

## **California Tribal Court/State Court Forum**

Judicial Council Conference Center

San Francisco, California

June 17, 2011

10:00 a.m. to 4:00 p.m.

*Present:* Hon. Richard C. Blake, Cochair, Hon. Harry E. Hull, Jr., Cochair, Hon. Abby Abinanti, Hon. April E. Attebury, Hon. Robert L. Dondero, Hon. Michael Golden, Hon. Cynthia Gomez, Mr. Olin Jones, Hon. Suzanne N. Kingsbury, Hon. James R. Lambden, Hon. Lester J. Marston, Hon. Robert Moeller, Hon. David E. Nelson, Hon. Dennis M. Perluss, Hon. Deborah A. Ryan, Hon. Deborah L. Sanchez, Hon. Juan Ulloa, and Hon. Christopher G. Wilson.

*Guests:* Ms. Stephanie Dolan, Ms. Annemarie Conroy, and Ms. Gina Jackson

*Miwok Tribal Court Youth Advisory Committee Members:* Adrianna Godsey, Alycia Godsey, Misty Godsey, Angelo Gonzales, Daniel Gonzales, Raquel Gonzales, and Simplicio Gonzales.

*Committee Counsel:* Ms. Jennifer Walter

*Staff:* Ms. Vida Castaneda, Ms. Donna Clay-Conti, Ms. Ann Gilmour, Ms. Diane Nunn, Mr. Patrick O'Donnell, Ms. Kimberly Papillion, Ms. Anne Ronan, and Mr. Courtney Tucker.

### **Welcoming Remarks and Introductions**

The cochairs opened the meeting, welcoming members and guests. Judge Blake welcomed the forum's newest members, Justice Dondero, Associate Justice of the First Appellate District and member of the CJER Governing Board and Justice Hull, Associate Justice of the Third Appellate District and cochair of the forum.

Judge Blake informed the members that this meeting was originally scheduled to take place in northern California at Hoopa and Yurok, but because the cost for such a meeting was prohibitively expensive and exceeded the grant funding generously given by the California Emergency Management Agency (CalEMA), the forum cochairs and AOC staff decided the forum's first educational meeting would take place in San Francisco at the Administrative Office of the Courts.

Judge Blake acknowledged the work of the AOC staff, the forum's educational committee, and members who prepared today's workshops. Judge Blake described the Native American Community Justice Project, referenced the NACJP reports (distributed at the meeting and posted to the AOC website <http://www.courts.ca.gov/8117.htm>), which serve to inform the work of the AOC and the forum in addressing the public safety crisis in Indian Country when it comes to domestic violence, sexual assault, stalking, and teen-dating violence (family violence). Judge Blake noted that the forum is marking its one year anniversary today, and stated that it is rewarding to see the progress that the forum, with the support of AOC staff, has made in addressing family violence in Indian Country.

Justice Hull stated that he was very pleased to be with everyone today and to see the work that was begun June 29th, just a year ago, come to fruition with the relationships forged through this forum and the concrete accomplishments evidenced by the forum's legislative and rule and form proposals and the pilot project giving tribal access to the California Courts Protective Order Registry.

Justice Hull informed members that he shared the former Chief Justice and the new Chief Justice's commitment to and support of this important effort to improve collaboration between California's state and tribal courts. He recounted a personal experience meeting tribal court judges from Wisconsin at the National Justice Center in Reno for the Appellate Justice Institute and how grateful he was to have this experience and to now learn that the Teague Protocol from Wisconsin, may well serve as a model that we can adapt here in California to help our judicial systems share and allocate jurisdiction.

Justice Hull welcomed the following special guests: Ms. Stephanie Dolan, Director, Northern California Courts Coalition, Ms. Annemarie Conroy, U.S. Deputy Attorney, U.S. Attorney General's Office, Ms. Gina Jackson, Model Court Liaison, National Council of Juvenile and Family Court Judges, and the members of the Shingle Springs Band of Miwok Indians- Tribal Court Youth Advisory Committee.

### **Invocation**

Judge Blake opened the educational sessions by giving an invocation that set the stage for members to learn from one another and work together to address the issues of family violence in tribal communities in California.

### **Committee and Working Group Reports**

#### Legislative Working Group

Justice Perluss gave members some background on the legislative proposal for amendments to the California Code of Civil Procedure dealing with the recognition and enforcement of civil judgments from tribal courts. Justice Perluss explained that the proposal's scope initially applied to only money judgments and the question the forum and the advisory committees have grappled with was how much of the everything else/noncriminal that is not carved out by federal statute should the act apply to.

Justice Perluss and Judge Marston reported on the status of the proposal and described the following recent changes adding language to the proposal as follows:

- Language re introduction and summary of proposal to clarify that the act would apply to judgments from tribes "throughout the nation";
- Language re scope of act:
  - To apply to all civil judgments, defined as all judgments that are not criminal and
  - To apply to all civil judgments except those expressly excluded under section 1731;

- Language expressly excluding probate/conservatorship orders/judgments under section 1731; and
- Language in the proposed Invitation To Comment seeking comment on the proposal's impact on real property divisions in family law judgments.

Justice Perluss and Judge Marston reported progress obtaining support from the Civil and Small Claims Advisory Committee and the Family and Juvenile Law Advisory Committee, which have each signed off on the proposal.

Ms. Walter explained that subject to the approval of the forum, the legislative proposal will be forwarded to the Policy Coordination and Liaison Committee of the Judicial Council (PCLC). The PCLC will consider the proposal at its June 29<sup>th</sup> meeting, and if approved, the PCLC will authorize its circulation for public comment during July and August. In the fall, the forum and advisory committees will have the opportunity to review comments and make revisions to the proposal based on those comments. The forum will then present the revised proposal at the Judicial Council's December meeting when the council will consider whether to sponsor the proposed legislation

Judge Marston reported that his lobbying efforts have been successful, and that he has assurances that when the legislation is introduced, it will have the Governor's support and broad support from democratic and republican legislators.

Judge Gomez raised an objection to the proposal on behalf of the Shingle Springs Band of Miwok Indians— that the proposal should not require that the tribal court judgment meet due process standards of U.S. and California law as those requirements do not apply to tribal courts which may set their own standards of due process. Judge Marston explained that these due process requirements must be in the proposal in order to comply with the Ninth Circuit Court of Appeals decision in *Wilson v. Marchington* (9<sup>th</sup> Cir. 1997) 127 F.3d 805, (citation provided by Ms. Ronan on page 7 of the legislative proposal) which determined that, as a general matter, the recognition of a tribal court order within the United States federal courts is governed by the principles of comity.

After some discussion, Justice Perluss brought a motion to approve the legislative proposal, and Judge Marston seconded, and the motion carried unanimously.

Ms. Walter asked for volunteers to form a working group with members of the Probate and Mental Health Advisory Committee to develop legislation to address the recognition and enforcement of tribal court orders of conservatorship and involuntary commitments. Justice Perluss and Judge Blake volunteered. Judge Brandenburg previously volunteered. After this meeting, Judge Stout volunteered. The working group will need to call on tribal court judges on the forum who are hearing these cases. Judge Moeller, Judge Abinanti, and Judge Attebury indicated that their courts are hearing these cases.

