corp. The plan would help tribes follow Echohawk's key advice: "Stay out of the Supreme Court."

Echohawk also described a project to monitor the judicial selection process. A group would

Click here to see Native American contributions to 9-11

review the judges' records and alert representatives to nominees with a bias against Indians.

"Send Them to Jail"

The next day, the NCAI returned to the theme of trust reform.

Keith Harper, senior staff attorney for NARF, came on like a firebrand. The DOI "has a policy and practice of consistently lying to plaintiffs and the courts," he said. "They don't lie all the time, only when they move their lips." Harper predicted Judge Lamberth would issue a structural injunction, forcing the DOI to adopt a wide-ranging remedy a la desegregation.

Then Eloise Cobell, lead plaintiff in *Cobell v. Norton*, took the podium. She received a standing ovation from the audience, who appreciated her tireless efforts.

Cobell demanded action for the 300,000 individual trust accounts she represents. "This case screams to the heavens for justice," she said.

She exhorted the NCAI to stay strong and continue the fight. "The most important part of this case is we're winning," she said. "We've got to make sure we send them to jail."

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(Do not send attachments)

107th CONGRESS
2D SESSION

S. _____

To affirm the government-to-government relationship between the United States and Indian tribes, to affirm the inherent sovereign authority of Indian tribes, to enhance tribal economic development, and for other purposes.

IN THE SENATE OF THE UNITED STATES

January ___ (legislative day, _____), 2002

Mr. _____(for himself and Mr. _____) introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To affirm the government-to-government relationship between the United States and the Indian tribes, to affirm the inherent sovereign authority of Indian tribes, to enhance tribal economic development, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TABLE OF CONTENTS

SECTION 1. SHORT TITLE.

This Act may be cited as the "Tribal Governance and Economic Enhancement Act of 2002."

SECTION 2. FINDINGS.

Congress finds the following:

(1) Indian people have owned and occupied lands within what is now the United States of America since time immemorial. During the millennia before Europeans came to this continent, Indian people formed their own sovereign nations and governed themselves, according to each nation's own traditions of political organization, spirituality, and reverence for the land.

(2) The Indian Commerce Clause of the Constitution (art. 1, § 8, cl. 3), as implemented by the Supremacy Clause of the Constitution (art. VI, cl. 2), lodged authority over Indian affairs in the Congress. From the earliest days of the Republic, the Congress has acknowledged that the United States is bound by a special trust duty to tribes, requiring the Congress, the President, and all entities of the federal government to assure that "the utmost good faith shall always be observed towards the Indians," as provided in the Northwest Ordinance of 1787 (1 Stat. 50). The Congress has always recognized the sovereign status of Indian tribes and has dealt with Indian tribes on a government-to-government basis through hundreds of treaties, agreements, statutes, and executive

orders in which presidents exercised authority delegated by Congress.

(3) Prior to treaties with the United States, Indian tribes possessed all the inherent sovereign powers of any government. Courts have found that, in the treaties, and in statutes, Congress extinguished the tribes' international sovereignty, that is, the right to ally with foreign nations. The tribes retained all other sovereign powers not expressly relinquished by the tribes or expressly limited by Congress.

(4) In *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832), the United States Supreme Court recognized the principles set forth in Findings (1), (2), and (3). Chief Justice Marshall wrote that, before treaties with the United States, America was inhabited by "separate nations . . . having institutions of their own and governing themselves by their own laws." Through treaties and other forms of relationship with the United States, Chief Justice Marshall wrote, the United States "explicitly recogniz[ed] the national character of the [Indian tribes] and their right of self-government." The tribes continued to be "considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception" of laws that might be enacted by Congress.

(5) The detailed and carefully-considered views of Chief Justice Marshall accurately describe Congress' view of tribal sovereign powers then and today.

(6) Through the treaties and subsequent statutes, wars, and other actions, including the allotment and termination programs, Indian tribes ceded or had taken from them most of the land within the boundaries of the United States. Beginning in the mid-nineteenth century, Congress enacted laws and policies that limited and suppressed the exercise of tribal sovereignty.

