

SB

117

<TARGET><BILL>SB 117</BILL><SUBJECT>SB
117</SUBJECT><COMM>SSTA29</COMM></TARGET>


ALASKA STATE SENATE

Interim:
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Session:
State Capitol, Room 119
Juneau, Alaska 99801-1182
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SENATOR JOHN COGHILL

To: Senator Bill Stoltze
From: Senator John Coghill 
Date: January 20, 2016
Re: Hearing Request Memorandum for SS SB117

Dear Senator Stoltze:

This office formally requests a hearing on "Sponsor Substitute for Senate Bill 117 ("SS SB117") – *"An Act relating to a tribal court diversion program for certain offenses; and relating to exemption of and levy on permanent fund dividends."*

An electronic version of this request shall be sent to: Senate.State.Affairs@akleg.gov.

The relevant documents include:

1. This signed hearing request.
2. A sponsor statement addressing the current bill version.
3. A sectional analysis.
4. The most recent version of the bill. The most recent version is 29-LS0797\E. The former version was 29-LS0797\W.
5. A brief explanation of changes since introduction.
6. The previous version of the bill.

There are no fiscal notes at this time.

There will be a simple PowerPoint presentation to accompany the introduction of the bill. An overhead projector is requested.

Potential testimony may come from the following individuals:

1. Lisa Jaeger – Tanana Chiefs Conference - (907) 451-6682.
2. Nick Gasca – Tanana Chiefs Conference - (907) 451-6682.
3. Natasha Singh – Tanana Chiefs Conference - (907) 451-6682.
4. Debra O’Gara – Central Council – Tlingit and Haida Indian Tribes of Alaska – (907)-463-7387.
5. Grace Singh - Central Council – Tlingit and Haida Indian Tribes of Alaska - (907)-463-7387.

Please contact Chad Hutchison from my office if you have additional questions. Mr. Hutchison’s direct phone line is (907)-465-6858. His e-mail is chad.hutchison@akleg.gov.

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SPONSOR STATEMENT

Sponsor Substitute for Senate Bill 117 ("SS SB117") – "An Act relating to a tribal court diversion program for certain offenses; and relating to exemption of and levy on permanent fund dividends."

Senate Bill 117 is about making Alaska Native communities safer.

Many Alaska communities lack timely access to police, courts, and related services. Concurrently, there are higher crime rates (for certain categories of crime) particularly in Alaska Native communities. Tribal courts provide local justice that is restorative in nature, and better fits the culture and timing.

Troubled communities in Alaska are a state problem. Steps must be taken to heal the mind, body, and the spirit of those affected. Those affected include, most importantly, the victims, the surrounding community, and the perpetrator.

Senate Bill 117 represents a "step in the right direction." Senate Bill 117 does the following:

1. Creates a tribal court diversion program for certain offenses, including:
 - a. Attempts or solicitations of class B misdemeanors (class B misdemeanors include less serious crimes, usually punishable by up to 90 days in jail and a fine up to \$2,000). Examples include: Small thefts, disorderly conduct, criminal mischief in the fifth degree, or prostitution;
 - b. Assault in the 4th degree;
 - c. A class B misdemeanor;
 - d. Possession in a dry community;
 - e. Possession by a person under the age of 21;
 - f. Minor operating a vehicle after consuming alcohol.
2. Creates certain notice requirements for the diversion program.
3. Clarifies jurisdiction.
4. Allows tribal courts to take a person's permanent fund dividend to satisfy tribal court ordered restitution.

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SECTIONAL ANALYSIS

Sponsor Substitute for Senate Bill 117 ("SS SB117") – "An Act relating to a tribal court diversion program for certain offenses; and relating to exemption of and levy on permanent fund dividends."

Section 1: AS 12.80 is amended to add a new section. The new section creates the tribal court diversion program.

1. Upon recommendation by the appropriate law enforcement agency, the department, after consultation with the appropriate tribal court, may defer prosecution of a tribal member and refer the case to the tribal court.
2. This situation may occur in certain, specific circumstances. These circumstances include the following offenses:
 - a. Attempts or solicitations of class B misdemeanors.
 - i. Class B misdemeanors include less serious crimes, usually punishable by up to 90 days in jail and a fine up to \$2,000.
 - ii. Examples include: Small thefts or prostitution.
 - b. Assault in the 4th degree.
 - c. A class B misdemeanor.
 - d. Alcohol possession in a dry community.
 - e. Alcohol possession by a person under the age of 21.
 - f. Minor operating a vehicle after consuming alcohol.
3. The department may not consent unless they have explained the process and consequences to the victim.
4. No referral shall be made unless the tribal member gives written consent. The written consent must include that the tribal member:
 - a. Agrees to be adjudicated by the tribal court.
 - b. Agrees to comply with the tribally imposed remedy. If there is a failure to comply, the department may initiate prosecution in state court.
 - c. Will not have right to legal counsel at the expense of the tribe or state.
 - d. Acknowledges that the tribal court is not bound by Alaska law or procedure.

5. Once consent is obtained, the state may withhold prosecution. The tribe may incorporate culturally derived procedures (including restorative justice hearings and circle sentencing).
 - a. The tribal court may use fines, fees, and monetary remedies to meet the needs of the victim.
 - b. The tribal court shall notify the appropriate law enforcement agency if there is a felony, misdemeanor, or violation not previously listed above.
6. The mandatory arrest provision for domestic violence cases still applies. The department may still elect to make a referral at the arraignment however.
7. If a tribal member does not comply with the tribal imposed remedy, the department may still prosecute the tribal member in state court.
8. If the tribal member complies with tribal court imposed remedies, then the department may not prosecute the tribal member in state court.
9. If a case is transferred to tribal court, the tribal court will provide notice to the department after a remedy is ordered.
 - a. The form must include:
 - i. The name of the tribal member.
 - ii. The circumstances of the offense.
 - iii. The remedy ordered by the tribal court.
 - iv. The time allowed for compliance.
 - b. The tribal court shall promptly notify the department (with the form provided by the department) if:
 - i. The tribal member complies with the tribally imposed remedy and the date of compliance.
 - ii. The tribal member fails to comply with the tribally imposed remedy and the time allowed for compliance.
 - c. There shall be a new form for each new offense.
 - d. The tribal court shall provide the forms to the department on at least a quarterly basis.

AS 12.80.120 – Jurisdiction – Nothing shall diminish the sovereignty of the tribal court or the tribe.

AS 12.80.200 – Definitions –

1. “Department” means the Department of Law.
2. “Law Enforcement Agency” means a division of the Alaska state troopers, a village public safety officer program, a village police officer agency, a tribal police officer agency, or a municipal or borough law enforcement agency.
3. “Tribal court” means a tribal justice system established by a tribe.
4. “Tribal member” means a member of a federal recognized tribe.
5. “Tribe” means an Indian tribe or band or Alaska Native village that is recognized under federal law.

Section 2: AS 43.23.065(b) is amended:

1. Permanent fund dividends may be taken to satisfy court ordered restitution, including tribal court order restitution. That includes fines and tribal court ordered fines.

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SUMMARY OF CHANGES

Senate Bill 117 to Sponsor Substitute for SB117

Sponsor Substitute for Senate Bill 117 ("SS SB117") – "An Act relating to a tribal court diversion program for certain offenses; and relating to exemption of and levy on permanent fund dividends."

1. In summary: On April 24, 2015 Senate Bill 117 ("SB117")(also known as "29-LS0797\W") was introduced. On January 19, 2016, after continuing conversations with interested stakeholders, the Sponsor Substitute for Senate Bill 117 ("SS SB117")(also known as "29-LS0797\E") was introduced. The two primary substantive changes include:
 - a. No appeal for tribal defendants to Alaska State Court;
 - b. Further clarification that Permanent Fund Dividends ("PFDs") can be used for tribal court-ordered restitution/fines.

From a technical perspective: references to "the state," were changed to "the department."

The specific changes are as follows:

2. Lines 8-11 at page 1 of SB117 were edited from:

[T]he state may elect to defer prosecution of a tribal member in a criminal case and refer the tribal member to a tribal court under the procedure provided in this section when the tribal member has been accused of committing one of the following offenses:

To how it appears in SS SB117, lines 7-11 at page 1:

[T]he department, after consultation with the appropriate tribal court, may elect to defer prosecution of a tribal member in a criminal case and refer the tribal member to a tribal court under the procedure provided in this section when the tribal member has been accused of committing one of the following offenses:

3. Line 14 at page 1 and lines 1-5 at page 2 were edited from:

(2) assault in the fourth degree under AS 11.41.230 if the tribal member has not previously

(A) been convicted of

(i) a felony crime against a person under AS 11.41; or

(ii) assault in the fourth degree; or

(B) been referred to a tribal court under this section;

To how it appears in SS SB117, line 14 at page 1:

(2) assault in the fourth degree under AS 11.41.230;

3. Lines 10-14 at page 2 of SB117 were edited from:

(b) The state may not consent to a referral under this section unless the state has consulted with the victim and explained the process and consequences of the referral to the victim. The state may not elect to proceed under this section if the tribal member has previously been referred to a tribal court under the procedure provided in this section two or more times.

To how it appears in SS SB117, lines 5-7 at page 2:

(b) The department may not consent to a referral under this section unless the department has met with the victim and explained the process and consequences of the referral to the victim.

4. Lines 15-23 at page 2 of SB117 were edited from:

(c) The state may not make a referral under this section unless the state obtains written consent from the tribal member stating that the tribal member

(1) agrees to be adjudicated before the appropriate tribal court;

(2) agrees to comply with the tribally imposed remedy, if any, and that, if the tribal member fails to comply with the tribally imposed remedy, the state may initiate prosecution for the offense in state court;

(3) will not have the right to legal counsel in tribal court; and

(4) acknowledges that the tribal court is not bound by Alaska law or procedure.

To how it appears in SS SB117, lines 8-18 at page 2:

(c) The department may not make a referral under this section unless the department obtains written consent from the tribal member stating that the tribal member

(1) agrees to be adjudicated before the appropriate tribal court;

(2) agrees to comply with the tribally imposed remedy, if any, and that, if the tribal member fails to comply with the tribally imposed remedy, the department may initiate prosecution for the offense in state court;

(3) will not have the right to legal counsel in tribal court at the expense of the state or tribe if legal counsel is permitted in the applicable tribal court; and

(4) acknowledges that the tribal court is not bound by Alaska law or procedure.

4. Lines 24-29 at page 2 of SB117 were edited from:

(d) Once the state makes a referral under this section and the tribal member consents to be adjudicated before the appropriate tribal court for the alleged offense, the state may withhold prosecution for the offense. The tribal court may incorporate culturally derived procedures, including restorative justice hearings and circle sentencing, imposing fines, or requiring forfeiture of property under procedures adopted by the tribal court

To how it appears in SS SB117, lines 19-24 at page 2:

(d) Once the department makes a referral under this section, the tribal member consents to be adjudicated, and the tribal court accepts jurisdiction, the department may withhold prosecution for the offense. The tribal court may incorporate culturally derived procedures, including restorative justice hearings and circle sentencing, imposing fines, or requiring forfeiture of property under procedures adopted by the tribal court

5. Lines 30-31 at page 2 and line 1 at page 3 of SB117 were edited from:

(1) shall use the fines collected for restitution for the victim of the crime and, if any funds remain after victim restitution has been paid, for the benefit of the tribe;

To how it appears in SS SB117, lines 25-27 at page 2:

(1) shall have the discretion to use fines, fees, and other monetary remedies on a case-by-case basis that best meets the needs of the victim, the community, and the tribe;

6. The word “state” on line 9 at page 3 of SB117 was changed to the word “department” in SS SB117. See line 4 at page 3 of SS SB117.
7. Lines 11-16 at page 3 of SB117 were edited from:

(f) If the state elects to make a referral under this section and the tribal member does not comply with the tribally imposed remedy under (d) of this section, the state may prosecute the tribal member in state court.

(g) If the state makes a referral under this section and the tribal member complies with the tribally imposed remedy under (d) of this section, the state may not prosecute the tribal member in state court.

To how it appears in SS SB117, lines 6-11 at page 3:

(f) if the department elects to make a referral under this section and the tribal member does not comply with the tribally imposed remedy under (d) of this section, the department may prosecute the tribal member in state court.

(g) if the department makes a referral under this section and the tribal member complies with the tribally imposed remedy under (d) of this section, the department may not prosecute the tribal member in state court.

8. Lines 17-29 at page 3 of SB117 were edited from:

Section 12.80.110. Tribal court diversion program; notice required. (a) If the state elects to refer a criminal case to tribal court under AS 12.80.100, the appropriate tribal court shall promptly provide notice to the state on a form created by the department after a remedy is ordered that includes the following information:

- (1) the name of the tribal member;
- (2) the circumstances of the offense; and
- (3) the remedy ordered by the tribal court.

(b) The tribal court shall promptly notify the state on a form provided by the department if

- (1) the tribal member complies with the tribally imposed remedy and the date of that compliance;
- (2) the tribal member fails to comply with the tribally imposed remedy within 120 days after the date the tribal court imposes the remedy.

To how it appears in SS SB117, lines 12-26, at page 3:

Section 12.80.110 Tribal court diversion program; notice required. (a) If the department elects to refer a criminal case to tribal court under AS 12.80.100, the appropriate triable court shall promptly provide notice to the department on a form created by the department after a remedy is ordered that includes the following information:

- (1) the name of the tribal member;
- (2) the circumstances of the offense;
- (3) the remedy ordered by the tribal court; and
- (4) the time allowed for compliance.

(b) The tribal court shall promptly notify the department on a form provided by the department if

- (1) the tribal member complies with the tribally imposed remedy and the date of that compliance;
- (2) the tribal member fails to comply with the tribally imposed remedy within the time allowed for compliance.

8. Lines 4-9 at page 4 of SB117 were eliminated. Lines 4-9 focused on appeals to State Court.
9. SS SB117 added a definition for “law enforcement agency.” See lines 5-7, at page 4.
10. Section 2 from SB117 was changed. Instead of focusing on State Superior Court jurisdiction, Section 2 for SS SB117 emphasized that the PFD may be used to satisfy tribal-court-ordered restitution and fines. See lines 13-31, at page 4 of SS SB117, and lines 1-6, at page 5.
11. Section 3 from SB117 was eliminated. Section 3 focused on indirect court rule amendments. Those rules are no longer necessary.



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Survey of Tribal Court Effectiveness Studies

Ryan Fortson and Jacob A. Carbaugh

Alaska Native tribes have used sentencing circles and other cultural traditions to address problems involving tribal members for centuries. This way of dealing with disputes in a restorative and reparative manner eventually gave way to an adversarial process when Alaska was purchased by the United States. Alaska Natives have always had a unique relationship with the federal government; there is currently only one reservation in Alaska and limited other forms of Indian country in the state. In 1971 the Alaska Native Claims Settlement Act (ANCSA) was signed into law, extinguishing all unsettled Alaska Native claims to land by placing title to land in the control of Alaska Native corporations. Subsequent cases have determined that land transferred to Alaska Native corporations via ANCSA cannot be considered Indian country for the purpose of establishing tribal court jurisdiction. (See "Key Acts and Cases for Alaska Tribal Court Jurisdiction," p. 12.)

However, in its landmark 1999 ruling in *John v. Baker* (982 P.2d 783), the Alaska Supreme Court determined that despite the lack of Indian country jurisdiction over ANCSA lands, Alaska Native tribes possess jurisdiction over *members* of the tribe through their rights of inherent sovereignty.