*Action Steps: (1) Staff to forward legislative proposal to PCLC and attend PCLC meeting on June 29, 2011 and (2) Staff to form working group with members of the Forum and the Probate and Mental Health Advisory Committee and schedule first meeting.*

### Protocol Working Group

Judge Abinanti and Judge Wilson reviewed the charge of the protocol working group and the status of the protocol toolkit, referencing the toolkit's table of contents in the meeting folder.

Judge Wilson described the protocol work as cutting edge and critically important. Cutting edge because when tribal and state court judges come together to develop protocols, they can work, just as they have in Inyo County/Bishop Paiute Tribe, Humboldt/Yurok Tribe and Hoopa Tribe, and Imperial County/Quechan Tribe. In these jurisdictions, Judge Wilson described, we have seen local protocols on the registration and enforcement of protective orders become a statewide rule and form proposal—the joint proposal of the Forum and the Family and Juvenile Law Advisory Committee which is out for public comment, and will soon be presented to the Judicial Council for adoption. The importance of this proposed statewide rule to ensure that tribal court orders be registered so that they are entered into the California Law Enforcement Telecommunications System (CLETS) is critical to ensuring that tribal protective orders are enforced by local law enforcement.

Judge Wilson described the role of the Protocol Working Group is to develop a toolkit that will foster the development of these types of local protocols and to identify when the forum can transform them into statewide solutions.

Both Judge Abinanti and Judge Wilson emphasized the importance of building individual relationships in order to forge the local protocols. By way of illustration, they described the Yurok home detention model—where the defendant is sentenced to custody in State Court, then supervised by the Yurok Tribal Court that has electronic monitoring and other in-home detention services. If the defendant was sentenced for violation of a restraining order, then the Yurok Wellness Court can address the needs of the victim and the defendant.

Both Judge Abinanti and Judge Wilson emphasized transforming those local and statewide protocols— either through rules of court or legislation— so that they are not dependent on the personal relationships that developed them.

Ms. Walter asked for volunteers to help with drafting the Protocol Toolkit. Judge Edwards and Judge Ulloa volunteered to join the working group and help with drafting.

*Action Item: Staff to work with members on drafting toolkit*

### Education

Justice Lambden and Judge Moeller reviewed the subcommittee's three charges: (1) to develop and plan educational events for forum members; (2) to facilitate local tribal/state collaborations (for example by being available to mentor tribal/state court judges not on the forum, to give presentations on the work of the forum and highlight local protocols that are working); and (3) to review judicial educational materials and make recommendations to the AOC's Center for Judicial Education and Research existing educational programming for judges.

Justice Lambden and Judge Moeller expressed appreciation to Justice Dondero for joining the forum and guiding its educational efforts.

They described the Education Subcommittee members as enthusiastic and very productive. Since the subcommittee's last meeting, the forum has held two successful educational workshops at the Cow County Institute- rural county judge conference and the Self Represented Litigants Conference.

They thanked Judge Edwards for the inspiration of the scripts, Judge Abinanti, Judge Stout, and Judge Wilson for serving as faculty at the Cow County Institute and Judge Attebury and Ms. Dolan, Judge Stout, Judge Ulloa, and Judge White for serving as faculty at the Self Represented Litigants Conference.

Forum members asked for a similar type of workshop at one of the Criminal Law Institute.

They thanked Judge Edwards and Judge Blake for their recent mentoring experience in Shasta County, and asked for an update at a future meeting on the local tribal/state court collaboration in that county.

Justice Lambden and Judge Moeller described the importance of reviewing the benchguides and making revisions to incorporate federal Indian law and its impact on state courts. Judge Marston pointed out that by making these revisions, there will be less confusion, less litigation, and a cost-savings to both the litigants and the state courts.

Justice Lambden and Judge Moeller thanked the forum members who participated in the judicial benchguide reviews and noted that there was still more work to be done in reviewing some of the publications, in particular the Native American Resource Guide. Judge Sanchez offered to help with the guide. Forum members acknowledged that their time working on the benchguides was gratifying. Justice Dondero directed Ms. Walter to work with Bob Schindewolf, Manger, CJER publications, to develop a process for revisions.

Justice Lambden and Judge Moeller described the planning sessions to develop today's workshops, and introduced the first workshop.

*Action Items: (1) Staff to ask CJER to consider a workshop at the Criminal Law Institute and (2) Staff to work with CJER to revise benchguides*

### **Educational Session 1: 10:45 – 11:45**

Judge Abinanti and Judge Sanchez presented an interactive discussion on the history of California Indians and the dynamics of domestic violence in native communities.

They introduced the topic with a set of questions that forum members answered remotely and anonymously. The questions were as follows:

#### **1. The largest concentration of American Indians in the country is located in:**

- A. Los Angeles, California
- B. Albuquerque, New Mexico

- C. Tulsa, Oklahoma
  - D. None of the above
2. **Federal agents negotiated 18 treaties with California Indians setting aside millions of acres of land, however:**
- A. The treaties were revoked by Congress before California Indians took possession
  - B. The treaties were hidden and never ratified
  - C. The United States government forced a transfer of the land back to the federal government and designated these lands as National Parks and U.S. Forest
3. **One of California's first acts of legislation was the Act for the Government and Protection of Indians in 1850. This act provided:**
- A. Whites to take control of Indian children
  - B. It was illegal to sell or provide alcohol to Indians
  - C. Indians could not testify against Whites
  - D. All of the above
4. **The Act for the Government and Protection of Indians was amended in 1860 to provide:**
- A. Indian women could be encumbered for their services to the age of 35 years
  - B. Indians would now be allowed to testify against Whites
  - C. Selling alcohol to Indians was legal during daylight hours
  - D. None of the above
5. **The estimated population of American Indians in California in 1870 was:**
- A. 12,000
  - B. 50,000
  - C. 100,000
6. **In the 1950's and 60's the federal government relocated American Indians from other parts of the country to California. Relocation centers were established at**
- A. Los Angeles and San Francisco
  - B. Los Angeles and San Diego
  - C. Los Angeles and Riverside
  - D. Los Angeles and Eureka
7. **In 1972, California Indians received compensation from the Claims Commission for lands that were taken. This amount totaled \$5,000 to each California Indian person born before 1954:**

- A. True
  - B. False
8. **The United States granted citizenship to American Indians in 1852:**
- A. True
  - B. False
9. ***Johnson v. M'Intosh*, a landmark decision finding that Indian lands could be taken because they were "discovered" was decided in 1823 by Supreme Court Chief Justice John Marshall. What other unusual feature was not part of the case?**
- A. The plaintiff and the trial judge had close family ties
  - B. The plaintiff's attorney and the defense attorney were hired by the same person
  - C. The Chief Justice had over 200 square miles of land next to the land in question
  - D. Thomas Marshall, the Chief Justice's father, orchestrated the "friendly" lawsuit
10. **The oldest human remains found in California are more than 10,000 years old:**
- A. True
  - B. False
11. **Caucasian women experience more violence per capita than Native American women:**
- A. True
  - B. False
12. **According to the Department of Justice, American Indians (men or women) experience more violent crimes at the hands of other American Indians:**
- A. True
  - B. False
13. **According to the Department of Justice, American Indian *women* experience intimate violence by perpetrators who are:**
- A. Seventy-five percent American Indian and 25% other races
  - B. Seventy-five percent other races and 25% American Indian
  - C. None of the above
14. **There is a connection between alcohol and drug abuse and domestic violence in "Indian Country."**
- A. True
  - B. False