(7) Congress has acknowledged, and attempted to correct, the loss of land and the suppression of tribal sovereignty. The Indian Reorganization of 1934 (Ch. 576, 48 Stat. 984) brought the allotment policy to an end and set out statutory procedures for tribes to adopt constitutions as one means of exercising their inherent sovereignty. In the 1970s, Congress adopted its policy of self-determination. The Indian Self-Determination and Education Assistance Act of 1975 (Public Law 96-638, 88 Stat. 2203), announced this policy in strong and clear terms: "The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility

to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy."

(8) Contemporary Indian tribes govern their reservations as one of the three sources of sovereignty, along with the federal government and the states, recognized within the federal constitutional system. Tribes adopt laws through their legislatures, administer laws through their executive offices and agencies, enforce law and order, and adjudicate cases through their courts. Nonetheless, while tribes have made many advances during the past two generations, because of their long and difficult relationships first with European governments in the colonial era and later with the United States, Indian tribes, people, children, and families have extraordinary unmet governmental, education, health, housing, employment, and other social and economic needs.

(9) In modern times, Congress has consistently followed the policy of self-determination so that tribes can continue to make progress. Many statutes have been enacted to treat tribes as states and otherwise to affirm and acknowledge their sovereign status in areas such as environmental protection, revenue sharing, and federal taxation; ~~to protect and expand the jurisdiction of tribal courts;~~ to support tribal natural resource management, including hunting and fishing rights; to protect and enhance cultural, spiritual and religious rights of tribal citizens; and generally to protect and enhance inherent tribal sovereignty.

(10) Congress has enacted these laws and many others in the belief that strong and stable tribal governments are the key to improving economic conditions, governmental services, and social well-being on Indian reservations.

(11) Recent opinions of the United States Supreme Court have left unclear the respective powers of tribal and state governments within Indian country. Many of these opinions have been inconsistent with Congress' policy of tribal self-determination; have created confusion regarding the respective powers of tribes and states within Indian country; and have hampered tribal efforts in such areas as raising tax revenues, regulating land use practices, ensuring law and order, and generally governing Indian country in a stable and efficient manner.

(12) The entire nation will benefit from enhancing tribal governments and encouraging economic development opportunities in Indian country. Citizens from nearby local communities, and

from afar, visit Indian reservations in increasing numbers to enjoy Indian art and traditional ceremonies, pursue recreational activities, visit tribal museums, shop at reservation businesses, attend tribal colleges, receive treatment at tribal medical facilities, and for many other purposes. The attractions of Indian reservations will expand as economic development increases. Regional economies will improve as reservation poverty is reduced. Visitors, as well as reservation residents, will benefit from improved tribal justice systems where tribal, state, and federal law enforcement and judicial officials work cooperatively under clearly-established guidelines.

(13) Accordingly, in order to fulfill Congress' constitutional responsibility to implement federal Indian policy as trustee in utmost good faith, it is Congress' duty to clarify the nature and extent of the powers of sovereign tribal governments.

SECTION 3. PURPOSES.

The purposes of this Act are:

(1) to affirm the government-to-government relationship between the United States and Indian tribes;

(2) to affirm the governmental authority and powers of Indian tribes;

(3) to improve and enhance tribal courts and other tribal governmental institutions; and

(4) to enhance economic development and reduce poverty in Indian country.

SECTION 4. DEFINITIONS.

As used in this Act the term:

(1) INDIAN COUNTRY. — "Indian country" means the geographic territory encompassed by 18 U.S.C. Sec. 1151, as amended by Section 5(c)(2) of this Act.

(2) INDIAN TRIBE. — "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pue

(3) SECRETARY. — The term "Secretary" means the Secretary of the Interior or the designee of the Secretary.

SECTION 5. AUTHORITY AND POWERS OF INDIAN TRIBES.

(a) OPTION TO EXERCISE AUTHORITY, POWERS, AND JURISDICTION UNDER THIS SECTION. — In addition to exercising the inherent authority, powers, and jurisdiction recognized under existing law, Indian tribes shall have the option of exercising the full authority, powers, and jurisdiction affirmed in this section. Upon tribal resolution or other official tribal action declaring that an Indian tribe intends to assert all or any measure of the authority, powers, and jurisdiction affirmed in this section, the Secretary shall accept such resolution and immediately cause such resolution, and the Secretary's acceptance of it, to be published in the Federal Register. The exercise of jurisdiction set forth in the resolution shall become effective upon the date of publication.