Alaska tribal courts today primarily hear cases involving family law and child custody and protection matters, including cases related to adoptions, child protection, Indian Child Welfare Act (ICWA) intervention, marriages/divorces, and domestic violence. Some tribes also hear cases involving contract disputes, employment disputes, probate/inheritance, animal control, environmental regulation, and natural resource management. A few tribes initiate civil proceedings in cases that are commonly criminal matters, including driving under the influence, assault/disorderly conduct, juvenile delinquency, vandalism, misuse of firearms, trespassing, and drug and alcohol regulation. The state and various tribes are working towards an agreement to refer additional case types to tribal courts for resolution. (See "Current Issues Regarding Alaska Tribal Court Jurisdiction," p. 14.)

The need for increased court and law enforcement presence in rural Alaska was recently highlighted by a 2013 report by the Indian Law & Order Commission on crime and safety issues in Native American and Alaska Native communities, *A Roadmap for Making Native America Safer: Report to the President and Congress of the United States*. The report authors devoted an entire chapter to problems in Alaska, the only

state to be singled out for such attention. Among the difficulties for Alaska Natives identified by the report are that: (1) Alaska Native women are overrepresented in the statewide domestic violence statistics by 250 percent—they comprise 19 percent of the statewide population, but 47 percent of reported rape victims; in Alaska villages, domestic violence rates are up to 10 times higher than the national average, and physical assault rates up to 12 times higher; (2) at least 75 communities lacked any law enforcement presence; and (3) although alcohol was involved in more than 95 percent of all crimes in rural Alaska, there were few available treatment facilities in these areas. (All statistics are taken from the report and have not been independently verified.) Tribal courts could potentially help address many of these issues.

This, though, raises the question of the effectiveness of tribal courts in addressing and resolving disputes involving its members. Although there is limited data related to tribal courts, some studies support the hypothesis that tribal courts are more effective than traditional Western courts within American Indian and Alaska Native communities.

Please see Tribal court studies, page 15

Tribal Courts in Alaska

This issue of the *Alaska Justice Forum* is devoted primarily to issues related to tribal courts in Alaska, including how they function, measures of their effectiveness, and past and future issues regarding tribal court jurisdiction.

"Survey of Tribal Court Effectiveness Studies" (p. 1) examines empirical studies that have been conducted on the effectiveness of tribal courts, both in terms of reductions in recidivism and participant attitudes. The article also looks at some of the challenges to implementing a tribal court effectiveness study in Alaska.

Professor Jeff D. May of the University of Alaska Fairbanks offers two articles on the theory and implementation of the restorative justice principles frequently used in tribal courts. The first, "Restorative Justice: Theory, Processes, and Application in Rural Alaska" (p. 2), explores the principles behind using

restorative justice as an alternate form of sentencing in criminal cases. The article focuses particularly on how restorative justice might be of benefit in rural Alaska. The second article, "Community Justice Initiatives in the Galena District Court" (p. 6) examines a community outreach program in rural Alaska whereby an Alaska Court System judge uses restorative justice principles in village sentencing hearings.

This issue also includes two surveys of tribal court jurisdiction—"Key Acts and Cases for Alaska Tribal Court Jurisdiction" (p. 12) and "Current Issues Regarding Alaska Tribal Court Jurisdiction" (p. 14). These surveys trace the development of tribal court jurisdiction in Alaska and federal case law and statutes, and examine some of the unresolved issues that will shape this jurisdiction in the years to come.

Restorative Justice: Theory, Processes, and Application in Rural Alaska

Jeff D. May

There is a growing recognition of the unique and challenging justice needs of rural Alaska. Administering an effective criminal justice system in rural Alaska requires continual effort to recognize the strengths and deficiencies of current practices. It also requires the commitment necessary to explore alternative processes that strengthen communities, increase confidence in judicial processes, and uphold the rule of law. There has been a growing movement in recent years, both inside and outside of the United States, to implement processes that more effectively address the needs of victims, offenders, and their communities in ways that reduce future crime and community discord. Many specific response strategies have developed out of this movement, such as community reparative boards, family and community conferences, victim-offender mediation, and circle sentencing. Each is grounded in a restorative justice framework. This article provides a brief introduction to the concept of restorative justice, some common restorative processes, and a discussion on why a balanced restorative approach is beneficial in rural Alaska.

Restorative Justice

Restorative justice is the term coined to describe justice approaches that focus on reparation rather than retribution. Restorative justice is a guiding philosophy broader than any one specific practice or program. Punishment, in its common retribution-focused sense, is secondary to the goals of reparation and reintegration under a restorative approach. Retributive-focused frameworks emphasize punishment-oriented concerns such as what precise crimes were committed and what level of punishment is deserved or statutorily prescribed for that specific offense. Restorative justice focuses on distinctively different questions such as what harm has occurred, what must be done to repair this harm, and who is responsible for this repair. These latter questions demonstrate restorative justice's goal of identifying ways crime has impacted specific victims, offenders, and communities, and discovering ways to remedy these harms and mend damaged relationships. To this end, restorative justice is often referred to as a peacemaking process.

A balanced restorative approach: (1) focuses on the harm that has resulted; (2) assists offenders in fulfilling their reparative obligations to others; and (3) allows victim, offender, and community engagement and

participation to the extent possible. This encourages victims, offenders, and communities to collectively identify harms, needs, and obligations in a unified effort to heal and put things right. This involvement empowers crime victims, helps offenders actively meet their obligation to make amends, and encourages community members to support victims and offenders in the reparation and healing process. To be restorative, community involvement should build local capacity and express community condemnation in constructive ways that encourage and assist offenders both in recognizing the impact of their actions on not only the immediate victim but also on the larger community, and in their efforts to correct their errors and rejoin the community. The focus is on meeting obligations rather than punishment. All requirements imposed on the offender should be viewed as ways of fulfilling their obligations to the victim and community. This approach is best pursued in situations where people have admitted wrongdoing and expressed an interest in correcting the situation.

Commentators on designing conflict resolution systems such as Andrea Kupfer Schneider at Marquette University Law School have observed that dispute resolution systems that do not seek peace and justice fail to provide long-term solutions. For instance, situations that seek only justice (i.e., convictions by a court of law or similar authority) without re-establishing peace or healing have proven a temporary fix. These commentators note the same can be said of processes focusing exclusively on peacemaking. Their conclusion is that most conflicts require both peace and justice and suggest that different processes are needed to develop these two coexisting needs. Restorative justice advocates such as John Braithwaite of the Australian National University and Declan Roche of the London School of Economics and Political Science suggest that processes focused on restorative justice can meet both these aims because restorative justice fosters peace and healing, but does not ignore the importance of personal accountability. However, accountability in restorative justice is not reached through the perpetrator of violence passively accepting punishment imposed by a third party, but rather by investing oneself in active efforts to repair damage caused. The accountability Braithwaite and Roche describe better satisfies the "justice" Schneider addresses.

A balanced process focuses on the needs of victims, offenders, and the community.

Focusing solely on rehabilitation of offenders is restorative for offenders, but it is not balanced without equal concern for victim and larger community needs. The same can be said of processes that focus too heavily upon only victim or community concerns. Creating room for victim, offender, and community participation helps ensure that no group's interests go unrepresented. This joint participation actually encourages restoration as well. Victim involvement validates that individual as a member of the community whose opinions and feelings matter. It also better enables the offender and community to understand the ways crime has impacted the victim. Direct involvement of the offender aids in understanding the reasons and contributing factors for the offense. This involvement provides insight into the offender's character and situation which helps identify realistic ways the offender can seek reparation. Direct involvement allows greater opportunity for sincere apology and active reparation efforts which help victims and offenders. Finally, community involvement is fundamental to an effective restorative response, because at the end of the day it is our communities that live with the cumulative fallout of criminal behavior.

Our legal system has become highly professionalized and takes ownership of community conflict. Conflicts can become depersonalized and invisible to the very group with a vested interest in the process used and outcomes achieved. Restorative justice promotes broader involvement to help ensure the full impacts of crime are identified, that responses are culturally relevant, and that communities identify conditions contributing to the problem. Community participation also reinforces social norms of acceptable behavior and fosters community self-reliance.

Ultimately, restorative justice seeks to move from processes where the justice system works separately and independent from the community to a system where the government follows community leadership because the community has shown itself to be an effective problem solver. When this occurs, formal justice professionals operate in support of community efforts and goals while protecting the rights of individual parties and ensuring fairness in the process.

Restorative Processes

As previously mentioned, restorative justice is not any one precise procedure. Different approaches can be "restorative." The

degree to which they are restorative depends on their ability to meet the reparative needs of victims, offenders, and communities. There are many variations of restorative-focused processes in use throughout the world. Three are briefly discussed here by way of example. In the context of criminal cases, these approaches all generally presume an acceptance of guilt by the accused and a focus on alternate means of sentencing.

Victim-Offender Mediation

One restorative approach is victim-offender mediation. This typically involves a victim and an offender in direct mediation facilitated by one or two mediators. Sometimes victims and offenders converse face-to-face, but other times they meet separately with the mediator, and the mediator relays information between them. In face-to-face mediation, family members or friends are often present as support persons. These meetings are designed to help the parties better understand why the crime occurred and what the impacts are and explore avenues for reparation. While not used in the criminal context in all jurisdictions, in others these programs have a respectable multi-decade track record. Many of these mediations involve less serious property crimes committed by young people, but this process is being expanded to more serious offenses by juveniles and adults. Multiple studies by

Mark Umbreit of the Center for Restorative Justice and Peacemaking at the University of Minnesota and others have shown this process leads to victim and offender satisfaction with the outcome, and significantly reduced recidivism rates among juvenile offenders.

Conferencing

Group conferencing broadens the range of persons involved. Group conferences vary in name and style, but each tends to use group discussion attended by a combination of victims, offenders, their respective family members or other support persons, and some additional community members such as government or school representatives. A trained facilitator leads the discussion, which may follow a particular speaking order. The session begins by discussing what occurred and how individuals were harmed. The facilitator then moves the discussion towards focusing on what must be done to make appropriate reparations. Finally, the group seeks to develop a consensus agreement regarding what must be done by the offender and how and when that will occur. By involving representatives of the community, this process takes into account community concerns.

Circles

Circles involve similar numbers and types of persons as those involved in group

conferences, but can be expanded to include the input from more members of the community. This process gets its name because participants generally seat themselves in a circle where all have equal ability to participate and share their views. Often, a trained facilitator or community leader leads the process by facilitating the discussion, but all in the circle have the opportunity to speak. A *talking piece* is passed around the circle to designate who may speak. (This is usually an object (e.g., an eagle feather) chosen by the facilitator and has some cultural or personal significance.) Participants express their feelings in a shared search to identify why crimes have occurred, identify what harms need repair, and identify the steps needed in the healing process. Circles can be used in numerous contexts from community talking circles (meant to discuss events of community significance) to circle sentencing where the circle members (which can include victims, offenders, family, friends, community members, police, and lawyers) deliberate and come to a consensus for a sentencing plan that addresses the concerns of all interested persons.

Mediation, conferences, and circles have many similarities, and communities can be flexible in the approach used in a given circumstance. In some instances it may be

Please see *Restorative Justice*, page 5

Restorative Justice References

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Restorative Justice Programs and Sentencing

Below are the amendments to Alaska Rule of Criminal Procedure 11(i) and Delinquency Rules 21(d)(3) and 23(f) which describe the requirements for referral to a restorative justice program as part of the sentencing process. These amendments took effect April 15, 2014. These rule changes were proposed by the Alaska Supreme Court's Local Dispute Resolution Subcommittee of the Fairness, Diversity, and Equality Committee. To support implementation of the rule changes, Alaska Supreme Court Chief Justice Dana Fabe assigned Superior Court Judge Eric Smith to facilitate meetings between local judicial officers and interested tribes or other organizations that the local groups want to be involved in and to work out specific agreements for referrals. Judicial officers in Kenai, Cordova, and Dillingham have approached Judge Smith for possible assistance in working with local tribes.

An Alaska Court System judge may refer a defendant to a re-

storative justice program with "the consent of the victim(s), the prosecutor, and the defendant(s)." Alaska R. Crim. Pro. 11(i)(1). The sentence recommended by the restorative justice program may then be sent to the court for consideration. The judge may, but is not required to, attend the restorative justice proceeding. Following a consideration of the recommendations of a restorative justice program, the judge will determine the sentence.

Restorative justice programs "include, but are not limited to circle sentencing, family group conferencing, reparative boards, and victim-offender mediation." Alaska R. Crim. Pro. 11(i)(3). Under this rule, the Alaska Court System's therapeutic courts, also called wellness courts—such as the Felony DUI Court, Felony Drug Court, Veteran's Court, Mental Health Court, Family Care Court, and Family Preservation Court—are not considered restorative justice programs.

Change to Alaska Criminal Rule 11

IN THE SUPREME COURT OF THE STATE OF ALASKA ORDER NO. 1816

Adding Criminal Rule 11(i) and Delinquency Rule 21(d)(3) and 23(f) concerning restorative justice programs, to implement the recommendations of the Local Dispute Resolution Subcommittee of the Fairness, Diversity, and Equality Committee.

IT IS ORDERED:

1. Criminal Rule 11 is amended to add a new subsection (i), to read as follows:

Rule 11. Pleas.

(i) Restorative Justice Programs.

(1) With the consent of the victim(s), the prosecutor, and the defendant(s), the judge may refer a case to a restorative justice program. The parties must inform the restorative justice program about any applicable mandatory sentencing provisions at the time the matter is submitted to the program. The parties may propose to the court the sentence recommended by the participants in proceedings convened by that program.

(2) The parties may include the recommendations of the restorative justice program in a sentencing agreement subject to the provisions of subsection (e).

(3) The term "restorative justice program" means a program using a process in which persons having an interest in a specific offense collectively resolve how to respond to the offense, its aftermath, and its implications for the future. Restorative justice programs include, but are not limited to, circle sentencing, family group conferencing, reparative boards, and victim/offender mediation. For purposes of this rule, the term "restorative justice program" does not include the Alaska Court System's therapeutic courts.

(4) Except as provided below, the sentencing judge shall not participate directly in any restorative justice program to which a case is referred for sentencing recommendations.

(A) The judge may be present during the proceedings of the program provided that:

- (i) the proceedings are conducted on the record; or
- (ii) minutes of the proceedings are kept in a manner that the parties agree will fairly and accurately represent what is said at those proceedings.

(B) The judge may speak at these proceedings provided that the judge's comments do not detract or appear to detract from the judge's neutrality.

2. Delinquency Rule 21(d) is amended to add a new paragraph (3), which reads as follows:

Rule 21. Adjudication Hearing.

(d) Judgment.

(3) A minor may, with the consent of the Department and the victim(s), condition an admission to one or more acts alleged in the petition upon the court's agreement to the recommendations made by a restorative justice program to which the matter is referred pursuant to Delinquency Rule 23(f).

3. Delinquency Rule 23 is amended to add a new subsection (f), which reads as follows:

Rule 23. Disposition or Dual Sentence.

(f) Restorative Justice Programs.

(1) With the consent of the victim(s), the Department and the juvenile may stipulate to a stay of disposition pending a referral of the matter to a restorative justice program. The parties must inform the restorative justice program about any applicable mandatory disposition provisions at the time the matter is submitted to the program.