**15. When domestic violence in Indian Country is investigated, the tribal or non-tribal status of the suspect must be determined along with:**

- A. The tribal status or non tribal status of the victim
- B. The legal status of the land where the offense took place
- C. Both of the above
- D. None of the above

After reviewing the responses and correct answers to these questions, Judge Sanchez presented a brief snapshot in time from pre-contact through today of California Indian history covering the following key dates and topics:

1. The History of Pre-Contact highlighting that Indians in California date back to 13,000 B.C., when there were over 300,000 Indians, with over 500 bands and 105 tribal groups who spoke more than 80 distinct languages. There are artifacts that date back 13,000 years in the Santa Rosa Islands. And through our creation stories there is talk of our coming from the islands to the mainland. Linguistic evidence indicates that the Chumash language is Polynesian in origin.
2. 1542 Captain Juan Rodriguez Cabrillo claims California's coast for Spain
3. 1579 Sir Francis Drake claims California's coast for the British Crown
4. 1769 First Spanish Mission founded near San Diego; 21 missions by 1823
5. 1823 Johnson v. McIntosh codified the Doctrine of Discovery- Chief Justice Marshall decided, based on the European doctrine of Discovery that Discovery = Conquest, therefore Discovery = Government Ownership
6. 1832 Worscester v. Georgia: Chief Justice Marshall narrowed the Doctrine of Discovery, holding discoverers had only a right of preemption
7. 1850: California statehood
8. 1851-1852: Federal agents negotiated 18 treaties with California Indians reserving 7.5 million acres of land while at the same time, the California legislature authorized 1 million dollars to suppress "Indian hostilities," and urged the US Senate not to ratify the treaties.
9. 1851: Governor Peter Burnett stated that "a war of extermination will continue to be waged between the two races until the Indian race becomes extinct, must be expected; while we cannot anticipate this result with but painful regret, the inevitable destiny of the race is beyond the power and wisdom of man to avert."
10. 1870: Estimated population for California Indians is 12,000; much of the human remains has not been repatriated and is in museums.
- 10 1900: Less than 1/2 million acres of reserve lands for all the Indians in California (7 million acres less than the 18 treaties had originally provided for)
- 11 1950: BIA establishes the Relocation Program, job-placement and assimilation with San Francisco Bay Area and Los Angeles as the "relocation centers"
- 12 1952 to 1968: 100,000 American Indians are relocated to California
- 13 Today: 109 federally recognized tribes and many unrecognized tribes in California. 2010 Census reported over 723,225 American Indian/Alaska Natives in California, more than



any other state. Los Angeles County has the largest concentration of American Indians 155,010 according to the 2010 Census

Ms. Walter noted that there are a number of excellent resources on California Indian history and directed members to their CD of materials to find the following additional resources: (1) National Park Service History of American Indians in California; (2) the California Research Bureau: Early California Law and Policies Related to California Indians; and (3) the California Native American Heritage Commission.

After providing this historical context, Judge Abinanti and Judge Sanchez gave some basic statistics about Native victims:

- Native American women experience the highest rate of violence of any group in the United States.
- The Department of Justice reports Native women suffer violent crime at a rate 3½ times greater than the national average.

Judge Abinanti posed the question: “Why would this be?” In part, the answer relates to the historical oppression. Judge Abinanti described that historically, tribal communities did not have domestic violence because “tribal community structure and dynamics did not allow for this type of behavior.”

Judge Abinanti referenced the work of Dr. Maria Yellow Horse Braveheart, PhD., on historical and generational trauma as the key to understanding the dynamics of domestic violence in tribal communities today. Referencing the Native American Communities Justice Project reports, Judge Abinanti described why Native women fear and distrust law enforcement. Law enforcement cannot respond quickly and effectively because many California tribal communities are located far from urban centers, lack electricity and passable roads. Also, most California tribes do not have a tribal police, and depend on county sheriff departments. Native women’s distrust of government agencies and the state court system is borne of historical trauma, institutional racism, and cultural barriers. Imagine, Judge Abinanti asked, “if your first contact with the state system is as an indentured slave, while this sounds like a long time ago, it is not; those in my courthouse remember. They remember when they couldn’t speak the language, do the dances, and were forced to hide their regalia, and they learned from this.”

Also key to understanding the dynamic of domestic violence today in California, Judge Abinanti, explained relates to PL 280. While PL 280 did not strip tribes or tribal courts of criminal or civil jurisdiction, it served as a justification for the federal government to reduce funding to tribal justice systems in PL 280 states, because it was assumed that the state government would take the lead in investigating and prosecuting crimes committed on tribal lands. Subsequent research has shown, however, that in PL 280 states many state law-enforcement agencies and court systems are reluctant to become involved in Indian country crimes. While California is home to more Native Americans than any other state, historically tribes in California have received very little of the federal moneys—less than 1% of these federal dollars. As a consequence, few tribes in California have had the capacity to develop tribal justice systems and lack the tribal resources

for court-connected services. Neither the state nor tribes have received money to provide law enforcement in these remote and rural areas.

The effect of PL 280 is that in many areas, criminal and civil, state and tribal courts share jurisdiction. What this means for Native American women, given the high rates of victimization by non-Indians and the fact that tribes have no criminal jurisdiction over non-Indians whatsoever, is that Native women must rely on state courts and local law enforcement for protection. And because typically the victim is not identified as Native, she is not generally referred to appropriate services.

In tribal communities, Native women play significant roles culturally, spiritually, and politically and it is in response to what they are sharing with tribal leaders that California tribes are responding, not because of sovereignty, but out of responsibility.

In the Yurok Tribe, Judge Abinanti, described that they have examined themselves and the problems of drugs and violence that stem from the history of invasion, and concluded that “we have let our people down. We want to return to the village/culture and help divert the problems state courts are having meeting the needs of our people.”

Judge Abinanti reported on what the Yurok Tribal Court is trying to do in response:

- (1) Strengthening tribal domestic violence, sexual assault, and stalking codes so that there are a range of sanctions that focus on consequences, rather than punishment and contain responses for the victims, the extended family of the victims, and perpetrators.
- (2) Look outside the criminal justice system to respond to crime committed by non-Indians to enact civil remedies and procedures that provide justice
- (3) Develop and strengthen services to help those impacted return to harmony in the community, to correct the disrespect to the victim, the victim’s family, and the community

Judge Abinanti described the key differences between the tribal and state justice systems as follows:

- (1) In state court, the judge is seen as not being biased because he or she does not know the people or circumstances of the case and this is seen as a good thing, whereas in the Yurok court system, reflecting the values and beliefs of the tribe, the judge cannot deliver justice unless he or she knows the people and circumstances;
- (2) The Yurok courts are not set up as a branch of government, but as a branch of the family, an equal member of the community, and the case managers are trained to work as extended family members;
- (3) Community services in state court are community/family responsibilities in Yurok courts

Judge Abinanti concluded by stating that while the two justice systems may have differences, they have more in common as both want to end the scourge of violence. She stated that while each court system’s approach will be different, neither is more valid than the other. They each respond to and reflect the values and beliefs of the community they serve. The question before us as a forum, Judge Abinanti, raised is: how do we reach our shared goal of public safety?