(b) CONGRESSIONAL AFFIRMATION AND DECLARATION OF TRIBAL POWERS. — Congress hereby affirms and declares that the inherent authority and powers of Indian tribes, except those expressly and clearly limited by Indian treaties or Acts of Congress, shall include, but shall not be limited to:

(1) IN GENERAL. — Within their territorial jurisdiction, all sovereign governmental authority and powers.

(2) LEGISLATIVE POWERS. — Authority and powers to establish a form of government, by constitution or otherwise, and to legislate concerning all matters within their territorial jurisdiction.

(3) CIVIL REGULATORY POWERS. — Authority and powers to exercise civil regulatory powers, including taxation, within their territorial jurisdiction.

(4) CIVIL ADJUDICATORY POWERS. — Authority and powers to adjudicate all civil disputes arising within their territorial jurisdiction.

(5) CRIMINAL ADJUDICATORY POWERS. — Authority and powers to enforce and try violations of applicable criminal laws by any person within their territorial jurisdiction.

(c) TERRITORIAL JURISDICTION.

(1) IN GENERAL. — An Indian tribe's authority and powers shall extend to all places and persons within its Indian country, as defined in 18 U.S.C. Sec. 1151, as amended by section 5(c)(2) of this Act; to the exercise of any valid tribal hunting, fishing, gathering, or other right, including tribal sovereign immunity, that may exist outside of Indian country; and to any person, activity, or event

having sufficient minimum contacts with a tribe's territorial jurisdiction to meet the requirements of due process.

(2) INDIAN COUNTRY. — 18 U.S.C. Sec. 1151 shall be amended to read as follows:

"The term 'Indian country' means (a) all land within the limits of any Indian reservation, pueblo, rancheria, or colony under the jurisdiction of the United States government, notwithstanding the issuance of any patent and including rights-of-way running through the reservation, (b) all dependent Indian communities, which include, but are not limited to, restricted or fee lands held by or set aside for Indian tribes and that are associated with existing Indian country or are of an Indian character, (c) all tribal and individual trust land and all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through same, and (d) all land within the exterior boundaries of Alaska Native villages' core townships, as identified as being eligible for village corporation land selections under the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. Sec. 1601 et seq."

SECTION 6. AUTHORITY AND POWERS OF STATES.

(a) IN GENERAL. – To the extent tribes exercise jurisdiction under Section 5 of this Act, the several States do not possess, and shall not exercise, civil or criminal authority, powers, or jurisdiction within Indian country or with respect to any valid off-reservation rights unless such state authority is expressly and clearly granted by an Indian treaty, an Act of Congress, or a voluntary agreement between an Indian tribe and a State. Nothing in this subsection or in this Act shall limit the ability of states to provide services within Indian country. Such state service programs shall be subject to concurrent state and tribal jurisdiction.

(b) REASSUMPTION OF CIVIL AND CRIMINAL JURISDICTION.

(1) Public Law 280. — 25 U.S.C. Sec. 1323(a) shall be amended to read as follows:

"The United States, through the Secretary of the Interior, shall immediately reassume on behalf of any Indian tribe that requests, by tribal resolution or other official tribal action, all or any measure of the criminal or civil jurisdiction, or both, acquired by the applicable State pursuant to the provisions of 18 U.S.C. Sec. 1162 or 28 U.S.C. Sec.

1360, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section."

(2) Other Statutes. — The Secretary of the Interior shall immediately reassume on behalf of any Indian tribe that requests, by tribal resolution or other official tribal action, all or any measure of jurisdiction that had been transferred, recognized or affirmed to a State or subdivision thereof under the authority of 97 Stat. 2016 and 100 Stat. 3184 (Connecticut); 96 Stat. 2016 and 101 Stat. 1556 (Florida); 62 Stat. 1161 (Iowa); 54 Stat. 249 (Kansas); 94 Stat. 1785 and 100 Stat. 3184 (Maine); 101 Stat. 710 (Massachusetts); 64 Stat. 845 (New York); 30 Stat. 495 and 34 Stat. 137 (Oklahoma); 92 Stat. 813 (Rhode Island); or 107 Stat. 1118 (South Carolina).

(3) Option to Exercise Authority, Powers, and Jurisdiction under this Act. — Tribes reassuming jurisdiction under the jurisdictional statutes referred to in subsections (b)(1) and (b)(2) of this section shall also have the option of exercising authority, powers, and jurisdiction pursuant to Section 5 of this Act.