(2) The court shall give due consideration to the recommendations made pursuant to a referral authorized by paragraph (1).

(3) The term "restorative justice program" means a program using a process in which persons having an interest in a specific offense collectively resolve how to respond to the offense, its aftermath, and its implications for the future. Restorative justice programs include, but are not limited to, circle sentencing, family group conferencing, reparative boards, and victim/offender mediation. For purposes of this rule, the term "restorative justice program" does not include the Alaska Court System's therapeutic courts.

(4) Except as provided below, the judge rendering the disposition shall not participate directly in any restorative justice program to which a case is referred for dispositional recommendations.

(A) The judge may be present during the proceedings of the program provided that:

- (i) the proceedings are conducted on the record; or
- (ii) minutes of the proceedings are kept in a manner that the parties agree will fairly and accurately represent what is said at those proceedings.

(B) The judge may speak at these proceedings provided that the judge's comments do not detract or appear to detract from the judge's neutrality.

DATED: December 4, 2013

EFFECTIVE DATE: April 15, 2014

/s/
Chief Justice Fabe
Justice Winfree
Justice Stowers
Justice Maassen
Justice Bolger

Restorative justice (continued from page 3)

desirable to only involve the victim and offender in a mediation session because of privacy concerns. Other matters may be of such community importance that a larger community circle is necessary.

These processes can also be implemented at various stages in the case. Many are implemented as diversionary tools meant to direct certain cases away from formal adversarial court proceedings. Diversion can be deemed appropriate because of the nature of the offense or because the situation involves a remorseful defendant who freely admits guilt and a victim willing to engage in the reconciliation process. When used as a diversionary tool, these processes generally operate as alternatives to and in the shadow of traditional court procedures. Because guilt is admitted and voluntary consent to participate is obtained from the defendant, these diversionary processes can appropriately focus more on interests rather than individual rights. This allows the needed flexibility to truly address harms and focus on involving the defendant in reparation efforts.

Youth Court mediation in Fairbanks, for example, and the Circle Peacemaking program in Kake are Alaska instances of these restorative diversionary programs used in delinquency and criminal matters. Restorative principles can also be infused into standard court procedures themselves. If carefully crafted, court procedures can combine restorative justice principles while simultaneously preserving the individual constitutional rights of defendants. For example, there is ample room for community and victim input when setting conditions of pretrial release and at the sentencing stages of a case. The recent efforts of the Galena District Court to encourage community talking circles that discuss what is needed for healing and accountability and solicit community sentencing recommendations is an example of melding restorative principles into sentencing hearings (see "Community Justice Initiatives in the Galena District Court," p. 6). Thus sentencing becomes more reflective of the approach taken in juvenile cases where goals of rehabilitation and reconciliation are emphasized rather than procedural formalities of the adjudicatory phase of a case. Finally, restorative processes can also be used as a part of probation or incarceration. Programs such as the Sycamore Tree Project in the United Kingdom and Australia, where prisoners meet with victims and their families, are an example.

Again, how restorative a particular

practice is depends on its ability to meet the overall objectives of restorative justice. Some are more restorative than others in considering and meeting victim, offender, and community needs. Government agencies and the communities they serve should explore and develop options together.

Restorative Processes in Rural Alaska

Rural Alaska is fertile soil for implementing restorative processes. First, rural Alaska is filled with individuals, Native and non-Native alike, who recognize their dependence on one another and value community harmony. These residents may be isolated from urban populations, but they are not isolated from each other in their respective communities. Many communities consist of a web of people bonded by blood relations or marriage. The need for harmony, restoration, and healing is great because many crimes involve persons who will continue to be in close proximity and association with each other. These close relations often make the collateral impacts of crime more pronounced. When someone is victimized or punished their loss is felt by the collective community. It is not like Fairbanks, Anchorage, Juneau, or other urban areas, where many residents are only exposed to the community's crime through the news media. Additionally, rural Alaska is filled with people who culturally relate better to peacemaking approaches. Peacemaking is emphasized as a justice response in many indigenous cultures. The goal is to return parties to cooperative coexistence and interpersonal harmony. For example, circle peacemaking practices are being practiced in several tribal courts throughout Alaska, First Nations communities in Canada, and in the Navajo Nation of Arizona.

Second, rural communities have little opportunity to view, understand, or participate in many court procedures. Rural Alaskans deserve and need an opportunity to participate in self-governing processes like dispute resolution. Lack of familiarity, due in part to cultural and physical barriers to ready participation, can lead to feelings of mistrust and vulnerability regarding the operations of the Alaska Court System and other justice agencies. This is compounded by the use of proceedings that are not culturally relevant to much of the Alaska Native population. In 2012, the Alaska Rural Justice and Law Enforcement Commission stressed in their report to Congress and the Alaska State Legislature the message they had heard during public testimony: "Public testimony impressed upon [the Commission] the importance, and success, of *locally driven* approaches that respond to the immediate and cultural needs of communities. Citing

its congressional mandate, the Commission asserted that the state judicial system does not have a sufficient profile in rural Alaska communities" (emphasis in original). The Commission also noted that "[a]t the same time, state-tribal jurisdictional conflicts and state policies have often prevented tribal courts from filling this tremendous void." This conclusion was echoed in the recent findings of the Indian Law and Order Commission provided to President Obama and Congress in 2013.

Many rural Alaska communities are more difficult to access and lack social and justice services available in the more accessible regions of the state. While accepting this reality, it is imperative we not become complacent regarding the need for law, order, and justice in these areas. The state and federal governments can do more to reasonably meet these community justice needs by adopting practices that partner with and utilize healthy localized social control mechanisms. Government agencies can also adjust their own practices to build community capacity to heal and control future crime. Justice delivery must not isolate the remote segments of the population from meaningful involvement, and must harness local resources to prove effective.

Conclusion

The Alaska Court System is taking significant steps to increase the involvement of local communities and the use of restorative justice programs in its cases. The Alaska Supreme Court adopted rules changes effective April 15, 2014 to formally authorize referrals to restorative justice programs, such as circle sentencing, in criminal and delinquency cases. (See "Restorative Justice Programs and Sentencing," p. 4.)

The demographics of rural Alaska and its residents suggest restorative justice processes will help increase local participation in dispute resolution and crime prevention, provide a justice focus that is less adversarial, and better meet small community needs and cultural preferences for reconciliation. These processes could empower rural areas to partner with state agencies in implementing strategies directed by the challenges they face. The adoption of practices that emphasize community, victim, and offender needs through direct involvement of these parties increases the likelihood that obligations imposed on defendants are culturally relevant, and directed at repairing the damage caused to those most impacted by harmful behavior.

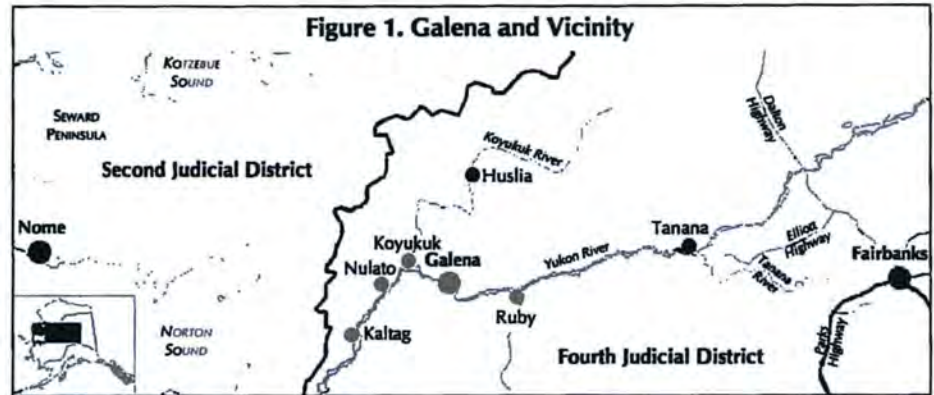
Jeff D. May is an associate professor with the Department of Justice, University of Alaska Fairbanks.

Community Justice Initiatives in the Galena District Court

Jeff D. May

The Galena District Court has been working closely with interested agencies and communities in the Fourth Judicial District to better connect the Alaska Court System and other justice system agencies to the rural villages they serve. This effort to bring court to the people has resulted in more frequent village-centered hearings in this region. It has also led to a practice of incorporating community recommendations into criminal sentences. Increasing village involvement is seen as an important factor in developing workable solutions and meeting the needs of remote residents.

Of late, the goal of improving justice delivery in rural Alaska has come into sharper focus. Reports generated by the Alaska Rural Justice and Law Enforcement Commission and the Indian Law and Order Commission, as well as commentary from the 2012 and 2013 Alaska State Court System's State of the Judiciary addresses have highlighted past practices, current needs, and recommended future direction. The Alaska Rural Justice and Law Enforcement Commission, established by Congress in 2004, has concluded that as government agencies work more closely with local



communities, the likelihood of developing publicly accepted and culturally relevant practices and outcomes will increase. The Galena District Court's community outreach efforts are a testament to this conclusion. This article describes this collaborative effort developing in the Yukon/Koyukuk region of the Fourth Judicial District aimed at increasing access to, understanding of, and community participation in criminal matters affecting remote villages. (See Figure 1.) The Galena magistrate judge, public defenders, and district attorneys serving this region, and others have joined with remote

communities to infuse local knowledge and participation into state court proceedings to help ensure relevant information necessary for successful remedies is available. A climate of cooperation and open dialogue that did not previously exist is growing between these predominantly Alaska Native communities, justice officials, and other concerned groups.

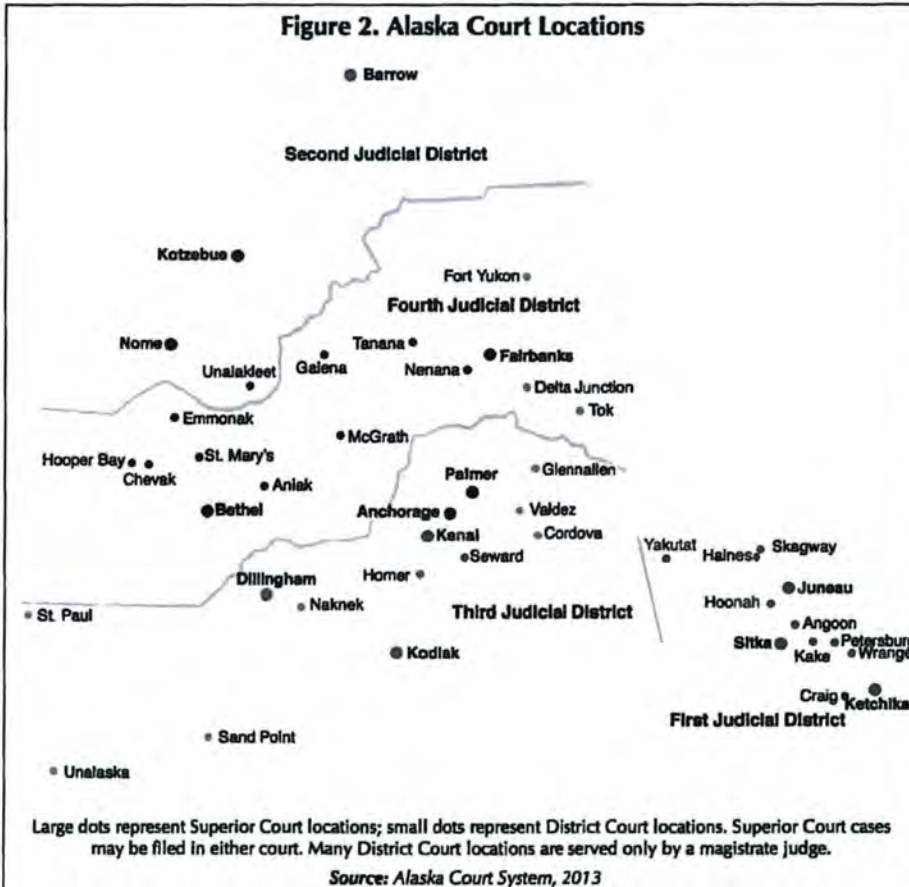
Community Involvement

Alaska's government and legal process are designed to serve its citizens, and various procedures—from jury service to voting on retention of judges to the public election of lawmakers—demonstrate efforts to connect the public with its governing processes. For many, the opportunity to view the judicial process in action is as simple as driving across town to the local courthouse. For citizens in distant remote communities that ability is far more limited. (See Figure 2.)

Misdemeanor crimes occurring in rural areas are addressed in hub communities such as Galena, Tok, and Dillingham by magistrate judges. Felony offenses are addressed by superior court judges, predominately situated in larger urban centers. For many villages all court proceedings occur in distant settings, and little is known about how a particular incident actually impacted individual victims and the community. In some villages these impacts can be dramatic and affect a large percentage of the community. Similarly, often little is known about the defendant, the defendant's role in the community, the circumstances which may have led to the criminal behavior, or community resources available to assist the individual.

Alaska's sentencing guidelines require thoughtful consideration of victim, offender, and community interests when crafting sentences aimed at addressing their respective needs. Alaska Statute 12.55.005, referred to as the "Chaney criteria" because the in-

Figure 2. Alaska Court Locations



formation was first articulated by the Alaska Supreme Court in *State v. Chaney*, 477 P.2d 441 (Alaska 1970), reads in part:

In imposing sentence, the court shall consider

- (1) the seriousness of the defendant's present offense in relation to other offenses;
- (2) the prior criminal history of the defendant and the likelihood of rehabilitation;
- (3) the need to confine the defendant to prevent further harm to the public;
- (4) the circumstances of the offense and the extent to which the offense harmed the victim or endangered the public safety or order;
- (5) the effect of the sentence to be imposed in deterring the defendant or other members of society from future criminal conduct;
- (6) the effect of the sentence to be imposed as a community condemnation of the criminal act and as a reaffirmation of societal norms; and
- (7) the restoration of the victim and the community.

Much of this information is only available if victims, offenders, and their affected communities have the opportunity to voice their feelings and concerns in a safe and culturally relevant atmosphere. Currently, some of this information comes into sentencing hearings by way of presentence investigation reports, written or oral statements by victims, and recommendations by the prosecutor and defense attorney. Often, this information is missing entirely. Presentence investigation reports, only prepared in felony cases and largely through document searches and phone calls made by distant probation departments, rarely contain the depth of information necessary for effective sentencing in rural cases. Even the attorneys struggle to obtain this detailed information. For example, the likelihood of an offender's rehabilitation is affected by many more variables than just prior criminal history. The community can assist in supplying answers to many questions integral to sentencing decisions, such as: resources that have been provided in the past, resources available in the defendant's community, existing family and community support, employment opportunities, the defendant's skills and education, and other factors that correlate with rehabilitation and the prevention of recidivism.

Similarly, the specific impacts of crime on a particular village are not generally known to prosecutors and judges living in distant communities. The community

often better understands the risk potential a defendant poses, the impacts on crime victims, and a sense of what is needed to regain harmony in the community. Yet, missing from most hearings is the voice of the community regarding their view of the offense, its causes and consequences, and suggestions regarding communal condemnation and/or hope for restoration. In short, much of the information needed under the *Chaney* sentencing criteria is in the hands of the various community members of these remote communities.