After discussion, Judge Kingsbury suggested that the two court systems have the opportunity to form partnerships in light of California Department of Corrections realignment to counties (AB 109). With the exception of violent offenders, most offenders will not be going to prison, but rather will be serving time locally. Since each jurisdiction must develop community corrections partnerships with the goal of developing a wide range of community options, Judge Kingsbury pointed out this is a fertile area for tribal and state courts to come together.

Judge Abinanti and Judge Wilson described how their courts are partnering to address recidivism in domestic violence and other cases. They both strongly support state/tribal partnership and find that through direct court-to-court communications, they are able to work out such questions as: (1) when to abstain; (2) when to transfer; and (3) when to share jurisdiction.

### **Working Lunch 11:45 – 12:45**

#### **Shingle Springs Band of Miwok Indians -Tribal Court Youth Advisory Committee. A Presentation of Miwok Culture**

Judge Gomez introduced the Tribal Court Youth Advisory Committee members as an extraordinary group of youth with whom she works. They meet once a month for 2-3 hours with the tribal representatives from education, social services, TANF, cultural and other departments. Judge Gomez explained that the youth wanted to show members their tribal regalia, describe the significance of the regalia, and convey the significance of the regalia.

The youth first gave a PowerPoint presentation describing their tribe— the Shingle Springs Band of Miwok Indians has approximately 500 members and lives on a reservation of 165 acres in Placerville, California. From the Central Valley Miwok, they are originally from a village called Pa'suni located at a place now called Discovery Park in Sacramento. In 1976, they explained that their group was referred to as the Sacramento-Verona Band of Homeless Indians and at that time, they reformed and were recognized by the federal government as the Shingle Springs Band of Miwok Indians. They described themselves as a strong group, dedicated to each other and the preservation of their culture.

The youth spoke eloquently about how their tribe had lost everything— their language, songs, and dances. They each explained how it was their responsibility to bring those songs, dances, stories, and ceremonies back, and through them to claim their identity.

One youth described their smudging ceremony where sage, sweet grass, or cedar is burned to drive away negative energy and thoughts.

Another young person described how the sweat lodge is like a church—it is a sacred place to gather for organized prayer, a place to relinquish all that is negative; and sometimes a place to sing for joy and/or scream as loudly and as long as one wants.

Another youth described a drumming circle. He said drumming is not simply the act of hitting the drum, but rather it represents the heartbeat—not only one's individual heartbeat, but that of all tribal members, and in this way, the drumming holds and keeps us together, he said.

A few of the young people described their tribe's traditional dances and how they enjoy learning about other Native dances from around California. They invited forum members to come to their dance ceremonies—one is held for each season of the year.

One young person showed forum members a clapper which is a traditional musical instrument, made from bamboo and elderberry, and is used to keep the beat when singing.

The girls showed and described the female regalia, pointing out the significance of the dress, headpiece and ribbon.

The boys showed and described the male regalia, pointing out the significance of the feathers and sticks.

In conclusion, the young people explained that they were responsible for keeping the knowledge of their regalia alive and for sharing their traditions and the significance of those traditions. By carrying out this responsibility today and always, they explained they would be able to stay strong and dedicated, becoming the future of their tribe.

When asked by members about school, several responded that they faced challenges because they were treated differently off the reservation by both peers and teachers. They described biases in text books and teachers who lacked the knowledge and sensitivity about Native culture. They also described how other students made racist remarks and bullied them. And this is why one young person said “it is so important for us to keep the regalia alive. . . it is a way of taking care of ourselves” and another young person said “for each season it keeps me going.”

Judge Blake and Justice Hull presented certificates to each of the youth, and on behalf of forum members, thanked each of the young children and youths for giving such a heartfelt and informative presentation.

## **Educational Session 2: 12:45 – 1:45**

### **Structure of Tribal Governments**

Judge Marston introduced the topic by describing the diversity of tribes in California, ranging from those that have very little written down and conduct business based on traditions and customs to tribes with extensive tribal codes that operate with a written constitution under the Indian Reorganization Act. He referenced the document he prepared for this presentation which describes the interrelationships between tribes, states, and the federal government, and how historically as a result traditional Indian governance structures were destroyed.

Speaking in generalizations, Judge Marston reported that by and large, most California tribes have a written constitution and a democratic form of government, and that most of these constitutions do not expressly establish?? a court, but some, like Hopland, do.

Judge Marston described how a large number of tribes in California operate with a tribal council or tribal business council (usually a smaller number of members, typically 5 – 9 members). This council is the political head of the tribe. The tribal councils for many tribes, not all, act on behalf of their tribes' general council which is composed of all tribal members. This arrangement is critically important to understand because it is the general council that is the state electorate or voters which gives the tribal council legislative authority to enact laws. Historically, the tribal council was both the legislative body and the body that resolved disputes. Enactment of ordinances was reactionary, rather than proactive, Judge Marston stated. By way of example, the Chemehuevi Tribe built 5 mobile home parks and leased them to nonIndians; when disputes arose relating to breach of these contracts, the tribal council determined it needed a court to resolve these disputes.

Judge Marston gave a brief overview of the unique historical experiences of California tribes, describing the distinct challenges faced by Northern and Southern California tribes explaining that this history establishes the context for modern tribal governments today in California.

It was common in the early 1800s to witness the wholesale slaughter of Indians and this genocide was legal. Under the Treaty of Guadalupe Hidalgo, Mexico ceded California to the United States. In Northern California, Indians were rounded up by organized militia. The first California Supreme Court Justice Serranus Clinton Hastings raised a militia to clear out Indians from the Eden Valley so that he and others could homestead the region.

Under the Treaty of Guadalupe Hidalgo, the United States agreed to respect the hundreds of land grants, many quite substantial, granted by the Spanish and Mexican governments to private landowners. It also agreed to respect the existing land rights of the California Indians which were recognized by Mexico. The United States established a commission and procedures to review the validity of such land grants. Under this law anyone with claims to land arising under Mexican law were required to bring those claims forward within two years. Southern California tribes brought their claims of title to this commission for ratification, but were denied. However, most tribes in California thought their land rights were already protected by treaties because the federal government made treaty promises that it did not keep. It was not until 1891, when Congress passed the Mission Indian Relief Act that the Secretary of the Interior set aside and created Indian reservations for all of the Indians under the jurisdiction of the Mission Indian Office in San Bernardino. This included all of the Indians in the counties of San Diego, Riverside, and San Bernardino. At that time, there were only three counties in Southern California since Imperial County had not yet been created.

In the early 1900s, Congress passed legislation that appropriated money for homeless California Indians and authorized Congress to purchase land for those Indians. This resulted in the creation of various small Indian reservations, commonly referred to as rancherias, throughout California for what was left of small tribes, bands, villages, or communities of Indians remaining in their traditional territory.