SECTION 7. FEDERAL REVIEW OF CERTAIN TRIBAL COURT DECISIONS.

(a) FEDERAL JURISDICTION. — Any person adversely affected or aggrieved by a final decision of a tribal court may, to the extent that such tribe exercises jurisdiction under Section 5 of this Act, obtain review of such decision in the United States Court of Appeals for the appropriate Circuit. Any petition for such review shall be filed within sixty days following the entry of such decision.

(b) LIMITATIONS ON REVIEW. —

(1) Jurisdiction for review under this section shall be exclusive with the Court of Appeals for the appropriate Circuit and shall be limited to the following issues:

(A) Alleged violations of the Indian Civil Rights Act of 1968, 25 U.S.C. Sec. 1301 et seq.;

(B) Interpretations of federal law; and

(C) Jurisdiction of the tribal court.

(2) Jurisdiction for review under this section shall not extend to matters related to tribal elections or tribal enrollment or to other matters internal to the tribe.

(c) FINDINGS OF FACT. — All findings of fact by the tribal court shall be accepted by the Court of Appeals unless clearly erroneous.

(d) CERTIORARI. — The judgment or decree of the Court of Appeals shall be final except that it shall be subject to review by the Supreme Court of the United States upon certiorari, as provided in 28 U.S.C. Sec. 1254, if petition is filed within sixty days following the entry of such judgment or decree.

SECTION 8. INTERGOVERNMENTAL AGREEMENTS.

Tribes, the federal government, and states, including subdivisions thereof, are hereby recognized as authorized to negotiate and enter into cooperative intergovernmental agreements concerning the respective jurisdictions and activities of tribal, federal, and state governments. Such agreements may address civil regulatory issues, including land use planning, child support, environmental protection, and other appropriate issues; civil judicial issues, including service of process, garnishments, repossessions, and other appropriate issues; criminal judicial and enforcement issues, including service of process, warrants, arrests, confinements, and other appropriate issues; jurisdiction on former Public Law 280 reservations and other reservations affected by Section 6 of this Act; the provision of services; and other issues that the parties may deem appropriate.

SECTION 9. ENHANCEMENT PROGRAMS.

(a) TRIBAL GOVERNMENT ENHANCEMENT TRUST FUND. —

(1) There is hereby established a Tribal Government Enhancement Trust Fund, to be administered by the Secretary according to the requirements of this section.

(2) All money received from sales, bonuses, royalties including interest charges collected under the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. Sec. 1701 et seq., and rentals of the public lands under the provisions of the Geothermal Steam Act of 1920, 30 U.S.C. Sec. 1001 et seq., shall be paid into the Treasury of the United States pursuant to 30 U.S.C. Sec. 191, and 5 per centum thereof shall be transferred by the Secretary of the Treasury to the Secretary for inclusion in the Tribal Government Enhanced Trust Fund.

(3) The Secretary, upon application by tribes, shall annually distribute the monies in the Tribal Government Enhancement Trust Fund to tribes for the following two purposes, with annual payments for each purpose being approximately equal:

(A) Acquisition of land, or interests in land, by tribes. Special consideration shall be given to reacquiring lands, within existing or former reservation boundaries, that passed out of tribal or individual Indian ownership through the General Allotment Act of 1887, 25 U.S.C. Sec. 331 et seq., and similar statutes and policies. After acquisition, the Secretary shall accept such lands in trust upon application by a tribe.

(B) Development and enhancement of tribal courts, other tribal governmental institutions, and infrastructure.

(b) PAYMENTS IN LIEU OF TAXES. — The Payments in Lieu of Taxes Act of 1976, 31 U.S.C. Sec. 6901 et seq., is hereby amended to add tribal and individual Indian trust lands to the categories of land for which local governments receive federal payments because of their inability to tax such lands.

SECTION 10. SEVERABILITY.

In the event that any section or provision of this Act, or amendment made by this Act, is held invalid, it is the intent of Congress that the remaining sections or provisions of this Act, and amendments made by this Act, shall continue in full force and effect.

SECTION 11. DISCLAIMERS.

Nothing in this Act shall be construed to:

(a) limit or abridge any authority, power, or right, whether inside or outside of Indian country, that any Indian tribe may possess inherently or by virtue of any treaty, Act of Congress, Executive Order, or final court order.