Along with current practices, the Alaska Court System can more fully seek this information by involving and asking communities about their concerns, needs, and recommendations. So long as constitutional guarantees of defendants and the statutory rights of victims are provided, community input furthers legitimate interests of the State and the individual communities. Alaska's sentencing statutes and court rules provide avenues for community input and participation. This input and participation can come in the form of community-generated sentencing recommendations, participation in a community-oriented restorative justice program, or even through submission of a negotiated agreement presented to the sentencing judge pursuant to the terms of AS 12.55.011 (adopted in 2000).

The Alaska Legislature sanctioned greater community and victim involvement in Alaska Statute 12.55.011, which provides statutory authorization for judges to accepted negotiated sentencing agreements in specified crimes. Alaska Statute 12.55.011 allows judges to adopt voluntarily negotiated sentencing agreements between victims, offenders, and their communities in prescribed cases when those agreements do not violate other mandatory sentencing provisions. Before accepting a negotiated agreement, the court must ensure the agreement was not coerced, but if voluntary, this statute provides room for restorative processes such as victim-offender mediation, group conferences, and community circles which culminate in a negotiated/consensus agreement that the court adopts.

Alaska Court System practice and newly adopted rules are also creating more opportunity for community and victim involvement. Several courts in the Alaska Court System, together with local justice system participants, have been creatively involving local communities and using restorative justice programs in conjunction with sentencings. The Supreme Court amended Criminal Rule 11 and Delinquency Rules 21 and 23, effective April 15, 2014, to formally authorize referrals to restorative justice programs,

such as circle sentencing, in criminal and delinquency cases. (See "Restorative Justice Programs and Sentencing," page 4.) The rule change is based on recommendations that were developed by the Local Dispute Resolution Subcommittee of the Fairness, Diversity, and Equality Committee. It is intended to support current practice as it has evolved over the years, and to protect the integrity of restorative justice proceedings and the neutral role of the Alaska Court System's judicial officers.

Criminal Rule 11 and the sentencing directives from the Legislature in AS 12.55.005 and AS 12.55.011 allow the courts to ensure victims and communities have the opportunity for appropriate amounts of input and involvement that do not violate the constitutional rights of defendants and the statutory rights of victims.

Restorative Community Outreach in the Yukon-Koyukuk Region

One of the more recent restorative community outreach efforts underway in Alaska is occurring in the Fourth Judicial District, predominately through the efforts of Galena's magistrate judge. Magistrate Judge Chris McLain has garnered the help and insight of local village leadership; court system presiding judicial officials; the Tanana Chiefs Conference (TCC), a tribal nonprofit organization representing the interests of 42 tribal groups in Interior Alaska; attorneys within the local District Attorney Office and Public Defender Agency assigned to the Galena region; and faculty of the University of Alaska Fairbanks to create and implement court practices that better serve the needs of remote villages of the Yukon-Koyukuk region. While not the only example of community outreach and restorative justice philosophy applied to the rural setting, this collaborative effort is gaining exposure, and presents a potential shift in the Fourth Judicial District towards more localized involvement in rural cases.

Galena is a lower Yukon River community in Interior Alaska of about 500 residents and serves as the District Court site for several surrounding villages (Figure 1 and Table 1). These other villages include Ruby, Kaltag, Nulato, Koyukuk, Tanana, and Huslia. (Note: Tanana is now served by the Nenana magistrate judge.) Each village is similar in that all are very small, none have road access, and all are predominately Alaska Native. Many of these remote residents have close ties to a traditional Athabascan lifestyle. Each village has an active tribal government, but few state-operated social

Galena

(continued from page 7)

and justice services are readily available. In these villages law enforcement presence is limited, there are no practicing attorneys, and court participation either occurs in person at Fairbanks or Galena or telephonically to these locations.

In 2009, after his first year in service, Magistrate Judge McLain expressed concern about the effectiveness of court procedures and how the court was perceived by residents in this area. These concerns arose from a palpable sense of mistrust between

community members and the court system, a generalized lack of understanding of how the court system operated, and an alarming realization that conditions of release or probation did not account for the realities of village life. Magistrate Judge McLain began exploring what could be done to address these concerns.

Discussions with local mental health and substance abuse counselors, who are provided by Tanana Chiefs Conference, revealed that few treatment services were readily available to defendants, and some court-imposed release conditions were impossible to comply with in the villages.

It was also difficult for villages outside of Galena to be aware of or participate in court hearings impacting their people. Magistrate Judge McLain and long-time Galena clerk of court Pam Pitka began discussing how to make court processes better address these needs. They concluded the communities needed to have ownership and input in the decisions that would impact them so as to remove mystery and gossip about the Alaska Court System. Magistrate Judge McLain and his clerk believed it would be beneficial to hold some court proceedings and community "talking circles" away from the Galena courthouse in the actual

Table 1. Community Characteristics

Community	Population	Percent American Indian/Alaska Native	Local Municipal government	Local tribal government	Local law enforcement ^a	Alaska Court System location	Local practicing attorneys	Local probation/parole officers ^b	Local treatment services ^c
Galena	470	64%	City of Galena (1st class city)	Village of Galena (federally recognized tribe)	Yes — two Alaska State Troopers (one assigned to fish and game regulation); one municipal police officer	Yes — District Court	No	No	Local substance abuse counselors employed by Tanana Chiefs Conference (TCC) offer substance abuse and mental health services
Huslia	275	92%	City of Huslia (2nd class city)	Huslia Village (federally recognized tribe)	Yes — Village Public Safety Officer (VPSO)	No	No	No	Counseling services provided by Galena-based TCC counselor during monthly visits
Kaltag	190	92%	City of Kaltag (2nd class city)	Village of Kaltag (federally recognized tribe)	No	No	No	No	Substance abuse and mental health counselor employed by TCC
Koyukuk	96	97%	City of Koyukuk (2nd class city)	Koyukuk Native Village (federally recognized tribe)	No	No	No	No	Counseling services provided by Galena-based TCC counselor during monthly visits
Nulato	264	94%	City of Nulato (2nd class city)	Nulato Village (federally recognized tribe)	Yes — Village Public Safety Officer (VPSO), but position vacant	No	No	No	Substance abuse and mental health counseling services provided by Kaltag-based TCC counselor during monthly visits; Behavioral Health Aide
Ruby	166	89%	City of Ruby (2nd class city)	Native Village of Ruby (federally recognized tribe)	No	No	No	No	Substance abuse and mental health counseling services provided by Galena-based TCC counselors during monthly visits
Tanana	246	87%	City of Tanana (1st class city)	Native Village of Tanana (federally recognized tribe)	No	Court location closed effective July 15, 2014	No	No	Tribal Health Office; counseling services provided by counselors from Fairbanks during monthly visits

a. As of the writing of this article, there was no VPSO listed as currently serving in Kaltag, Koyukuk, Ruby, or Tanana. The VPSO formerly serving in Tanana was recently transferred to Fairbanks to serve as a designated regional VPSO rover.

b. Probation/parole is a unified system in Alaska. VSPOs are trained to act as agents for probation/parole officers. Probation/parole officers attempt to visit villages in which probationers/parolees reside at least twice per year. Alaska State Troopers often volunteer to meet with probationers/parolees when conducting routine business in villages.

c. These and other service positions are subject to change over time.

Sources of data: Alaska State Troopers, Active VPSO by Village (updated September 2014), <http://www.dps.state.ak.us/ast/vpsol/docs/OversightListing.pdf>; Alaska State Troopers Statewide VPSO Coordinator; Tanana Chiefs Conference VPSO Coordinator; Alaska Department of Corrections, Fairbanks District Supervisor, Probation and Parole; Alaska Department of Commerce, Community, and Economic Development, Community Information, <http://commerce.alaska.gov/cra/DCRAExternal/community>

villages where crimes were occurring. This would serve two purposes. Local residents could see how court is conducted, and the court could use the talking circle to inquire about general justice needs and concerns in these more remote villages. The talking circle format would provide a culturally significant way for the court to communicate with the villages and open the doors of communication in a respectful way. Magistrate Judge McLain explained: "You need to see and understand the villages one serves. You have to understand them to craft solutions that will work there. Going there shows respect."

These outreach trips began in 2010 with Magistrate Judge McLain being accompanied by the Fairbanks district attorney and the public defender assigned to the region. Court hearings and talking circles were conducted in Nulato, Huslia, and Tanana. The hearings were held in the village tribal halls with permission and support from the community, and after each hearing a general talking circle was held with community members and leaders. Out of these community discussions came a universal concern that village members did not understand court processes, desired greater understanding of the state justice system, and wanted to be involved in the decisions that impact their communities. The communities expressed their desire to work with the State in addressing criminal matters rather than a desire for the State to stay out of these community concerns. Magistrate Judge McLain began to see how important it was to adjust the way the Alaska Court System operated in this area rather than just exploring diversionary options wherein certain matters could be shifted from the court to the local communities. Diversion of matters away from the court would not likely address deficiencies in court procedures nor overcome the sense of mistrust and mystery present. Magistrate Judge McLain believed changing the way the District Court actually operated in these villages was necessary and felt that incorporating community recommendations into court proceedings would allow the judge to be privy to important information regarding victim, community, and offender needs and allow communities to play a more active and informed role in the process. Community members would then become active participants and partners in effectively addressing crime.

Tanana Chiefs Conference (TCC) and the University of Alaska Fairbanks Department of Justice have also become partners with Magistrate Judge McLain in these outreach efforts. Lisa Jaeger, TCC Tribal Government Specialist, has been instrumental in

arranging visits to Galena region villages and facilitating community circles.

Using Talking Circles to Generate Community Recommendations

Several changes to court practices have emerged as these village trips have continued, but perhaps the most talked about has been the use of *circle sentencing*—a community talking circle—as part of a sentencing hearing, used to develop community recommendations for the sentencing judge. Magistrate Judge McLain and others believed that the use of talking circles and the input they generate would increase the effectiveness of imposed sanctions and the ability for communities to heal themselves. After exploring Alaska's statutory law and criminal procedures, it was determined that this information was vital to give true effect to the *Chaney* criteria, and the circle process could be implemented as part of a sentencing hearing in ways consistent with the constitutional rights of individual defendants. While community participation and input is deemed important, it has not replaced the role of a neutral and impartial judge with final sentencing authority. Rather, as currently practiced in this region, the judge considers the community's recommendations along with input from the attorneys involved, the defendant, and even the victim as is required under our current sentencing statutes. Ultimately, the judge reflects upon all the information provided to tailor a sentence that meets the Legislature's various sentencing goals.

At these village sentencing hearings it has been readily apparent how willing the judges are to incorporate community recommendations. The recommendations make sense, and account for the realities of village life. Yet not all recommendations have been adopted, which attests to the final role the judge retains. Community recommendations reflect what is important to the actual victims, offenders, and community members. To date, this type of sentencing hearing has been used in Tanana, Nulato, Galena, Kaltag, and Huslia. Other villages from this region and other regions of the state have expressed their desire and preference for this type of process. Magistrate Judge McLain, District Court Judge Jane Kauvar (now on the Superior Court in Fairbanks), and Superior Court Judge Paul Lyle have all conducted a circle sentencing-style proceeding.

These village sentencing hearings are currently initiated by a request from the defendant, after the defense attorney and the prosecutor have discussed the nature of the case and jointly determined that the

facts of the case present a situation where community input is desirable either because of defendant, victim, or community needs. Once the attorneys have made the formal request for a local hearing, the court coordinates a scheduling conference, usually as part of its monthly calendar call where a representative of the affected community, the circle facilitator, and the involved attorneys discuss and arrange for the village trip. This includes discussing travel arrangements, securing a location for the hearing, making lodging accommodations if the trip involves spending the night, and other preliminary matters. Court hearings have been held in the community tribal halls and the court brings its mobile recording equipment. The hall is set up to accommodate a court hearing where the judge and clerk are positioned at a table in front of the room, each attorney has a small table to sit at, and the community observers are seated on chairs or benches behind the attorneys.

When the hearing begins, the judge explains the nature of the offense and brief case history leading up to the sentencing. The judge explains the purpose of sentencing in light of the *Chaney* criteria, describes any statutory sentencing obligations specific to that offense, and requests that the community meet with the appointed circle facilitator to discuss and develop a recommendation that includes information pertinent to the needs of the victim, offender, and community. (In the first few sentencing hearings, Tanana Chiefs Conference Tribal Government Specialist, Lisa Jaeger, acted as the circle facilitator. In later hearings Ms. Jaeger assisted a community member selected to act as the facilitator.) After this explanatory session, the judge then takes a recess while those interested, including the attorneys, victims, and the defendant gather in a talking circle to discuss how this particular offense came to be, the impacts it has had, and what can be done to appropriately remedy the situation. The facilitator helps guide this discussion by identifying harms and needs as part of the process of developing a consensus recommendation for the judge. All in the circle have a chance to participate, but are not required to do so. Circles have lasted from one to several hours in length.

Once a recommendation is formed, the judge is notified and returns, and the hearing continues. The judge asks for a community representative, usually the circle facilitator, to present the community recommendation for the record. The attorneys are then asked whether they have any specific objections or concerns about what has been presented and each attorney has the opportunity to

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Galena

(continued from page 9)

provide recommendations. The defendant is given the final opportunity to address the court, and then the judge normally takes a brief recess to consider this information and formulate the official sentence.

The benefit of these hearings extends beyond any one victim or defendant. Community residents of all ages are witnessing the court system in practice. For some communities, this is the first time state court has ever occurred at their location. Residents have the opportunity to better understand the criminal laws, what governs judges' decisions, and the role of attorneys in the process, and are given the opportunity to assist in matters of community importance. There have been numerous examples of growing trust and respect between these communities and the Alaska Court System. One occurred in

the village of Huslia when a village leader invited the district attorney to close the circle in a blessing—something typically reserved to community Elders. Another occurred at the 2012 Tanana Chiefs Conference Tribal Court Development conference. State justice officials were invited to attend, and village leaders from Nulato and Tanana publicly and sincerely, but with a healthy dose of Athabascan humor, expressed gratitude for the justice officials that have come to their villages. Magistrate Judge McLain attests to the changes in attitude he has witnessed and believes that attorneys are more inclined to better serve these village people because they have put faces to the names. According to Magistrate Judge McLain, this has provided "a window into the lives of Bush residents," and the feelings of many in rural Alaska who view the judicial system as racist are being replaced with trust and respect. He notes, "[t]his is bigger than just changing processes. It

allows for state laws that apply to all our citizenry to be applied in a way that makes sense in our unique village life."