During this time, the official policy of the federal government was one of assimilation. The idea was to convert the Indian to the conventional land-owning white farmer. The first step consisted of an attempt to break up tribal assets into individual allotments or parcels of land, to terminate

historical tribal governments, and to suppress Indian customs and tribal laws. As a result, some tribal governments virtually disintegrated or lost a great deal of their original importance among the members of the tribe. Broken promises and harsh to cruel treatment naturally caused many Indians to feel varying degrees of hostility towards the white race. This suspicion was ingrained in them so that any new policy which might be started by the government was motivated by a desire to aid whites and hurt the Indians. Since Indians were denied their natural way of life, the government had to establish a ration system to feed the Indians on reservations which further sapped Indians' initiative and resourcefulness. Many of the Indians became dependent upon government aid as a consequence. A tradition of need for assistance, therefore, was developed among many Indians who have experienced long periods of dependency on government assistance, as well as unemployment or partial employment.

Despite the government's dominance and control over Indians on the reservation, the Indians residing on reservations were able to establish a structure for making decisions about how tribal resources would be allotted among tribal members and used to benefit the common good. One example of this is the formation of the Hopland Men's Club, which was developed to make decisions about which tribal members would have the right to use tribal land and about the management and operation of the tribe's main business at the time of establishment: the raising and selling of cattle.

With the election of Franklin Delano Roosevelt, the policy of assimilation was reversed and a policy was adopted to strengthen tribal governmental control over the Indians residing on the reservation and reservation resources. This ultimately led to the adoption of the Indian Reorganization Act, 25 U.S.C. 476, et seq., which allowed any Indian tribe or the Indians residing on a reservation to organize a tribal government under a written constitution approved at an election called and conducted by the Secretary of the Interior. The application of the provisions of the Indian Reorganization Act to a particular tribe was not mandatory but, rather, the tribe had to affirmatively vote on the issue of whether the provisions of the Act would apply to a particular tribe. Approximately 41 tribes voted to have the provisions of the Indian Reorganization Act apply.

Those tribes that accepted the provisions of the Indian Reorganization Act were encouraged by the Bureau of Indian Affairs (BIA) to organize a tribal government under a written constitution. In most cases, those tribes that organized under a written constitution did so pursuant to a "boiler plate" constitution that was drafted by the Solicitor's Office at the request of the BIA. The tribal governmental structure established under most of those BIA constitutions was that of a business committee or general council, elected by the adult members of the tribe and granted the authority to exercise some control over the day-to-day affairs of the Indians that resided on the reservation. The leaders elected under these constitutions were seen by the Indians residing on the reservation not only as the elected leaders of the tribe with the authority to make decisions about the use of tribal assets and resources, but also as the decision-making body to whom disputes were taken for resolution. Thus, between 1935 and 1960, there is an emergence of the tribal council or business committee established under a written constitution as the body that resolves disputes that arise between members of the tribe on the reservation.

After Judge Marston's overview, Judge Nelson facilitated a group discussion eliciting answers in response to the following questions:

1. What is the relationship between the Tribal Council and your tribal court?
2. What are some of the challenges to ensuring separation of powers?
3. What process has the Tribal Council undertaken to develop a tribal court? Was there a strategic planning process to establish goals, to ascertain tribal members' needs, and to address those areas of need?
4. What has been the process by which the Tribal Council and your tribal court have established priorities for hearing cases?
5. What resources are available to California Tribes to develop a tribal court and the necessary court-connected services to operate a court?
6. What kinds of local partnerships have the Tribal Council and the tribal court developed to leverage resources and address members' needs/tribal court goals? (For example, MOUs with local shelters, service providers, law enforcement, tribal/state court judicial partnerships, etc.)

Shingle Springs: Judge Gomez shared that she has worked within State and local government for 30 years and knows about the inner workings of her tribal council through her mother who was a council member for 25 years. From these experiences, she believes that both types of governmental structures work well, but that each has the challenge of communicating how the other works so that mutual understanding can lead to mutual respect.

Chemehuevi: Judge Moeller highlighted the importance of tribal election ordinances and tribal courts to resolve disputes, because otherwise in his experience the tribe becomes dependent on the BIA to resolve disputes and federal officials construing Indian law is an affront to tribal sovereignty. Judge Moeller described his judicial role as independent from the Chemehuevi Tribal Council, and in fact council members have expressly stated that they like that he is nonnative and does not live in California, because it ensures that he is not involved in tribal affairs. He cautioned that this sentiment is not shared by all tribes, and in fact many northern California tribes have the opposite view—they want their judges to be tribal members who know the families who come before them so that they will be accountable to them.

Karuk: Judge Attebury described that her court was established by the tribal council through legislation. Her employer, she explained, is the tribal chair, but she reports to the tribal council, just like any other tribal department. While this structure does not have separation of powers, the court operates independently from the tribal government, and the government does not interfere with court decision-making or cases.

Morongo: Judge Golden reported that he has never worked for a tribe that has had a separation of powers clause. He views his court as subordinate to the tribal council and the tribal council as a department head, responsible for funding the court. Despite this arrangement, he stated that he has never been pressured by council members to rule one way or another in a given case.

Hoopa: Judge Blake reported that he has very little interaction with the tribal council, and thus he considers his judicial role as independent from the council's governance role.

Forum members discussed the challenge of overcoming the perception in the nontribal community that tribal courts are kangaroo courts where one cannot receive a fair hearing. Judge Nelson compared tribal courts to collaborative state courts, where the judge is one member of the team working together. Judge Abinanti and others agreed. At the end of the day, Judge Abinanti said, "I do not want half the people mad at me. My goal is to return my people, our tribal community, to harmony." Some forum members concluded that a separation of powers is not necessarily required to have an independent judiciary.

Judge Nelson asked forum members to share their experiences when adjudicating disputes between Indians/tribal members and NonIndians. Forum members agreed that they looked at the facts of the dispute and the focus was on doing the right thing, not who the parties were in a given dispute.

Judge Nelson asked forum members to describe the process used in establishing their tribal courts?

Yurok: Judge Abinanti described the extensive focus groups held to determine tribal members' needs. She described that court planning takes into account the input from tribal members and what has been recovered in terms of how disputes were handled historically. She described how the Yurok tribal court procedures and processes and the laws are codified in language that the tribal membership can understand.

Karuk: Judge Attebury described that her court uses extensive mediation, a family unity approach and peacemakers, before a case comes before a judge.

Shingle Springs: Judge Gomez explained that her court was established two year ago as a requirement of the tribe's gaming compact with the state. Currently, the tribal council has prioritized domestic violence and cases arising out of the casino as the top priority for the court's exercise of jurisdiction.

Judge Nelson asked forum members about the funding for their courts.

Karuk: Judge Attebury responded that her tribal court's capacity is very dependent on grants; the tribe provides only the court facility and transportation for its members.

Shingle Springs: Judge Gomez responded that her tribe provides judicial and clerical salaries and the court facility. Because of the funding from the casino, the tribe has base funding in place for at least the next 5 years, and likely into the future.

Chemehuevi: Judge Moeller described that his salary is paid through a "638 contract" (See Chapter 14- Indian Self Determination Act (Public Law 93-638) which authorized the process now popularly known as "638" contracting) as codified (organized by subject matter in Title 25 of the United States Code). Judge Moeller reported that his court first exercised jurisdiction over



hunting and fishing type cases, and then the tribal government established the court's authority through a judicial code or ordinance.

Hopland: Judge Williams responded that the tribal council provides base funding derived from casino revenues.

Hoopla: Judge Blake responded that the tribal council provides base funding derived from casino revenues.