(b) affect, modify, diminish, or otherwise impair the trust responsibility of the United States to Indian tribes.

SECTION 12. AUTHORIZATION OF APPROPRIATIONS.

There are hereby authorized to be appropriated to carry out this Act such sums as may be necessary.

CONCEPT PAPER

2003 LEGISLATIVE PROPOSAL ON TRIBAL GOVERNANCE AND ECONOMIC ENHANCEMENT

June 19, 2002

Co-chairs, Tribal Leaders Steering Committee

Kelsey Begaye, President
Navajo Nation

Tex Hall, President
National Congress of American Indians

Co-chairs, Legislative Options Committee

John E. Echohawk, Executive Director
Native American Rights Fund

Susan M. Williams, Partner
Williams & Works, P.A.

2003 Legislative Proposal
on
Tribal Governance and Economic Enhancement

The Congress shall have power to . . . regulate commerce with foreign nations, and among the several states, and with the Indian tribes . . .

Article I, Section 8, United States Constitution

Introduction

The Supreme Court, breaking from the established legal framework set by Congress and previous judicial opinions, has recently issued decisions directly threatening and limiting tribal governance and economic progress in Indian country. This comes at a time when tribes, through their own progressive and painstaking actions in the implementation of the federal policy of self-determination, have finally made significant inroads into the BIA domination and poverty that gripped reservations for 150 years.

Over the past year tribal leaders have held a series of meetings around the country to address the problems created by the Court's decisions. The tribal leaders have concluded that legislation will be necessary. This paper presents some of the concepts that such legislation could include.

The Traditional View of Tribal Governance

The Constitution recognizes that Indian tribes are independent governmental entities. Like state governments and foreign governments, Indian tribes have the inherent power to govern their people and their lands. A fundamental contract was created in the treaties. Indian tribes ceded millions of acres that make the United States what it is today; in return, tribes received the guarantee that the federal government would protect the tribes' right to govern their own people and their reservations as homelands for tribal cultures, religions, languages, and ways of life.

Since the time of the Constitution, the U.S. Supreme Court has repeatedly affirmed the fundamental principle that Indian tribes retain their government powers unless specifically limited by treaty or by federal law. Chief Justice John Marshall, whose decisions laid the foundation for Indian law, wrote that tribes were "distinct, independent political communities, retaining their original natural rights." Until very recently, the Supreme Court remained faithful to Chief Justice Marshall's principles, upholding inherent tribal governmental authority over their reservations.

Recent Supreme Court Decisions in Indian Law

In the past decade, the Court developed a trend in ruling against tribal interests, culminating in two major 2001 opinions. *Atkinson Trading Company v. Shirley* struck down a Navajo Nation hotel occupancy tax on a non-Indian establishment. The hotel, built on non-Indian land, is located within the boundaries of the Navajo Nation, which provides basic governmental services, including police and fire protection. The establishment is a former trading post, and many visitors are attracted there by Navajo culture. Yet the Court found that the Nation has no "interest" sufficient to warrant a tribal tax.

In *Nevada v. Hicks*, the Court found that a tribal court lacked jurisdiction to hear a case in which a state police officer allegedly conducted an illegal search on a tribal member's home located within the reservation. Again, the Court found that the tribe lacked a sufficient "interest" in the case. Justice

Scalia's opinion in *Hicks* went far beyond the facts and included many propositions not supported by previous decisions, including the sweeping statement that "ordinarily, it is now clear, an Indian reservation is considered part of the territory of the State."

Congress, in its longstanding Tribal Self-Determination policy, and until very recently the Supreme Court, have consistently emphasized the right of tribes to govern comprehensively in Indian country and to have the ability to tax in order to support their governments. *Atkinson*, *Hicks*, and other decisions cripple the tribes' ability to govern their own homelands.