Conclusion

Community and government leaders understand the importance of this work and the need to capitalize on our collective resources. In the 2012 State of the Judiciary address then Alaska Supreme Court Chief Justice Walter Carpeneti spoke about the growing trend both in Alaska and nationally to try to stop the "rampaging" prison growth and reduce spiraling recidivism rates by applying "smart justice" concepts. He defined *smart justice* as "weighing—in every criminal case—the likely effectiveness of the actions we take. Further, it means considering the costs of these actions—to our resources, to public safety, and to the collective potential of our citizens." Recognizing that rehabilitative and reentry services are few and far between in many predominantly

Table 2. Summary of Village Sentencing Hearings, 2010–2013

Case 1	Case 3
<p>Offenses Involved: DUI (AS 28.35.030(a)(2); 2 counts Misconduct Involving Weapons in Fourth Degree (AS 11.61.210(a)(1) – possession while intoxicated); Petition to Revoke Probation (PTR) for new criminal charge</p> <p>Location of Offense: Village</p> <p>Manner of conviction: Rule 11 Guilty Plea subject to open sentencing and agreement to dismiss DUI charge and one count of weapons misconduct</p> <p>Location of sentencing: Village (telephonic, as defendant and attorneys located in Fairbanks)</p> <p>Community recommendations: The community met prior to the sentencing and generated recommendations to offer at the sentencing hearing. Recommendations included ordering the defendant to earn GED while serving jail time. Additionally community announced plans to keep in contact and offer support and encouragement to defendant while incarcerated.</p> <p>Sentence imposed: Magistrate imposed 100 days incarceration (revoked PTR jail time included with jail for additional cases); recommended community's recommendations to defendant with community action plan; unsupervised probation for two years.</p>	<p>Offense(s) involved: Multiple counts of Minor in Possession (AS 4.16.050(d) – habitual); multiple counts of Petition to Revoke Probation (PTR) based on new criminal charges</p> <p>Location of offense(s): Village</p> <p>Manner of conviction: Rule 11 Guilty Plea subject to open sentencing</p> <p>Location of sentencing: Village</p> <p>Community recommendations: Recommendations generated through community talking circle and then read into the record by community representative; community recommended community work service (CWS)—with specific ideas on how the CWS could be done (working with youth, teaching dog sledding, preparing youth for races, attending a follow up circle in one month, keep a journal, work with elders, talk to youth about alcohol, attend alcohol free events), monitored, and reported; recommended getting an alcohol assessment and getting treatment immediately; imposing a no alcohol requirement, and requiring defendant to stay in village to do CWS.</p> <p>Sentence Imposed: The magistrate imposed 30 days incarceration with all 30 suspended; ordered 96 hours of CWS to be completed within six months, recommending the CWS plan proposed by community; unsupervised probation for 732 days.</p>
Case 2	Case 4
<p>Offense(s) involved: Assault in the Fourth Degree – Reckless injury to another (AS 11.41.230(a)(1)); Petition to Revoke Probation (PTR) – New criminal charge.</p> <p>Location of offense: Village</p> <p>Manner of conviction: Criminal Rule 11 Guilty Plea subject to open sentencing on one count of Assault IV and one count of PTR</p> <p>Location of sentencing: Village</p> <p>Community recommendations: The victim was in attendance but chose not to make a statement; two community representatives testified under oath at the hearing. The first encouraged a sentence that would include counseling and a requirement to better self by learning trades needed in village such as plumbing and electrical work. The other community representative testified about battle the community is having with alcohol, emphasizing the role alcohol is playing in the crime in the village. Additionally, the court met with community afterwards for a general talking circle about community justice concerns.</p> <p>Sentence imposed: Defendant had multiple prior assault convictions; for the PTR charge 60 days incarceration, pay suspended surcharge of \$100, and terms of probation stay in effect. For the Assault IV charge, ordered to serve 120 days in jail and pay \$50 police surcharge and \$50 correctional facility surcharge. Additional recommendations included performing Community Work Service, obtaining vocational training and substance abuse treatment.</p>	<p>Offense(s) involved: Misconduct Involving a Weapon in the 2nd Degree (AS 11.61.195(a)(3)(A) – firing gun at building) (later amended to Weapons Misconduct in 4th Degree (AS 11.61.210(a)(1) – possession while intoxicated)</p> <p>Location of offense(s): Village</p> <p>Manner of conviction: Rule 11 Guilty Plea subject to open sentencing</p> <p>Location of sentencing: Village</p> <p>Community recommendations: Recommendations generated through community talking circle and then read into the record by community representative; recommended no jail time because defendant needed for services provided to the community; recommended working with youth in teaching subsistence skills; recommended CWS, with particular emphasis on serving elders and working with the youth; recommended no possession of alcohol.</p> <p>Sentence Imposed: The judge imposed 222 days incarceration with 182 suspended—the remaining days could be substituted by completing 320 hours of community work service (CWS) to the community based on the community's recommendations (CSW to be reported to and monitored by the Tribal Council); imposed unsupervised probation for 912 days with specific conditions such as no alcohol; suspended jail surcharge.</p>

Note: The offenses noted all took place in one or more of the following locations: Fairbanks, Galena, Huslia, Kaltag, Nulato, or Tanana. Sentencing in all cases was conducted in the village in which the offense occurred. The information regarding sentencing presented here was collected from public records including CourtView and log notes and/or recordings of the hearings.

Native communities, Chief Justice Carpeneti lauded efforts in the Galena region to engage village residents more directly in the cases that affect them. In his words, "The benefit of having the court system operate in a village goes far beyond the outcome of an individual case. Visits have helped foster mutual respect among the state, local, and tribal leaders involved in justice delivery, and have helped build greater community trust and confidence in the ability of our justice system to serve rural areas fairly and adequately."

Adding to then Chief Justice Carpeneti's comments, current Chief Justice Dana Fabe in her 2013 State of the Judiciary address noted:

Every study or survey of rural justice over the past two decades has acknowledged the unique and compelling justice needs of Alaska's small and isolated

villages.... Consistent among their recommendations is a theme heard with increasing urgency: the need for greater opportunities for local community leaders and organizations to engage in justice delivery at the local level. Quite simply, for courts to effectively serve the needs of rural residents, justice cannot be something delivered in a far-off court by strangers, but something in which local people—those most intimately affected—can be directly and meaningfully involved.

The changes that have been occurring are relatively new, and more time is needed to determine the effects on crime rates, recidivism rates, and community stability. Yet, the forecast looks optimistic and many have stepped forward voicing satisfaction and support for these changes. The Galena District Court has provided a contemporary

example of local engagement in our most rural communities. Tribal leaders and community members appreciate being involved in the process, and judicial decisions are more reflective of the actual needs of victims, defendants, and the community. The people of rural Alaska play very important roles in their communities. Not only are they mothers and fathers, brothers and sisters, grandpas and grandmas, aunts and uncles, they are also tribal court judges, village tribal chiefs, community Elders, and concerned and loving community members. It is their unique roles that make a consensus village community recommendation so important to a state judicial officer facing decisions regarding pretrial release, probation conditions, and appropriate sentences.

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Table 2. Summary of Village Sentencing Hearings, 2010–2013 (continued)

Case 5	Case 7
<p>Offense(s) involved: Multiple counts of Contributing to the Delinquency of a Minor (AS 11.51.130(a)(1))</p> <p>Location of offense(s): Village</p> <p>Manner of conviction: Rule 11 Guilty Plea</p> <p>Location of sentencing: Village</p> <p>Community recommendations: No specific recommendations; court met with community afterwards for a general talking circle about community justice concerns.</p> <p>Sentence imposed: Three counts dismissed by prosecutor; sentencing was on one count of AS 11.51.130(a)(1) and included a suspended imposition of sentence and one year unsupervised probation with some specific probation requirements and recommendations, one of which was 80 hours of community work service (CWS).</p>	<p>Offenses Involved: Two counts of Assault IV (AS 11.41.230(a)(1)- causing reckless injury</p> <p>Location of offense(s): Village</p> <p>Manner of conviction: Rule 11 Guilty Plea subject to open sentencing and agreement to dismiss case</p> <p>Location of sentencing: Village</p> <p>Community recommendations: Recommendations generated through community talking circle and then read into the record by community representative; community recommended no jail time, provide community service work, attend counseling to work on relationship with family with local Tanana Chiefs Conference counselor</p> <p>Sentence imposed: In this case (Assault IV), the court imposed 90 days jail, with 60 suspended, remaining 30 days to be treated as follows: 3 days good time credit, 15 days suspended, 12 days can be replaced with 96 CWS hours done in community (specifically recommending part of time spent serving in community wood lot with his family); full contact with victim allowed with encouragement to mend family relationships; two years of probation with requirements of no alcohol and gaining alcohol assessment and complying with recommendations.</p>
Case 6	Case 8
<p>Offense(s) involved: Assault in the Third Degree (AS 11.41.220(a)(1)(A) – cause fear of injury with weapon; (later amended to Assault in the Fourth Degree (AS 11.41.230(a)(3) – causing fear of injury; Leaving the Scene of an Accident (AS 28.35.060(b)); Failure to Provide Immediate Notice of Accident (AS 28.35.080)</p> <p>Location of offense(s): Village</p> <p>Manner of conviction: Rule 11 Guilty Plea subject to open sentencing (DA dismissed charges for leaving the accident and failing to notify of accident.)</p> <p>Location of sentencing: Village</p> <p>Community recommendations: Recommendations generated through community talking circle and then read into the record by community representative; recommended community work service (CWS) projects in village (particularly assisting local culture camp for kids); obtain alcohol assessment and follow recommendations; attend family alcohol treatment; probation imposed with no alcohol conditions; the community felt jail time would not help and the defendant would benefit more from working with people; no fines.</p> <p>Sentence imposed: The magistrate imposed 60 days of incarceration with 40 suspended (125 hours of CWS may substitute for 20 days in jail); magistrate recommended defendant work with community on the culture camp; imposed two years unsupervised probation with no alcohol condition and requirement to submit to preliminary breath test (PBT) with reasonable suspicion of alcohol consumption; receive alcohol screening and counseling within 30 days and comply with recommendations (including 60 days inpatient treatment); surcharges imposed; while not all ordered, the magistrate recommended following the precise recommendations of the community as a roadmap of how to move forward.</p>	<p>Offense(s) Involved: Assault IV (AS 11.41.230(a)(3)) – cause fear of injury; two counts of Petition to Revoke Probation (PTR) for new criminal charges</p> <p>Location of offense(s): Village</p> <p>Manner of conviction: Rule 11 Guilty Plea subject to open sentencing and agreement to dismiss case</p> <p>Location of sentencing: Village</p> <p>Community recommendations: Recommendations generated through community talking circle and then read into the record by community representative; recommendations included performing community work service (CWS), obtaining alcohol assessment and order to follow prescribed treatment plan, and strong encouragement to work (as a family) with the local Tanana Chiefs Conference substance abuse counselor in the village.</p> <p>Sentence imposed: For Assault IV charge the magistrate imposed 180 days incarceration, 150 suspended and credit for time served; obtain alcohol assessment and follow recommendations; attend anger counseling; probation for two years with conditions of no alcohol and must obey all laws. For probation violation charges the magistrate imposed 10 days incarceration for first count and 30 days for second count with credit for time already served; must do 240 hours CWS within two years; suspended surcharges imposed; strongly encouraged to engage in counseling services with local counselor with entire family.</p>
<p><i>Note: The offenses noted all took place in one or more of the following locations: Fairbanks, Galena, Huslia, Kaltag, Nulato, or Tanana. Sentencing in all cases was conducted in the village in which the offense occurred. The information regarding sentencing presented here was collected from public records including CourtView and log notes and/or recordings of the hearings.</i></p>	

Key Acts and Cases for Alaska Tribal Court Jurisdiction

Ryan Fortson

Alaska Native Claims Settlement Act (ANCSA) (1971). ANCSA resolved the outstanding land claims of Alaska Natives through Congressional action. Prior to ANCSA, Alaska Natives held what is known as *aboriginal title* to land in Alaska. Through a series of United States Supreme Court cases dating back to 1823, *aboriginal title* was held to mean that Native American tribes were domestic dependent nations that had a right to occupy lands they had traditionally used but not to sell this land. This doctrine was later applied by the U.S. Supreme Court to Alaska Natives. In the face of confusion over the exact nature of Alaska Native rights to land, ANCSA explicitly extinguished all claims to *aboriginal title* by Alaska Natives. In exchange, a combination of Alaska Native village and regional corporations received \$962.5 million and the right to select 45.7 million acres of land.

Indian Child Welfare Act (ICWA) (1978). ICWA was passed by Congress to counteract a long history of Indian children being taken from their homes and being placed for foster care or adoption with non-Indian families. ICWA contains several provisions aimed at preserving Indian families. It is important to note that ICWA only applies to foster care and termination of parental rights proceedings and not to custody disputes between parents. ICWA sets heightened evidentiary standards for removing Indian children from their families. If children are removed, there are "placement preferences" that require, absent good cause to the contrary, that Indian children be placed with members of their extended family or with other Indian families. Tribes have exclusive jurisdiction over foster placement and termination proceedings for children that reside on reservations, but even for Indian children who do not live on a reservation, foster placement and termination proceedings can be transferred to tribal court provided that the parents do not object to the transfer. Federal and state courts are required to recognize tribal court decisions. Moreover, if a foster placement or termination proceeding does take place in state court, the Indian child's tribe must be allowed to intervene in the proceeding.

Native Village of Nenana v. State of Alaska, 722 P.2d 219 (Alaska 1986). A tribe sought in Alaska state court to transfer to tribal court a petition to declare an Indian child to be in need of foster care services. The State fought the transfer and prevailed, with the Court holding that the Native Village of Nenana was not a federally

recognized tribe, that it had not attempted to reassume jurisdiction under the procedures set out in ICWA, and that federal law granted Alaska exclusive jurisdiction over custody matters involving Indian children.

Native Village of Venetie I.R.A. Council v. State of Alaska, 944 F.2d 548 (9th Cir. 1991). In this case, two village councils and two individuals who had adopted children through tribal courts sued the State for refusing to recognize the legal validity of tribal court adoptions by denying the adoptive parents public assistance that they otherwise would have been able to receive. The State contended that tribal court jurisdiction had been removed by a federal law that pre-dated ICWA and which in general granted jurisdiction over civil matters in certain specified states, including Alaska, to the state governments. The court held that ICWA still allowed tribal courts to have concurrent jurisdiction with state courts over the types of cases covered by ICWA. In reaching this conclusion, the court held that tribes have inherent sovereignty—meaning that as distinct political communities, tribes can exercise authority over their members unless this authority has been removed by Congress. Because Congress had not removed this authority for Alaska tribes, and in fact had affirmed it through ICWA, tribal courts could grant legally binding adoptions that the State of Alaska must recognize.

Federally Recognized Indian Tribe List Act (1994). One of the issues left unresolved by the *Venetie I.R.A.* case was whether Venetie and Fort Yukon, the two Native villages involved in the case, had sufficient historical connections to recognize them as being inherently sovereign. The history of tribal recognition in Alaska is long and confusing, leading some to argue against the existence of Alaska Native tribes or that any tribes that may have existed were extinguished by ANCSA. The federal legal status of Alaska tribes was clarified in the early 1990s, first with a list put out by the Department of the Interior in 1993 recognizing as tribes the Alaska villages specified in ANCSA, and then the next year with the Federally Recognized Indian Tribe List Act. Initially 226 tribes were recognized, but subsequent amendments have raised this to 230 federally recognized tribes in Alaska. Other than with one exception (the exception being the Metlakatla reservation on Annette Island in far Southeast Alaska), these tribes lack reservation land following the passage of ANCSA.

State of Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520

(1998). This case addressed whether the land selected by Alaska Native corporations through ANCSA constituted *Indian country*. This status is important because tribes can do things in Indian country normally associated with sovereign governments, such as tax business conducted on tribal lands and exercise criminal jurisdiction. Venetie had tried to collect taxes from the State and a private contractor for constructing a school on ANCSA land to which it held title. Relying upon a federal statute, the U.S. Supreme Court held that there were three types of Indian country: (1) reservations; (2) dependent Indian communities; and (3) Native allotments. The land in question was not a reservation because (other than Metlakatla) reservations had explicitly been extinguished by ANCSA. The land clearly did not fit the legal definition of Native allotment land. The Court then did a more detailed analysis of whether the Venetie land was a dependent Indian community and set out two criteria for this type of Indian country: the land must be federally set aside for use by Indians as Indian land, and the land must be under federal superintendence. The Venetie land met neither of these requirements because ANCSA lands were transferred to private ownership by state-regulated corporations and could be sold by the corporation. Thus, the land in question could not be considered Indian country.