Karuk: Judge Attebury responded that the tribe does not have casino revenue and is dependent on grants to sustain the court. Her court began with children's court and has expanded; it is a court of limited jurisdiction, and because caseloads are small, she described how she can spend time on each case, getting to know the individuals involved in each case.

### **Educational Session 3: 1:45 – 2:45**

#### **Tribal Court Development in California**

Judge Attebury and Ms. Stephanie Dolan, Director, Northern California Tribal Courts Coalition gave a PowerPoint presentation describing tribal courts in California. They started by listing tribal court stereotypes (i.e., untrained, unqualified staff and judges; lack of due process; inadequate substantive laws, lack of accountability, lack of objectivity, no separation of powers/lack of independent judiciary, conflicts of interest (everyone's related and nonIndians cannot get a fair hearing), and explored these stereotypes with forum members. One forum member pointed out that some of these same complaints are heard about rural courts—the perception is you cannot get a fair hearing if you are an outsider, not known to the local court system.

They focused their presentation on what tribal and non-tribal justice systems have in common. Their presentation included an overview of tribal jurisdiction, stemming from the tribe's inherent right to govern its members and highlighting the traditional justice system's goal of restoring harmony to the group. Judge Attebury listed the many types of cases currently heard by many of the tribes in California (child welfare, family law, civil disputes, domestic violence, elder abuse, housing, membership and enrollment issues, land use, small claims, torts, traffic violations, etc.). Ms. Dolan gave a brief historical overview of the development of tribal courts generally and in California. Both presenters described the diversity of tribal courts in California, explaining that each tribe is different and their courts will look different due to unique history and culture. They described the continuum from very informal, mediated, non-adversarial settings to more formal trials, to hybrids that use both formal and informal approaches. They pointed out the similarity between tribal and nontribal justice systems that use collaborative, problem-solving approaches, and intensive court-connected services. They pointed out the inter-jurisdictional complexities that tribal and non-tribal justice systems face since they share jurisdiction over many matters and explored how they can be resolved through legislation affording full faith and credit or comity.

Judge Attebury and Ms. Dolan described the Northern California Tribal Courts Coalition (NCTCC) and showed a 15 minute video describing the member tribal courts in NCTCC. They answered questions about the NCTC's appellate program, specialized docket, the percentage of cases that involved domestic violence. They described how the participating tribes can

maximize their resources by sharing an appellate program, and how increasingly tribes need specialized courts to address the complex needs of victims and perpetrators. By having a specialized docket, they explained the court has the trained experts who can meet these complex needs. They estimated that approximately 20% of their cases involve domestic violence.

They then presented the PowerPoint slides prepared by Mr. Temet Aguilar, Court Administrator, Inter-Tribal Court of Southern California. These slides described the ICSC member tribes and the operation of the court (trial, appellate, and related court services) pursuant to an inter-governmental agreement (IGA) that authorizes tribal judges to travel from one reservation to another to hear cases and centralizes the court on the Rincon Reservation in San Diego County. Under the IGA, the Intertribal Court is governed by an independently appointed Judicial Council, whose members are selected by each tribe pursuant to its tribal laws. The Judicial Council's responsibilities include reviewing budgets, hiring key staff, policy review, and appointing judges and removing judges for cause. Tribes are able to have an independent court yet are still able to oversee the court system through the Tribal Judicial Council of Southern California. All ICSC tribal judges are licensed California attorneys and make rulings based on each participating tribe's laws, ordinances, customs, and historical precedent. The ICSC averages about one thousand hearings, mediations, arbitrations, and in-takes per year. Case types include the following: child/family law, guardianships, custodianships, conservatorships, domestic violence, civil disputes, land use and trespass, tribal housing, small claims, traffic citations, evictions, tort claims, personal injuries, and enrollment issues.

Forum members asked questions about the diversity of tribal courts represented in the NCTCC and the ITCSC. In these coalitions, there are tribal courts that are more western looking with many codes, and rules of court procedure and evidence, like the Hoopa Tribal Court, and there others that are less western and look much more like collaborative courts, like the Smith River Tribal Court.

Generally, only one judge adjudicates a given case. Some tribes have peacemaking panels/elder panels—typically 3 sit on a panel. One can think of these panels as collaborative approaches that serve to divert these cases from the court.

Forum members discussed how they might resolve inter-jurisdictional challenges and brainstormed the following solutions: (1) what we do best—judge to judge conversations; (2) state courts deferring to tribal courts—similar to doctrine of exhaustion of remedies under federal law (even where federal court has personal and subject matter jurisdiction, where a tribal court also has jurisdiction the federal court it will not exercise its jurisdiction unless the parties exhaust the tribal court forum); and (3) legislative solutions.

Judge Wilson gave a concrete example of how he and Judge Abinanti have resolved jurisdictional questions in Domestic Violence Protection Act cases. When there are property and child custody issues involving tribal members and the case is pending in tribal court, he explained that if a party comes to state court, he issues a restraining order and orders that the property and custody issues be resolved in tribal court.

Forum members explored the topic of criminal jurisdiction in California tribal courts. Members pointed out that in tribal court, unlike in state court, there is no automatic right to trial by jury

and no double jeopardy if a criminal matter is pursued in both tribal and state court. Some tribes do afford the right to a jury trial at the parties' cost (e.g. Hopland Tribal Court). Given the historical reasons recounted by Judge Abinanti and Judge Marston, and the fact that tribal courts have no criminal jurisdiction over non-Indians, few California tribes exercise criminal jurisdiction and most do not have their own law enforcement; many lack funding for their own jails or to contract for jail beds. With the passage of the Tribal Law and Order Act and the evolution of tribal courts in California, forum members anticipate more and more tribes exercising their criminal jurisdiction and establishing the infrastructure to support criminal justice systems.

*Action Item: Staff to send summary of Tribal Law and Order Act to forum members*

### **Break 2:45 – 3:00**

After the break, Ms. Walter introduced Ms. Gina Jackson, MSW, Model Court Liaison, Permanency Planning for Children Department, National Council of Juvenile and Family Court Judges (NCJFCJ). Ms. Jackson described the NCJFCJ and the recent Tribal Judicial Leadership Gathering in December. The purpose of this gathering was to listen to tribal leaders and learn how the NCJFCJ can better serve tribal judges, courts, and communities. Ms. Jackson presented highlights from this gathering and directed forum members to read more in the Spring issue of Juvenile and Family Justice Today's article by Judge Raquel Montoya-Lewis, which she distributed along with other materials from NCJFCJ.

### **Educational Session 4: 3:00 – 4:00**

#### **Models of Tribal Court State Court Collaboration**

**Hon. Richard C. Blake**

**Hon. Christopher G. Wilson**

In recognition of the Conference of Chief Justices Resolution 27 and the forum's own work aimed at reducing jurisdictional conflict among tribal and state courts, Judge Blake introduced the Tribal/State Protocol for the Judicial Allocation of Jurisdiction Between the Four Chippewa Tribes of Northern Wisconsin and the 10th Judicial District of Wisconsin (also called the Teague Protocol), and invited members to think about this protocol as a framework for discussing the following case scenarios. Judge Wilson facilitated the discussion underscoring how local tribal court/state court protocols are an excellent way to share and allocate jurisdiction, as well as share and leverage resources.

Below are the scenarios the forum discussed in light of the federal Indian law and the Teague Protocol (especially section 7):

1. Street scene: Police officer, man and a woman.

Woman: Officer, he has been following me. That is a violation of a restraining order I have here.