Impacts of Decisions

Indian tribes are full-service governments, offering Indians and non-Indians alike a broad range of recreational, economic, education, and health services. Yet this new direction in the Supreme Court's Indian law cases poses a very serious threat to the ability of tribal governments to provide needed governmental services on Indian lands. For example, the Tulalip Tribe of Washington has established Quil Ceda Village, which includes a business park, parkland, and watershed. The tribe provides comprehensive municipal services, but the state receives a windfall of $11 to $50 million each year in sales taxes while the Tribe—which has 25% unemployment—receives no tax revenue due to the economic impossibility of adding a tribal tax on top of the state tax. At the Wind River Reservation in Wyoming, an economic study has found that the state collects $185 million in severance and property taxes from the reservation, but returns only $85 million in services—on a reservation with 70% unemployment. As at Navajo, where the *Atkinson* case prevents the Navajo Nation from taxing non-members to support a reservation population in excess of 200,000 people, tribes nationally are now prohibited from raising revenues to provide residents with governmental services. Rather than the existing unfair system, tribes should be the primary taxing governments and states should instead be fairly compensated for the services they provide through the Payment In Lieu of Taxes statute and other federal programs.

The current jurisdictional structure promotes the inefficient provision of services in Indian country. The Federal Communications Commission recently interpreted the Supreme Court decisions to mean that tribes can regulate telephone service on the reservation only for tribal members. Similar confusion and inefficiency occurs with roads, sewers, drinking water, garbage collection, and other services. This legislative proposal would place clear responsibility with the tribes and ensure uniformity and fairness in the delivery of these and other basic services.

The recent opinions have narrowed tribal court and law enforcement jurisdiction, especially with respect to non-Indians. Recent statistics from the Department of Justice show that the rate of violent crime against American Indians is more than twice the rate for the nation—critically, however, non-Indians commit 70% of the violent crimes experienced by American Indians. Among American Indian domestic violence victims, 75% of the victimizations involved a non-Indian offender. Domestic violence is a particularly difficult issue on Indian reservations because federal and state authorities most often decline to investigate or prosecute, and tribal governments have no authority to exercise jurisdiction over non-Indians. Given the well-documented failure of federal and state officers to prosecute reservation crimes, the court decisions curtailing tribal authority have left a law enforcement void. Visitors, as well as reservation residents, will benefit from improved tribal justice systems where tribal governments are the primary authority and tribal, state, and federal officials work cooperatively under clearly established guidelines. The tribal proposal calls for federal court review to ensure protection of the civil rights of persons brought into tribal courts.

The Role of Congress

One of the most remarkable aspects of the recent Supreme Court decisions in Indian law is that they have been rendered by the Court while the Congress and the Executive Branch have worked so effectively and consistently with the tribes over the last 30 years to develop and implement the policy of Tribal Self-Determination. Self-Determination has shown its value in the form of improved tribal economies, health and governance, with profound benefits for the tribes and their neighbors. The American public also recognizes and supports the role of tribal governments and the importance of the Self-Determination policy. More than 70% of all registered voters support Self-Determination for tribes and the comprehensive exercise of tribal authority on the reservations.

In ruling on tribal jurisdiction over non-Indians, the Court has adopted its own new tests—whether particular tribal powers would be "inconsistent with their status" as domestic dependent nations and whether there is a "tribal interest" in regulation. As Supreme Court Justices have observed, the field would benefit from the certainty resulting from clear congressional guidelines on these critical issues. Indeed, under the constitution, the Congress is the only forum with the authority to provide the tribes and the courts with the necessary direction.

Tribal Proposal

The Tribes have developed a response to this crisis that calls upon Congress, as trustee for Indian tribes, to address the situation by asserting its primary constitutional authority in Indian affairs and setting forth clear guidelines for jurisdiction in Indian country. We believe that unless Congress steps forward and acts to protect the gains made under the Self-Determination policy, the Court will continue to erode the foundations of Tribal Self-Determination. Importantly, this proposal acknowledges the legitimate interests of the states and non-tribal members by providing for federal review of tribal court decisions and by providing for compensation to the states for the educational and other services that they will continue to provide. The following are the core principles that, when put into a statute, would provide the courts with direction consistent with the authority conferred on the Congress under the Constitution.

1. Tribal governmental authority. Congress should affirm the fundamental principle that Indian tribes retain their inherent right to govern all people and places within Indian country unless that power has been specifically limited by treaty or federal statute. Indian tribes, therefore, would be squarely recognized as the primary governments within Indian country with broad civil and criminal court jurisdiction and broad regulatory authority, including taxation. Most existing federal laws (including, for example, the Major Crimes Act, which sends most reservation felonies to federal court) would remain in place. Nothing would limit Congress' existing broad authority over Indian affairs.