John v. Baker, 982 P.2d 738 (Alaska 1999). The seminal case in establishing tribal court jurisdiction over civil matters in Alaska, the Alaska Supreme Court in *John v. Baker* found that a tribe had inherent sovereignty to hear a custody case between tribal members in its courts. The Court made this decision despite the fact that the tribe in question (Northway Village) did not possess what could be classified as Indian country. Rather, the Court determined that due to the central role that membership and regulating domestic relationships among members plays in exercising tribal sovereignty, jurisdiction rested not just with land but could also be derived from a tribe's existence as a federally-recognized sovereign with powers over its tribal members. "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory. Tribes not only enjoy the authority to exercise control within the boundaries of their lands, but they also possess the inherent power of regulating their internal and social relations."

The Court noted that because of the lack of territorial-based jurisdiction, tribal courts in Alaska do not have exclusive jurisdiction

over custody cases and instead have concurrent jurisdiction, meaning that such cases could be started in either tribal or state court. But when a tribal court does issue a custody order, a state court should generally speaking give recognition and legal effect to that decision, a principle known as *comity*. The state court is required to conduct a due process analysis to ensure that the due process rights of the litigants in the tribal courts were protected. As part of its due process analysis, the state court is to look at: (1) whether the parties received notice of the tribal court proceedings; (2) whether the parties were granted "a full and fair opportunity to be heard"; and (3) whether the tribal court judges were impartial and the proceedings conducted in a regular fashion. Tribal court procedures need not be identical to those of state courts, and state court judges should "respect the cultural differences that influence tribal jurisprudence, as well as recognize the practical limits experienced by smaller court systems."

In the Matter of: C.R.H., 29 P.3d 849 (Alaska 2001). This case explicitly overruled the decision in *Nenana v. State of Alaska* by holding that ICWA allows transfer of child custody cases from state to tribal court regardless of whether the tribe had sought to reassume jurisdiction. Per the language of ICWA, state courts should retain jurisdiction if either parent objects to transfer from state to tribal court, the tribe declines the transfer, or the state court finds good cause to deny transfer. Good cause might exist where the state court proceedings are at an advanced stage, the child is over 12 and objects to the transfer, the child is over 5 and has had little contact with the tribe, or transfer would create an undue hardship to the parties or witnesses. Absent a finding of good cause or one of the other reasons for denying transfer, ICWA-related custody cases must be transferred to tribal court.

Kaltag Tribal Council v. Jackson, 344 Fed. Appx 324 (9th Cir. 2009). In response to the decision in *In re C.R.H.*, the Alaska Attorney General in 2004 issued an opinion that state courts continued to exercise exclusive jurisdiction over child custody matters unless the tribe had petitioned the federal government to reassume jurisdiction or the case had been transferred from State court to tribal court. In essence, the opinion directed State administrative agencies not to grant full faith and credit to tribal court decisions in cases that started in tribal court. The Kaltag Tribal Council and two adoptive parents sued the Alaska Department of Health and Social Services and its commissioner for refusing to recognize a tribal court adoption order. The federal district court affirmed that tribal courts had concurrent jurisdiction under ICWA. The State had argued that tribal courts could only accept transfer of cases from state courts, but the federal court held that tribal courts could also initiate ICWA-related custody cases. The

federal court further noted that jurisdiction was based upon tribal membership of the child and not that of the parents. This decision was affirmed by the Ninth Circuit Court of Appeals, which reiterated, citing *Native Village of Venetie I.R.A. Council*, that "[r]eservation status is not a requirement of jurisdiction".

State of Alaska v. Native Village of Tanana, 249 P.3d 734 (Alaska 2011). This case can be thought of as the state court equivalent of *Kaltag Tribal Council*. In *Native Village of Tanana*, the Alaska Supreme Court held that Alaska tribes have the jurisdiction to initiate child custody proceedings and that the resulting tribal court decisions are entitled to full faith and credit by state courts and agencies. Drawing on *John v. Baker*, the Court concluded that tribes still have concurrent jurisdiction over ICWA-defined child custody proceedings independent of the existence of Indian country. Tribal courts retain this inherent sovereignty unless specifically divested of it by Congress. Moreover, neither ANCSA nor the federal law relied upon in *State v. Nenana* divested tribes of their sovereign authority over internal domestic relations among its own members.

McCrary v. Ivanof Bay Village, 265 P.3d 337 (Alaska 2011). McCrary sued Ivanof Bay and its president for a breach of contract. Ivanof Bay contended that because it was a federally recognized tribe, it possessed sovereign immunity against being sued. Relying upon and affirming *John v. Baker*, the Alaska Supreme Court agreed. Despite not having a land-base, Alaska tribes do possess sovereign immunity.

Simmonds v. Parks, 329 P.3d 995 (Alaska 2014). This case arose in Minto Tribal Court involving foster placement of a child (S.P.) who is a member of the tribe through her mother. Based on domestic violence allegations against the father and substance abuse issues with the mother, the tribe took custody of S.P. in 2008 and placed her with a pair of foster parents, the Simmonds. The following year, the Minto Tribal Court sought termination of the parental rights of both parents. At a hearing on terminating his parental rights, Parks purports to have objected to the Minto Tribal Court having jurisdiction to terminate his parental rights because he himself is not a member of the Minto tribe. Parks also asked that his attorney be allowed to argue the jurisdiction issue to the tribal court, but the tribal court refused this by saying that attorneys were not permitted to provide oral argument in their courts. Parks claims that this violated his due process rights. Parks' rights were subsequently terminated by the Minto Tribal Court, and he challenged this decision by filing a case in Alaska Superior Court seeking custody of S.P. The state court found both that the tribal court did not have jurisdiction over Parks and that Parks' due process rights were violated by not being allowed to be represented by an attorney in tribal court.

In a decision issued on July 18, 2014, the

Alaska Supreme Court held that because Mr. Parks failed to appeal the tribal court decision within the Minto tribal court system, he could not bring his case in the State of Alaska court system. Tribal court decisions are due the same respect in this regard as would be decisions from other states. The Supreme Court rejected Mr. Parks' argument that an appeal would have been futile, since the Minto Tribal Court did have an appeals process, including the opportunity for his attorney to submit written briefs, of which he could have availed himself. Because the Supreme Court decided the case on this one narrow issue, it did not definitively decide the jurisdiction and due process arguments raised in the briefs, though the Court did reject the argument by the State that there was no tribal court jurisdiction whatsoever, holding instead that there was a legally credible argument to be made that jurisdiction over termination of parental rights attached to the child and not the child's parents. The full implications of this case are at this point unclear, but at the very least it means that litigants in tribal courts must exhaust the tribal appellate process before bringing the case in state court.

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Current Issues Regarding Alaska Tribal Court Jurisdiction

Ryan Fortson

Alaska Exception to Violence Against Women Act. In 2013, Congress reauthorized the Violence Against Women Act (VAWA). As part of this reauthorization, Congress expanded the jurisdiction of tribal courts over criminal domestic violence prosecutions to include cases in which the perpetrator is non-Native. A previous U.S. Supreme Court case held that tribal courts cannot bring criminal charges against non-Natives unless Congress specifically authorized it. The 2013 VAWA reauthorization accomplished this for crimes of domestic violence. However, the 2013 VAWA reauthorization bill also contained a provision (introduced by Sen. Lisa Murkowski) that explicitly excluded Alaska from this expanded jurisdiction.

Later in 2013, Sen. Mark Begich (co-sponsored by Sen. Murkowski) introduced the Alaska Safe Families and Villages Act of 2013 that, among other things, removes the Alaska exception to VAWA. The proposed Act additionally encourages and provides grants for intergovernmental agreements between the State of Alaska and tribal governments for the enforcement of certain state laws. The Act is currently pending before Congress.

Indian Law and Order Commission Report. In November 2013, the Indian Law and Order Commission, pursuant to the Tribal Law and Order Act of 2010, issued a report (*A Roadmap for Making Native America Safer*) to the President and Congress. The report analyzed law enforcement and criminal justice issues on reservations and other areas governed by tribal courts. An entire chapter of the report was devoted to Alaska ("Reforming Justice for Alaska Natives: The Time is Now"), the only state singled out for its own chapter. The report justified this attention based on the endemic sexual assault, domestic violence, and other public safety issues experienced by Alaska Natives and tribes, many of which are in areas inaccessible by roads with no local law enforcement. Also noted was the very limited role that tribes and tribal courts in Alaska are allowed to play in resolving criminal offenses resulting in punishment.

The report placed much of the blame for the lack of tribal criminal jurisdiction on the Alaska Native Claims Settlement Act (ANCSA), which is described as "the last gasp of Federal 'Termination Policy'" (referring to the occasional policy of the federal government to terminate Indian tribes) and which eliminated much of the Indian country in Alaska. The concept of Indian country serves as a foundation for land-based jurisdiction for tribes in the Lower 48. To address this issue, the report recommended a variety of potential remedies, including: amending ANCSA to allow the creation of Indian country; clari-

fying that land transferred from the federal government to individuals or tribes constitutes Indian country; allowing ANCSA lands to be transferred to tribal governments or otherwise be put into trust by the federal government for the purpose of creation of Indian country (to some extent, this is already happening—see below); repealing the Alaska exception to VAWA (see above); and affirming the inherent criminal jurisdiction of tribes over their members.

State of Alaska v. Central Council of Tlingit and Haida Indian Tribes of Alaska (CCTHITA). This case, which is currently pending before the Alaska Supreme Court, addresses whether tribal courts can issue child support orders that the State could then be required to enforce. The State interprets the phrase "internal domestic relations" in *John v. Baker*, which established member-based jurisdiction for Alaska tribes, to preclude tribal courts from hearing child support cases because tribal support orders may require state enforcement and may involve a parent who is not a tribal citizen. The tribe responds that because it has jurisdiction to make child custody decisions, the tribe should also be allowed to set the corresponding amount of child support so long as the child is a member of the tribe. The tribe further notes that under the applicable federal program for Alaska, the State is required to follow the same administrative procedures to enforce orders for children subject to tribal orders as for children subject to child support orders from other states. The tribe prevailed on its arguments before the Alaska Superior Court, and the State of Alaska has appealed this decision.

Land into Trust Regulations. Prior to a court decision in 2013, a federal regulation prevented the Secretary of the Interior from accepting Alaska land into trust status, meaning that title to the land would be held by the federal government for the benefit of the Native Americans or Alaska Natives living on the land. That changed with the 2013 U.S. District Court for the District of Columbia decision in *Akiachak Native Community v. Salazar*, which found the regulation in question to be illegal. In May 2014 the Department of the Interior issued a proposed rule change that would permit the Secretary to take land into trust in Alaska. This land would likely be land owned by the tribes, though potentially other land, including individually owned land and ANCSA land, could be taken into trust if title to the land was given to the Department of the Interior. Taking land into trust could potentially lead to the expansion of Indian country in Alaska, which might resolve some of the issues raised above. The exact status of what would happen to land taken into trust in Alaska is at this point unclear.

Civil Diversion Agreement between the State of Alaska and [Indian Tribe]. The State of Alaska has proposed a "Civil Diversion Agreement" with Alaska tribes to divert certain misdemeanor criminal cases to tribal courts (as opposed to retaining jurisdiction in state courts but using tribal court sentencing processes). The proposed Civil Diversion Agreement recognizes the remoteness of many villages, the high rates of alcohol abuse and domestic violence in rural Alaska, the frequent difficulties in obtaining a quick response by law enforcement personnel to these areas, and the benefits of tribal and community involvement in the judicial process. Under the agreement, if an individual in a village with a tribal court that has entered into a referral agreement is charged by the State with one of a number of specified misdemeanor criminal offenses, the case could with the consent of the offender be diverted to the tribal court for the imposition of a civil remedy using tribal cultural standards. The offenses covered by the proposed agreement include most Class B misdemeanor offenses, fourth degree assault (including domestic violence assault), as well as many alcohol infractions, including minor consuming alcohol offenses. There are restrictions, however, on an offender's eligibility for referral if the offense involves domestic violence. For all offenses, tribes are not allowed to sentence the offender to incarceration or issue a fine exceeding \$250. If the offender fails to abide by the terms of the tribal court sentence, he or she would then be subject to prosecution by the State. The agreement is subject to negotiation between the State of Alaska and individual tribes. As of this writing (October 11, 2014), no civil diversion agreements have been finalized. (For questions regarding the agreement or to obtain a copy, email attorney.general@alaska.gov.)

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Erratum

A disclosure statement was erroneously omitted from the original version of the article, "Shifting Marijuana Laws and Policies: Implications for Alaska," *Alaska Justice Forum* 31(1-2), Spring/Summer 2014, page 20:

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Alaska at a Glance

Tribal courts play an important role in contemporary Alaska life. According to U.S. Census population estimates, of the over 735,000 people residing in Alaska in 2013, 14.7 percent of those persons identify as American Indian or Alaska Native only. In stark contrast, only 1.2 percent of the over 316 millions persons in the United States identifies as American Indian or Alaska Native only.

There are 230 federally recognized tribes within Alaska; however, it is difficult to estimate the current number of active

tribal courts. A Bureau of Justice Statistics technical report in 2014 identified 426 tribal courts across the U.S. and 152 tribal courts in Alaska, though it is not clear if all of the identified tribal courts are currently active. There may also be new tribal courts in the process of being developed in Native villages across the state.

A snapshot of tribal courts in the Lower 48 and Alaska can be seen in a survey conducted in 1999 by the American Indian Law Center for the Bureau of Indian Affairs, *Survey of Tribal Justice Systems & Courts of Indian Offenses: Final Report*. Surveys were sent to all federally recognized tribes, pueblos, and Alaska Native villages administering tribal courts or other types of justice systems. Of the 246 tribes identified who

administer tribal court or other systems, 84 returned completed surveys. Of the responding tribes, the survey found that 55.6 percent had constitutions containing a Bill of Rights and 39.8 percent did not. All but 4.6 percent of responding tribes had constitutions. The survey further found that 78 percent of tribes had written codes, of which 71.8 percent were modern, Western-style codes, 8.5 percent were customary law, and 19.7 percent a combination of the two. The average number of cases filed during 1998 in tribal courts participating in the survey was 786.2, the average number of cases closed in 1998 was 483.1, and the average number of cases pending at the end of 1998 was 213.4.

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Tribal court studies
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A Bureau of Justice Statistics (BJS) survey of tribal courts was conducted in 2002, but Alaska tribal courts were not sent the survey instrument. BJS is currently undertaking the first tribal courts survey since 2002.

Studies of Effectiveness of Tribal Courts

There are many ways in which the effectiveness of tribal courts may be defined, with corresponding differences in the measures employed. Effectiveness may be measured, for example, in terms of recidivism rates of participants, judicial satisfaction with the tribal court process, defendant/litigant satisfaction with the tribal court process, and victim and community-wide satisfaction with the tribal court process. This section will discuss different studies of the effectiveness of tribal courts and the different ways the measure of effectiveness has been defined.