Officer: Let me see it.

Man: That paper is worthless, officer. Look – it came from the tribal court, not from the Superior Court.

Officer: How do I know that this is a valid order, madam?

Woman: Call the court, officer. They will tell you it's valid. And just look at it. It has a judge's signature and a clerk's stamp.

Officer: I'll have to call in to find out if this is valid. You wait here madam, and you, sir, wait over there.

#### Forum Discussion Highlights:

18 U.S.C. § 2265 mandates that states and tribes provide full faith and credit for each other's protective orders. Prior registration of such orders is not required for enforcement. California has implemented the requirements of 18 U.S.C. § 2265 through the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act found in Family Code §§ 6400– 6409. The Act confirms that tribal court protective orders are entitled to full faith and credit. In California the mechanism to register a tribal court protective order with the California Superior Court is through the filing of the order along with a DV-600 form *Register Out-of-State Protective Order*. Once a tribal court protective order is registered in this manner, it will be entered into the California Law Enforcement Telecommunication system. However, a tribal court order does not need to be registered in order to be entitled to full faith and credit. A tribal court protective order must be enforced by law enforcement whether or not they are registered through the California Court system. Family Code § 6403 states:

Presentation of a protection order that identifies both the protected individual and the respondent and, on its face, is currently in effect constitutes, in and of itself, probable cause to believe that a valid foreign protection order exists.

Therefore, in this case the police officer who is presented with a facially valid tribal court protective order should enforce the order.

#### 2. Traffic Court: Judge, police officer, defendant.

Judge – what are we here for today?

Officer – I stopped him for a broken tail light and expired registration.

Defendant – Your honor. I'm an enrolled member of the Rincon tribe and I was driving on the Rincon Indian reservation.

#### Forum Discussion Highlights:

An individual is charged with driving with a broken tail light and expired registration. The Defendant argues that because he is an enrolled member of the Rincon tribe and was driving on the Rincon Indian Reservation he does not need to comply with these provisions of the state law.

Indian Reservations are part of “Indian Country” as defined in 18 U.S.C. § 1151. Indian country includes all land within the limits of any Indian reservation... including rights-of-way running through the reservation.

As a general rule states and state law has very limited application to the activities of tribal members in Indian country. California is one of six mandatory Public Law 83-280 (PL-280) states. PL-280 is a federal law enacted in 1953 which affects the allocation of jurisdiction in Indian country. Part of what PL-280 did was to transfer most of the federal government’s criminal jurisdiction to the state. The criminal provisions of PL-280 are now codified in 18 U.S.C. § 1162. PL-280 did not grant states “civil regulatory” jurisdiction over Indian Country. (*California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987)) The Ninth Circuit has held that traffic laws are “civil regulatory” in nature and thus not applicable to an Indian in Indian country. (*Confederated Tribes of Colville Reservation v. State of Wash.*, 938 F.2d 146 (9th Cir. 1991)) This position has been affirmed by the California Attorney General 89 Ops. Cal. Atty. Gen. 6 (2006) which concludes that “California motor vehicle registration and driver’s license requirements are not subject to enforcement against Indian tribal members on roads within their Indian reservation.” Note, however, that provisions such as those governing driving under the influence or reckless driving which have a very important public safety component may be considered “criminal prohibitory” rather than “civil regulatory”.

Here the provisions at issue are likely civil regulatory in nature rather than criminal prohibitory, therefore they would not apply to the conduct of a tribal member within their Indian reservation.

### 3. Family Court: Judge and parties in Court on a hearing for a protective order.

Wife is asking for a stay away order against the husband to keep him away from the home they live in.

Husband – your honor. I am a tribal member. She is not. The house is on the reservation.

#### Forum Discussion Highlights:

The wife is asking for a stay away order against the husband to keep him away from the home they live in. The husband objects that the home is on the reservation and that he is a tribal member and she is not. The reservation is “Indian country”. The state has very limited ability to regulate the conduct of Indian tribal members on the reservations of their tribes. Generally the state has no authority to regulate the use of tribal lands and in particular no authority to order an individual out of tribal housing. “Where a dispute involves trust or restricted property, the state may not adjudicate the dispute nor may its laws apply.” *In re Humboldt Fir, Inc.*, 426 F.Supp. 292, 296 (N.D.Cal.1977), *aff’d* 625 F.2d 330 (9th Cir.1980) (see also *All Mission Indian Housing Authority v. Silvas* (C.D. Cal. 1987), 680 F. Supp. 330 and *Owens Valley Indian Housing Authority v. Turner* (9th Cir. 1999) 185 F. 3d 1029, 1032). Here the wife is seeking a stay away order which would effectively bar her husband tribal member from the home on the reservation. The state court has no jurisdiction to order a tribal member to stay away from a home on the reservation of that individual’s tribe. Note however, that a tribal court would likely have jurisdiction to make such an order.

4. Courtroom: Several people sitting in the audience.

Judge: People v Marvin Echohawk. Would you please step forward and be sworn.  
(Police officer and defendant step forward and are sworn – either by the judge or by a clerk)

Judge: Officer, the charges on your ticket state that you stopped Mr. Echohawk for a broken taillight and for an expired registration. Is that correct?

Officer: Yes judge. The registration had expired over a year ago.

Judge: Mr Echohawk, do you have anything to say about this?

Mr. Echohawk: Yes, judge. I am an enrolled member of the Rincon tribe. When he stopped me, I was driving on the Rincon Indian reservation. With all due respect, your honor, this court has no jurisdiction over me.

Officer: But your honor, when I first saw Mr. Echohawk, he was driving off of the reservation. I followed him and stopped him on the reservation.

Judge: Looks puzzled

#### Forum Discussion Highlights:

The conduct at issue occurred off the reservation. “Absent express federal law to the contrary, Indians going beyond reservation boundaries are generally subject to non-discriminatory state law otherwise applicable to all citizens of the state.” *Cabazon Band of Mission Indians v. Smith*, 249 F.3d 1101. The state officer may be entitled to enter on the reservation in order to enforce the state’s laws with respect to off reservation conduct. *Nevada v. Hicks*, 121 S.Ct. 2304. Therefore Mr. Echohawk may be held accountable in state court for his violation of state traffic regulations off of the reservation.

5. Courtroom: Judge and 2 parties – one male, one female and one attorney/

Judge: I see from your papers, Mrs. White that you are asking for a protective order, to keep your husband, Mr. White away from the family home. Is that correct?

Mrs. White: Yes, your honor. He has been harassing me.

Judge: Mr. White, do you have anything to say?

Mr. White: Yes, your honor. I am a tribal member. She is not. The house is on the reservation. I do not believe that this court has the power to take any action against me.

Mrs. White: But your honor, he has been harassing me both on and off the reservation.

Judge: Looks puzzled.

#### Forum Discussion Highlights:

Wife is seeking a protective order against husband and the family home. Husband objects that the house is on the reservation. He is a tribal member and she is not. He states that the court does not have any power to take action against him. Wife says that he is harassing her both on and off the reservation. The state court has jurisdiction over “criminal” activities of Indians both on and off the reservation, so the judge may issue an order enjoining criminal activities that would be effective both on and off the reservation. However, state court has no jurisdiction to govern the use of tribal housing, so it is doubtful that there is authority to issue a valid stay away order from the home on the reservation.