2. Federal judicial review of tribal court decisions. Legislation should provide for federal judicial review of tribal court decisions that will guard the civil rights of non-Indians, while also protecting the right of tribes to create and maintain their own forms of government and their traditions, religions, cultures, languages and ways of life.

3. Tribal right to opt in or out of legislation. Every tribe should have the right to choose whether or not to exercise any or all of the jurisdiction over non-Indians and to subject itself to federal judicial review for the exercise of that jurisdiction.

4. Tribal right to opt out of Public Law 280 and similar laws. Over the years, some congressional statutes, notably "Public Law 280," passed in 1953 during the termination era, have allowed state jurisdiction in Indian country to varying degrees. Each tribe subject to such a law should have the right to opt out of its coverage.

5. Tribal enhancement fund. A Tribal Government Enhancement Fund should be established, perhaps by dedicating a small percentage of federal mineral leasing receipts, for the development of tribal courts, other tribal institutions, and infrastructure.

6. Compensation to states. In addition to continuing the existing federal programs that provide funds to states for Indian programs, the Payment In Lieu of Taxes Act should be amended to include Indian trust lands so that states will be fairly compensated for the services they provide to Indian reservations.

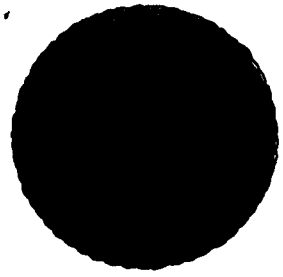
7. Intergovernmental agreements. Jurisdiction in Indian country has always been complicated to implement. In many cases, intergovernmental agreements—tailored to meet particular needs—have been highly successful. The new legislation should authorize and encourage such negotiated agreements among tribal, state, local, and federal entities as appropriate.

Conclusion

Many people have referred to the recent Supreme Court decisions as "judicial termination" and we agree with that assessment. But termination has never worked. Congress adopted that policy in 1953 but then repudiated it and replaced it with Self-Determination. We believe that Congress must now repudiate this new form of termination.

We recognize that these are extraordinarily difficult matters. Correcting this situation will take hard work and time. Yet the judicial action has cut to the heart of the inspiring tribal progress that is taking place all across the country. This is the time for the tribes' ultimate trustee to act. We hope that members of Congress and state officials will work closely with us in making this conceptual approach a reality.

For more information, please contact the National Congress of American Indians at 202-466-7767, www.ncai.org, or the Native American Rights Fund at 303-447-8760, www.narf.org.



MINNESOTA SHERIFFS' ASSOCIATION

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July 11, 2002

Minnesota Supreme Court
Rules Advisory Committee
135 Judicial Center
25 Constitution Avenue
St. Paul, MN. 55155

Re: Proposed Rules Amendment on Tribal Court Orders

Dear Advisory Committee:

The Minnesota Sheriffs Association (MSA), which consists of and represents all of the sheriffs of Minnesota, has recently learned of a proposed rule amendment concerning judgments and orders issued by tribal courts in Minnesota. I am writing to express concern about what appears to be an unnecessarily fast time-line for the proposed adoption of this rule.

Even more so than any other law enforcement agency, the Office of Sheriff is responsible for enforcement of court orders and judgments, as well as relationships with tribal governments. Many of our sheriffs have extensive experience in such matters and I believe that they would like the opportunity to provide the Court with some thoughtful input on the practical issues that might arise with the formal adoption of such a rule.

However, because our Association has only recently learned of the specifics of this proposal, we have not had an opportunity to have any discussion of it and its implications. For some counties this rule could have significant fiscal and resource impact and there might be other details that the rule should address. We have not had the chance to discuss this matter either as an organization or with our individual county attorneys and we would like a chance to do that before any rule changes are adopted or recommended to the Supreme Court for adoption.

The Minnesota Sheriffs' Association urges the Committee to give this matter sufficient time for thoughtful consideration by the county offices that this rule could most impact, particularly the county sheriffs and county attorneys.

We urge that while discussion should continue, that no formal action be taken by the Committee until we have had a chance to more fully study this proposal and its potential impact on the counties and Office of Sheriff.

Sincerely,

Larry Podany
Executive Director
Minnesota Sheriffs' Association

Cc: MSA President - Freeborn County Sheriff Don Nolander
MSA Legal Counsel - Assistant Washington County Attorney Richard Hodsdon