Studies Conducted Throughout the Contiguous United States

Research on the effectiveness of tribal courts is limited. (See “Tribal Court References,” p. 15, for a list of studies to be discussed here.) The most extensive quantitative study of tribal court effectiveness in the U.S. is found in a 2001 report titled *An Evaluation/Assessment of Navajo Peacemaking*. This study compares the effectiveness of Navajo Peacemaking in resolving domestic violence cases with a more Western-style Navajo Family Court. (Both types of court are part of the Navajo judicial system.) It identifies Navajo Peacemaking as a type of *restorative justice* aimed at resolving conflict through the healing of relations between individuals in conflict. The role of the Peacemaking process is not one of justice delivery, but rather “a service to communities and families needing a minimally-formal, accessible, and affordable form of conflict dispute services.” As such, Navajo

Peacemaking does not focus primarily on victim-offender reconciliation, although agreements specifying restitution and/or reparations to a victim are not uncommon.

Several variables are used in the study to evaluate a participant’s perception of fairness and *hózhó* as an outcome or measure of effectiveness. *Hózhó* is defined as a dynamic process of finding a sense of solidarity, balance, and harmony within one’s self, family, clan, tribe, and the living world. Similar domestic violence cases in Family Court and in Peacemaking Court were selected for comparison. A survey was distributed to the parties in these two groups, all of whom were full-blooded Navajos living in the Navajo Nation. The control group was composed of complainants and respondents who participated in the Navajo Family Court which uses a Western approach to interpersonal domestic conflict. The second group included petitioners and respondents who participated in Navajo Peacemaking, which uses restorative justice techniques.

The Navajo Peacemaking study revealed dramatically different perceptions between Peacemaking participants and Family Court participants. Most notably, two key responses were observed between the two groups: perception of hearing fairness and perception of *hózhó*. Of the Peacemaking participants, 80.7 percent either agreed or strongly agreed that their hearing was fair, while 78.9 percent of participants expressed experiencing *hózhó* as a result of the proceedings. Among the Family Court participants, these numbers were 50.0 percent and 63.9 percent respectively. Additionally, Peacemaking cases were significantly more likely to result in case settlement (78.6 percent agreed or strongly agreed) than Family Court cases (51.4 percent agreed or strongly agreed). Finally, a significant difference between participant perceptions was noted in the opportunity provided to the participants by the different courts to express one’s feelings: 86.0 percent of Peacemaking participants reported having the opportunity to express their feelings during the process while 50.0 percent of Family Court participants responded having this opportunity. (See Table 1.)

The study acknowledges that its results are not the product of a true experimental or quasi-experimental design, as cases could not be randomly assigned

to Peacemaking or Family Court. Additionally, these results, while informative, may not be generalizable due to the small sample size of the groups (57 participants in Peacemaking and 37 participants in Family Court). However, the results are suggestive of significantly higher satisfaction among participants in Navajo Peacemaking compared to participants in a Western approach to conflict as utilized in Family Court. Peacemaking participants expressed a greater sense of *hózhó*, greater fairness with the process, higher levels of settlement, and expressed that Peacemaking allowed them to communicate their feelings more freely. As such, the study suggests that when measured by participant satisfaction, tribal courts are a viable and practical alternative to the adversarial system used in Western courts.

Studies Conducted in Alaska

Just as in the contiguous United States, in Alaska there is very limited information on the effectiveness of tribal courts. A literature search uncovered only one Alaska study on tribal court effectiveness, *Evaluating Restorative Justice in Alaska: The Kake Circle*, and it faces limitations due to the small sample size. This research was conducted by the Alaska Court System First Judicial District area court administrator for the Institute for Court Management for the National Center for State Courts. This 2010 study focuses on the Kake Circle sentencing hearings and the reported recidivism numbers—a recidivism rate of less than five percent—as a measure of effectiveness.

Kake is a Tlingit village located in Southeast Alaska. The methodology of the study was conducted through the review of archival data of cases obtained from the Kake Healing Heart Council. From the over 100 cases files on Kake Circle participants over the period 1999–2008, 46 cases were selected for the study. The study found that of the 46 Circle cases spanning a ten-year period, the Circle offenders recidivated at a rate of 28 percent. For the study, recidivism was defined as follows:

[A] participant in the Circle or the control group recidivates if, upon conviction of the underlying offense, commits a subsequent act and is convicted of another wrongful act within five years. For comparative purposes, this project examines recidivism at the one, three, and five year benchmarks following the offender’s entrance into or completion of the Circle or upon conviction (for Control Group cases and Circle cases).

The figure of 28 percent is substantially higher than the recidivism rate of 5 percent

Table 1. Perceptions of Participants in Navajo Peacemaking Court and Navajo Family Court

Perceptions of hearing participants	Navajo Peacemaking Court N = 57		Navajo Family Court N = 37	
	Strongly agree or agree	Percent	Strongly agree or agree	Percent
Hearing was fair	46	80.7 %	18	50.0 %
Experienced <i>hózhó</i>	45	78.9	23	63.9
Hearing resulted in a settlement	44	78.6	18	51.4
Had opportunity to express feelings	49	86.0	18	50.0

Note: Percentages may not sum to 100 percent due to missing data.

Source of data: *An Evaluation/Assessment of Navajo Peacemaking* by Erik K. Cross (1999), <https://www.ncjrs.gov/pdffiles1/nij/grants/187675.pdf>

originally reported by the Circle, yet at the same time is substantially lower than the statewide recidivism rate of 66 percent, as reported in an Alaska Judicial Council study using 1999 data. (This figure of 66 percent is the one noted in the Kake study and is the rate for all offenders, regardless of the severity of the offense, and includes reincarceration for probation or parole violations. The Alaska Judicial Council released a follow-up study in 2011 (after the Kake study summarized here) using 2007 and 2008 data. This study found that 48 percent of misdemeanor offenders were rearrested within two years of being released. Circle sentencings only involve misdemeanor-level offenses.)

The study also conducted a comparison of the Kake cases to a control group of cases from the Alaska state court in the Tlingit village of Hoonah. Hoonah was selected due to its close proximity to Kake and relatively similar populations. Alaska Court System magistrates routinely hear cases in both villages. (Note: At the time of this study, the title for magistrate judges was "magistrate.") In order to effectively compare the Circle cases with the Hoonah control group cases, the study identified offenders of the same sex and approximate age. Of the 46 Kake cases, 26 cases from the period 2002–2006 were chosen for the comparison study with 26 Hoonah cases from 2000–2009. In both groups, female offenders were over 60 percent of the sample population. The overall recidivism rate for the Kake Circle group was 48 percent and the rate for the Hoonah group was 42 percent—a difference which is not statistically significant due to the small sample size. Although the Kake Circle group had a slightly higher recidivism rate, the study also found that both male and female recidivist offenders in the Hoonah control group recidivated earlier than offenders in the Kake Circle group. In the Hoonah state court control group, of the males who recidivated, all did so within the first year, and of the females who recidivated, 89 percent recidivated within the first year. Conversely in the Kake Circle group, of the males who recidivated, only 25 percent recidivated within the first year, and of the females who recidivated, 60 percent recidivated within the first year. While informative, the reliability of these figures is compromised by the small sample size.

In addition to analyzing case data, the study sent out a stakeholder survey to Kake Circle participants with open-ended questions. The survey was intended to be filled out by the offender, as well as non-offenders who took part in the Circle sentencing process. The survey was to have been conducted in face-to-face interviews in the village, but

an Elder in the village had passed away and the day-long services were scheduled on the day originally set for interviews. In lieu of face-to-face interviews, the survey was mailed to 22 households and five community service agencies. Twelve stakeholder surveys were returned, of which only one was completed by someone who participated in a Circle as an offender.

The survey results note that every respondent reported that the Circle approach was the best way to address the offender's problem. Half of the respondents to the survey had participated in only one Circle, and about half had participated in "many" or "several" Circles. The participants who had participated in only one circle reported that they did so to support the offender's family and to facilitate healing between the offender and the community. In contrast, the participants who attended multiple Circles did so to help or support the offender. Those who attended multiple Circles noted the challenges that the offender faced, including the need for more follow-up Circles and meetings to encourage and help monitor the continued progress of the offender, and the lack of necessary clinical resources for the offender.

The long-term recidivism rate for Kake Circle participants was not significantly different than the long-term recidivism rate for participants in the Hoonah state court control group. This suggests that restorative justice Circles are at least as effective as the Hoonah state court. The study also uncovered evidence that restorative justice Circles may be more effective, because participants recidivated more slowly and were more satisfied with Circles than with the Western approach to crime and punishment. (The Kake study also looked at reconviction by case types and made a number of recommendations concerning cases involving alcohol, the need to involve the community, and future research areas.)

Additional Studies of Tribal Courts

There are numerous qualitative studies that address the effectiveness of tribal courts in the U.S., Canada, Australia, and New Zealand. One study from 2005, "What Are You Going to Do with the Village's Knowledge," evaluates the methods of legal discourse used in the Hopi Indian Nation. Research focused on 15 property disputes—including inheritance—heard in Hopi Tribal Court on the Hopi reservation in northeastern Arizona, and included a review of audio recordings of the court from 1995–2002, interviews with the court members and the community, and ethnographic observations over a 27-month period. The article found that Hopi tribal traditions do not mesh well

with Western terminology and procedures used in Hopi tribal courts. There is a continuing tension between Western-style legal language and process and Hopi language and world-view that results in difficulties integrating Hopi tradition into the process.

An article from 2005, "Delinquency and Justice: Tribal Court Data and Tribal Members' Perspective from One American Indian Nation," analyzes the perceived increasingly high levels of crimes committed by American Indian youths across the country by looking at 192 tribal court system arrest records of juveniles and conducting interviews with tribal judges and law enforcement officers in one American Indian community in the Southern Ute Nation in the Four Corners area of the U.S. The study found that "[r]eports of dramatic increases in juvenile crime among American Indians are often inappropriately generalized across all American Indian communities," that alcohol was a major contributing factor in most juvenile offenses, most offenses were low level, and that involvement from non-Indians and less traditional community members in the juvenile justice system acts as a barrier to more traditional approaches. The authors stressed the need to conduct individual case studies in communities, rather than focusing on aggregate data, to accurately determine the level of juvenile crime and the services needed by American Indian youth.

A 2007 study, "Negotiating Jurisprudence in Tribal Court and the Emergence of a Tribal State: The Lac du Flambeau Ojibwe," evaluates the adjudication of 580 off-reservation hunting and fishing violations from 1983 through 1999 in the Ojibwe tribal court as a case study on how tribal courts and tribal communities are generally becoming more state-like. The research includes an analysis of tribal records and interviews with community representatives in Wisconsin. Using a detailed reading of the transcripts from three actual cases, the article illustrates how the process of litigation, even in tribal courts, tended toward an assimilation of tribes into Western systems of adjudication and a loss of cultural distinctiveness.

Canada also has a distinct population of indigenous people, commonly referred to as First Nations people, who are increasingly using restorative justice/circle sentencing practices. In July 2010 a study was published which looked at the attitudes of Canadian judges toward restorative justice practices used in intimate partner abuse cases. As reported in "Judges' Attitudes About and Experiences with Sentencing Circles in Intimate-Partner Abuse Cases," 25 judges from a large Western Canadian province were interviewed face-to-face

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and two were interviewed over the phone. The study acknowledged that very few (6) of the judges interviewed had experience with restorative justice/sentencing circles in intimate-partner abuse cases, but 18 had experience with circle sentencing in other types of cases. Over three-fourths of the judges were male; 26 identified themselves as white and one as First Nations. The study found that 74 percent of judges reported a belief that sentencing circles are or could be beneficial in intimate-partner abuse cases. The study also found two major commonly suggested benefits identified by judges—community involvement/public awareness and defendant responsibility. Judges felt that getting the community involved in intimate-partner abuse cases may be a way for the community to participate and monitor the abusers. Judges also felt that defendants often blame the victims for abuse, and that circle sentences may help a defendant take responsibility for the offense, thus making reoffending less likely. Overall, the findings again suggest cautious judicial support for restorative justice in intimate partner abuse cases.

The Need for More Research and Identified Obstacles to Overcome

As outlined above, there is a resurgence of Native American and Alaska Native peoples utilizing their traditional ways to resolve legal matters. Though there are few quantitative studies, a growing body of qualitative research has explored tribal courts and traditional Native processes. Still, there remains room for additional study, including quantitative approaches, to aid in determining the effectiveness of Native American and Alaska Native courts and practices.

One issue central to the study of the effectiveness of any court is how to measure and define “effectiveness.” The study of the effectiveness need not necessarily focus on recidivism or reoffending rates—but as seen with some of the studies discussed above may also focus on impact to victims and their perception that the offender was adequately dealt with, the impact of the offender on the community as a whole, and the overall “fairness” of tribal courts. Each of these measures of effectiveness would bring with it different challenges. For example, depending on the types of records that have been maintained, it might be possible to conduct a recidivism study retrospectively and without the involvement of the offenders or any other participants in the tribal court adjudication and sentencing process.

This is how the Kake recidivism study was conducted. The other more attitudinal measures of recidivism—how people perceive the process—would require qualitative data obtained through surveys or interviews. Collecting survey data would require extensive involvement both by the offender and by the tribal court and all participants in the circle or other tribal court process. This raises substantial privacy concerns that would need to be addressed.

While defining the intended measure of effectiveness and determining how best to collect relevant data would be issues for any study of tribal courts or any other court system, there are certain challenges that though perhaps not entirely unique to Alaska are certainly accentuated here. These challenges can be grouped into two main topics—jurisdiction and geography. The remainder of this article will analyze these challenges and then conclude by outlining a possible research agenda to meet these challenges.

Tribal Court Jurisdiction

The jurisdiction of tribal courts in Alaska is an evolving issue, with much of the legal history focusing on civil cases where custody of a child is involved. (See “Key Acts and Cases for Alaska Tribal Court Jurisdiction,” p. 12, and “Current Issues Regarding Alaska Tribal Court Jurisdiction,” p. 14). Criminal jurisdiction of tribal courts in Alaska is even less well defined, with there being currently no court precedent firmly establishing the ability of Alaska tribes to adjudicate criminal cases absent a reservation or some other form of land-based jurisdiction. But initiating cases in tribal courts is only one way for tribal courts or principles commonly used in tribal courts to be employed. Sometimes state courts will refer cases to tribal courts. Other times, state courts will retain jurisdiction over a case but use restorative justice principles, such as circle sentencing, to decide a case. It is worth briefly reviewing how each of these three methods for employing alternate sentencing play out in Alaska with an eye toward how these nuances might impact a study of tribal court effectiveness.

(a) **Initial jurisdiction in tribal courts.** Tribal courts can address a wide variety of civil cases. Tribal courts can issue civil protective orders in domestic violence situations where the respondent is a tribal member, where the respondent consents to jurisdiction, or where the health and safety of a tribal member is seriously threatened; these orders can then be enforced by the State. Tribal courts can also resolve custody disputes between parents, as well as adjudicate cases involving the foster placement of children or the termination of parental

rights. The types of civil cases described above can start in tribal courts, though there are also provisions under the Indian Child Welfare Act (ICWA) for transferring foster placement and termination proceedings from state court to tribal court. Recidivism is not an applicable concept for family law or many other types of civil cases, so it would be difficult to derive a quantitative measure of tribal court effectiveness for this type of case. Instead, studies of cases initiated in tribal courts, because these cases are usually family law, would more likely rely on qualitative surveys to measure satisfaction with tribal court proceedings, similar to the Navajo study on *hózhó*. Recidivism can come into play for criminal cases, but there are currently no tribal courts in Alaska that are exercising broad criminal jurisdiction to initiate cases.