6. Courtroom: Application for a guardianship of the person of a minor. Grandmother is petitioner and mother is respondent.

Judge – to the grandmother. “You say that your daughter-in law is not properly caring for your grand daughter and you want this court to appoint you as the guardian for your grand-daughter?”

Grandmother–“That’s right.”

Judge to mother–“Do you have a response?”

Mother –“Yes. I do. I take perfectly good care of my daughter. She just doesn’t like me since I divorced her son. And your honor, both my daughter and I are members of the XXX tribe. She has not given any notice to the tribe. Also, all those things she is complaining about–electricity being turned off and the house being cold, that is all because her son doesn’t pay child support and I have asked her for help to meet expenses and she always says no. She has made no active efforts to help me keep my daughter at all.”

Judge looks puzzled.

#### Forum Discussion Highlights:

Grandmother argues that child is not being properly cared for. Mother denies allegations. She further states that she and her daughter are tribal members and argues that grandmother has done nothing to help her alleviate the problems caused by lack of child support payments. Mother says grandmother has made no “active efforts”.

Because the child subject to the guardianship proceedings is a tribal member, she is an “Indian child” within the meaning of the *Indian Child Welfare Act* 25 U.S.C. §1901 *et seq.* An involuntary guardianship falls within the scope of ICWA (see Probate Code § 1459.5) It constitutes a “foster care placement” within the meaning of ICWA.

Among the requirements of ICWA is that the party seeking to effect the foster care placement of an Indian child under State law “... shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.” (25 USC § 1912 (d))

The active efforts requirement applies to private petitioners as well as agency petitioners. (*In re Adoption of Hannah S.*, 142 Cal.App.4th 988, 48 Cal.Rptr.3d 605 Cal.App. 3 Dist., 2006 and *In re Crystal K.*, 226 Cal.App.3d 655, 276 Cal.Rptr. 619 Cal.App.3.Dist.)

What constitute sufficient “active efforts” will vary with the circumstances of each case, but Grandmother must present evidence that she attempted to prevent the breakup of the Indian family and that these efforts were unsuccessful before a guardianship order could be issued.

7. Courtroom: Delinquency case. Judge, District Attorney, Public Defender, Juvenile, and tribal representative all present.

Judge – “I understand that the Public Defender and Tribal Representative are seeking a dismissal of this matter. Counsel, can I have your positions on this request?”

District Attorney – “Your honor, we object to the dismissal. The Juvenile is charged with committing an assault. That’s clearly a crime that this court has jurisdiction over.”

Tribal Representative – “Your honor, this alleged assault took place on the reservation. The Juvenile is a tribal member. He is already under the jurisdiction of the tribal court and is on probation with the tribal probation department. This matter should be dealt with in tribal court.”

#### Forum Discussion Highlights:

The Public Defender and the tribal representative are seeking a dismissal of the matter because the minor is a tribal member, the events took place on the reservation and the minor is already a ward of the tribal court. The District Attorney objects to the dismissal of the assault charge which is clearly a crime that the court has jurisdiction over.

Under the terms of PL-280 the state of California has criminal jurisdiction over the conduct of tribal members on their reservations. However, PL-280 did not divest tribes of their concurrent jurisdiction. Therefore a tribal member may also be subject to the jurisdiction of the tribal court for their criminal activities on the reservation. Because the state and the tribe are separate sovereigns, double-jeopardy does not attach and both sovereigns may prosecute for the same transaction.

However, there may be an issue as to whether the matter falls under the Indian Child Welfare Act where the minor is found to be “...in foster care or at risk of entering foster care”. (Welfare and Institutions Code § 224; California Rules of Court, Rule 5.480 (1); *R.R. v. Superior Court of Sacramento County* (2009) 180 Cal.App.4th 185 but see also *In re W.B., Jr.* (2010) 182 Cal. App.4th 126 currently on appeal to the California Supreme Court.)

If ICWA applies then we must consider the requirements of 25 U.S.C. § 1911:

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. **Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction**, notwithstanding the residence or domicile of the child.

and Welfare and Institutions Code § 305.5:

(a) If an Indian child, who is a ward of a tribal court ... has been removed by a state or local authority from the custody of his or her parents or Indian custodian, the state or local authority shall provide notice of the removal to the tribe no later than the next working day following the removal and shall provide all relevant documentation to the tribe regarding the removal and the child's identity. If the tribe determines that the child is an Indian child, the state or local authority shall transfer the child custody proceeding to the tribe within 24 hours after receipt of written notice from the tribe of that determination.

8. Judge in Chambers on the telephone.

Hello, Judge Jones, this is Judge Brown from the tribal court.

Fine, fine, and how are you?



I'm calling about a case I have before me now. I want to coordinate this case with you.

#### Forum Discussion Highlights:

Judge from the tribal court is calling the local state court judge to coordinate on a case that is before him. We do not know the nature of the case, but we can assume that it overlaps in some way with matters in the local state court. Under the Uniform Child Custody Jurisdiction and Enforcement Act, Family Code §§ 3400 *et seq.* a tribe is to be treated like a state:

3404. (a) A child custody proceeding that pertains to an Indian child as defined in the Indian Child Welfare Act (25 U.S.C. Sec. 1901 *et seq.*) is not subject to this part to the extent that it is governed by the Indian Child Welfare Act.

(b) A court of this state shall treat a tribe as if it were a state of the United States for the purpose of applying this chapter and Chapter 2 (commencing with Section 3421).

(c) A child custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of this part must be recognized and enforced under Chapter 3 (commencing with Section 3441).

3410. (a) A court of this state may communicate with a court in another state concerning a proceeding arising under this part.

(b) The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.

(c) Communication between courts on schedules, calendars, court records, and similar matters may occur without informing the parties. A record need not be made of the communication.

(d) Except as otherwise provided in subdivision (c), a record must be made of a communication under this section. The parties must be informed promptly of the communication and granted access to the record.

(e) For the purposes of this section, "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

These scenarios point out some of the types of inter-jurisdiction challenges tribal and state courts face. Forum members noted that the tribal court/state court partnership between the Yurok Tribal Court and the Humboldt Superior Court benefits both courts. Judge Abinanti describes how her court can provide the wellness approach that restores community harmony and ensures that tribal members are dealt with in the most culturally appropriate way. Judge Wilson describes how the state court uses the resources of the Yurok court, thus keeping defendants from returning to his courtroom. This tribal court/state court partnership appears to be reducing recidivism with domestic violence cases.

Judge Blake described another partnership between the Smith River tribal prosecutor and the Humboldt County district attorney determine together which low level misdemeanor cases involving youth should go to state versus tribal court.

Forum members agreed that they would like to identify ways to formalize these types of partnerships and foster new ones statewide. They discussed the following three strategies: (1) developing a template/memorandum of agreement between tribal and state courts; (2) proposing a rule of court that endorses the process of entering into such agreements; and (3) continuing the forum's work on its protocol manual.

*Action Item: The Protocol Working Group will consider the three strategies and report back to the forum.*

**Adjourned**

Judge Blake and Justice Hull thanked members for their participation and alerted members of their next conference call to review comments to the rule and form proposals on July 5, 2011, noon – 1p.m.