(b) **Referral of cases from state to tribal courts.** In addition to the ICWA transfer of cases just mentioned, the State of Alaska is looking into ways to refer misdemeanor criminal cases to tribal courts. Recognizing the remoteness of many villages, the high rates of alcohol abuse and domestic violence in rural Alaska, the frequent difficulties in obtaining a quick response by law enforcement personnel to these areas, and the benefits of tribal and community involvement in the judicial process, the State of Alaska is in the process of negotiating intergovernmental agreements with tribal courts. Under this model, if an individual in a village with a tribal court is charged by the State with one of a number of specified misdemeanor criminal offenses, the case could, with the consent of the offender, be referred to the tribal court for the imposition of a civil remedy using tribal cultural standards. The civil remedy imposed by the tribal court would be in lieu of prosecution in state criminal court. If the offender fails to abide by the terms of the tribal court sentence, he or she would then be subject to prosecution by the State. This agreement has not been finalized as of this writing, so some of the terms may change. (See “Current Issues Regarding Alaska Tribal Court Jurisdiction,” p. 14.)

From a research perspective, the possibility that some cases may be referred to tribal courts creates the opportunity to compare different measures of effectiveness for similar types of cases in different courts. Of course, different tribal courts operate differently depending on their cultural traditions, which is one of the justifications for referring cases to tribal courts. However, just the fact that cases are being resolved through restorative justice programs creates a commonality that is worth exploring. It would be possible in this way to evaluate different measures of tribal court effectiveness, both

quantitative and qualitative.

(c) **Cases retained by the State but resolved using restorative justice principles.** For several years, the Alaska Court System has explored introducing restorative justice principles in rural Alaska through incorporating these principles into certain criminal cases. The State still retains jurisdiction over the cases, and the cases are tried by an Alaska Court System judge. (For a description of this process, see "Community Justice Initiatives in the Galena District Court," p. 6.) In addition to Alaska Court System Magistrate Judge Christopher McLain in Galena, circle peacemaking processes are practiced by Alaska Court System Magistrate Judge Mike Jackson in Kake, the source of the Kake study discussed above. The Alaska Court System is expanding the cooperation with and use of tribal courts as alternate sentencing methods through such means as the new Alaska Rule of Criminal Procedure 11(i), effective April 15, 2014, which allows the referral of criminal cases, with the consent of the victim, the prosecutor, and the defendant, to restorative justice programs or models such as circle sentencing. (See "Restorative Justice Programs and Sentencing," p. 4.)

While circle sentencings are not tribal courts *per se*, the state court's referral to restorative justice programs such as circle sentencing offers a chance to assess their effectiveness. And to the extent that the judge departs from the circle's recommendation in imposing a sentence, that could also provide some insights, though it would likely be more qualitative than quantitative. (See "Table 2. Summary of Village Sentencing Hearings," p. 10.)

Alaska's Challenging Geography

Research methodology regarding tribal courts needs to take into account Alaska's geography. Most tribal courts are off the road system and can be difficult to reach, which underscores the need for more rural, local court options due to the difficulty of access—and has implications for the cost of travel to individual villages to conduct research. Moreover, Alaska's challenging geography is coupled with the state's demography and the fact that many villages are relatively small in population, with most ranging from approximately 100 to 1,000 residents.

The result is smaller tribal courts that have relatively small numbers of cases. For example, the Kake study found only 46 cases in the Kake Circle program over 10 years that it felt appropriate to use for determining recidivism. (Stretching out a study over this length of time may mask intervening reform efforts that change the manner of the

proceedings or the educational efforts aimed at prevention.) And the Kake program is one in which the State is retaining jurisdiction and using restorative justice principles in sentencing. There are no published figures on the number of cases heard per year by any particular tribal court, but the number of cases from any one court are unlikely to yield results that reach a high degree of statistical significance or confidence. In any study, small numbers of the factor to be examined do not yield results that have great statistical reliability. Given the new frameworks being developed or already in place regarding the involvement of tribal courts and circle sentencing practices, it is likely that there could be larger sample sizes going forward. Even then, no one court is likely to generate enough cases to produce statistical reliability in any quantitative analysis.

Moreover, all records of tribal court cases are inevitably going to be maintained differently. Each tribe is its own sovereign, and there are no uniform standards for maintaining tribal court records. Each tribe may also conduct their hearings differently, which could complicate cross-tribe comparisons or aggregating data from multiple tribes. Further, the remedies/punishments implemented may differ greatly from tribe to tribe or even from offender to offender being sanctioned for a similar offense. All of this impacts the feasibility of retrospective studies. Future studies should involve tribal courts in collecting the desired information on a going-forward basis, resulting in greater uniformity over the variables and measures being studied.

Another issue derivative of smaller courts and smaller sample sizes is privacy concerns. Though circle sentencing involves a substantial segment of the local population, particularly those affected by the offense, the content of the discussion in the circles is usually meant to be kept confidential. Researchers can take steps to protect confidentiality of study participants in any reports that are issued, but if one of the outcomes being measured is recidivism, there would need to be a means for tracking the circle participants. Where cases are being referred from state court or where jurisdiction is being retained by state court, such mechanisms are likely to be in place. But this may not be true for cases handled solely by tribal courts. And the very fact that issues of recidivism are being addressed when the tribal court is small and the number of cases few may unavoidably reveal to those in the village information about Circle participants that might otherwise have been kept confidential. The larger the sample size, the more anonymity, but getting this sample size is difficult when examining individual

tribal courts serving small populations.

Minor Consuming Alcohol as a Quantitative Measure

Although qualitative studies can avoid some of the above jurisdictional and geographic challenges, the results of these studies might be hard to generalize, though they could inform quantitative studies. If the purpose of a tribal court effectiveness study is to measure the success of different results between tribal and Western-style courts, then the two systems must be compared directly. The Navajo and Kake studies did this, though the former was focused more on participant satisfaction than on quantitative measures of recidivism and the latter suffered from a small sample size.

A quantitative study of tribal court effectiveness needs to address issues of sample size and control groups. More specifically, not only does a quantitative study need to include enough cases from both the test group and the control group to generate statistical reliability, but there needs to be a common measure of effectiveness that touches both sets of cases. This can be accomplished through examining how the same type of case is handled in different jurisdictions (as the term is used above) and employing a common measure of effectiveness, such as recidivism, or a standard methodology that measures satisfaction.

The criminal offense that best meets these requirements is minor consuming alcohol (MCA) cases. MCA cases are widespread in Alaska. Indeed, the Kake study noted that the "vast majority" of the offenders in the Circle program were there for alcohol-related offenses. Over roughly the same time period, the control group—the village of Hoonah, with a population of around 800—had 132 cases filed involving either MCA or a repeat MCA. This is symptomatic of cases statewide. As reported in "Underage Drinking: Research, Evaluation, and Related Efforts," based on Alaska Court System data, in 2011 alone there were 3,441 MCA charges statewide in Alaska, 77.2 percent of which resulted in convictions. And these are just the cases for which charges have been brought. Close to 60 percent of Alaska minors will consume alcohol sometime before reaching legal drinking age.

Minors consuming alcohol is obviously a serious problem in Alaska. But from a research perspective, it is one that provides many data points for study with a fair degree of common characteristics for the offense, regardless of where it is committed. Furthermore, there is a concerted effort by the Alaska Court System, which organized a conference on April 4, 2014 just on MCA issues, to involve tribal courts in resolving these types of cases. However, not all MCA cases will be

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resolved using restorative justice principles in state court or referring cases to tribal court jurisdiction. Many MCA cases will still be handled by the state court system, even in rural areas. Some tribal courts may even choose to address minor alcohol consumption situations without resort to the state court system, though the extent to which these may be informal resolutions as opposed to tribal court proceedings could become an issue from a research perspective. Regardless, the range of options should provide a solid comparison of effectiveness between different methods of adjudication with substantial sample sizes while still retaining a core control group.

Because widely different remedies will be adopted by these alternate sentencing methods, the effectiveness of each might be difficult to study unless some commonalities between remedies can be found with large enough sample sizes. Indeed, this aspect may be better studied qualitatively than quantitatively. Yet, valuable insights can be gained on the effectiveness of tribal courts and restorative justice principles by examining recidivism rates when these methods are implemented, independent of the actual alternate sentence employed. Minor consuming alcohol cases could potentially provide the research tool to achieve sample sizes of statistical reliability.

Conclusion

People who advocate for and participate in tribal court proceedings intuitively believe

that they are effective. But there is little empirical research to support this. The few studies that have been conducted tend to support the notion that tribal courts can be more effective than Western-style courts, though more work needs to be done in this area. Although there are challenges in structuring a research study of Alaska tribal courts, there

are ways to meet these challenges. Minor consuming alcohol cases might be a tool for creating a statistically reliable study of tribal court effectiveness in Alaska.

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Rural Governance Report 2014

Mara Kimmel

Empowering rural people through strengthening rural governance systems—in accordance with the mandate of the Constitution of the State of Alaska—was the underlying theme throughout the recommendations of the 1999 Rural Governance and Empowerment Commission (RGC). Almost all of the RGC's original recommendations remain pertinent today. There is a pressing need to identify and advance effective solutions to rural concerns, particularly in the area of public safety. Gathering in 2013, a group of committed Alaskans—including Alaska Native leaders, rural residents, local government officials, former legislators and state government officials, and academics—revisited the 1999 report and identified the following pathways necessary to ensure public safety for rural Alaskans:

- **Reform state-tribal relations.** Recognize tribes as governments, support tribal public safety programs, and clarify and empower tribal jurisdiction to eliminate barriers to justice in rural Alaska.

- **Strengthen Alaska Native culture.** Cultural integrity is a powerful tool in attaining educational or academic success and in combatting high rates of suicide and crime.

Language, dance, art, and other forms of cultural education are essential.

- **Reconfigure state systems to work with and for Native cultures, not against them.** Strong cultures mean safe communities, and our state justice institutions should be responsive to the variety of cultures throughout our state.

- **Expand tribal compacting.** Federal and state governments could enter into formal agreements (compacts) with tribes to share resources to fill the gap in rural public safety needs not met by government systems.

- **Build Native leadership.** Alaska Natives need to continue to grow culturally-connected, strong, compassionate leaders, as they have for the last 10,000 years. Alaskans from both Native and non-Native populations need to work together to find committed leaders to face statewide challenges and amplify the help we give each other across the state.

The full report, *Rural Governance Remains Unfinished Business in Alaska—A Call to Action*, can be accessed at <http://www.ruralgov.org/>.

Mara Kimmel is a visiting scholar at the UAA Institute of Social and Economic Research and was among the 50 Alaskans who participated in the 2013 reconvening of the RGC.



**Alaska Federation of Natives
2015 Annual Convention
Resolution 15-27**

TITLE: SUPPORT THE DEVELOPMENT AND EXPANSION OF TRIBAL COURTS

WHEREAS the Alaska Federation of Natives (AFN) is the largest statewide Native organization in Alaska, and its membership includes 165 federally-recognized tribes, 146 village corporations, 12 regional corporations, and 12 regional nonprofit and tribal consortiums that contract and compact to run federal and state programs; and

WHEREAS the mission of AFN is to enhance and promote the cultural, economic, and political voice of the entire Alaska Native community; and

WHEREAS Alaska Native tribal courts are a proven tool for effective justice in rural Alaska. Tribes know that over 95% of child neglect, sexual abuse, violence, and juvenile issues stem from substance abuse. Armed with this knowledge, tribal courts focus on addressing the underlying issues of substance abuse. Practices that seek to heal the individual, heal the family, and address underlying issues have worked to restore tribal communities for centuries and they work today; and

WHEREAS approximately one-third of Alaska's tribes are operating formal tribal courts, while others are taking informal action. Tribal courts currently handle child protection, adoption, domestic and family violence, substance abuse issues, and juvenile cases. With increased confirmed authority and funding for tribal courts, more tribes would initiate development of formal tribal court procedures; and

WHEREAS to date, tribal court proceedings have saved the state hundreds of millions of dollars and deterred countless criminal activities that cannot be quantified monetarily. When the state initiates a child protection or criminal matter it triggers tens of thousands of dollars in the form of court action, attorneys, social workers, and corrections. If tribes could utilize a fraction of this funding to operate tribal courts and programs Alaska would make huge advances to reduced criminal activity, recidivism rates, and child neglect while still saving money.

WHEREAS today, most tribal courts operate on limited grant funds, skeleton budgets, and volunteer hours and thus are only able to take on a limited amount of cases; and

WHEREAS tribal courts need assistance in further development of tribal ordinances, code and court procedure drafting, court clerk and judicial training and overhead costs; and

WHEREAS in the past, the state of Alaska has marginalized and ignored the positive outcomes of tribally based justice systems and tribal consortiums to provide more cost-effective and responsive alternatives to prevent crime, which has caused confusion over tribal court authority; and

WHEREAS today, leaders in all three branches of government in the state of Alaska and our federal delegation to the U.S. Congress, have recognized the authority and value of tribal court action and discussion is able to move forward as tribes offer innovative

ways in which tribal programs can work with state and federal programs in order to improve the safety of our state; and

WHEREAS U.S. Senator Lisa Murkowski, member of the U.S. Senate Committee on Indian Affairs (SCIA) and Chair of the U.S. Interior Appropriations Committee has taken action to confirm tribal court authority with the repeal of Section 910 of Title IX of the Violence Against Women Reauthorization Act of 2013 (VAWA). Senator Murkowski has sought tribal court funding through the Consolidated and Further Continuing Appropriations Act of 2015 which mandates that “within 180 days of enactment of this Act, the Bureau [of Indian Affairs], in coordination with the Department of Justice, is directed to report to the House and Senate committees of jurisdiction on the budgetary needs of tribal courts in [Public Law 280] states. See 160 Cong. Rec. H9764-5 (Dec. 11, 2014). In addition, Senator Murkowski has held multiple SCIA hearings which seek to identify ways to improve the safety and health of Alaska’s communities; and

WHEREAS Alaska Senator John Coghill has introduced Senate Bill 117, which seeks to create a Tribal Court Diversion Program in which law enforcement will refer certain misdemeanor and alcohol offenses to tribal courts to supplement other efforts in criminal justice reforms; and

WHEREAS state of Alaska Attorney General Craig Richards has issued an official opinion instructing law enforcement to comply with VAWA by enforcing tribal protections orders (even those not registered with the state courts) and by investigating and prosecuting all violations of tribal protection orders (that comply with the full faith and credit requirements set forth in VAWA); and

WHEREAS Alaska Native tribal courts have been successful with limited resources and confirmed authority, to heal community members by addressing underlying substance abuse issues and Alaska’s elected leaders including tribal chiefs, the Alaska congressional delegation, and state of Alaska administration, and legislators are committed to utilizing tribal courts in new and innovative ways.

NOW THEREFORE BE IT RESOLVED by the delegates of the 2015 AFN Annual Convention that in order to address the high rates of criminal activity, recidivism, domestic violence, and child protection concerns in Alaska’s communities, Alaska Native tribal courts should be empowered with state and federal confirmed authority and dedicated funding.

BE IT FURTHER RESOLVED that this resolution shall be the policy of AFN until it is withdrawn or modified by subsequent resolution.

SUBMITTED BY:

COMMITTEE ACTION:

CONVENTION ACTION:

COUNCIL FOR THE ADVANCEMENT OF ALASKA NATIVES

PASSED

PASSED AS AMENDED


Julie Kita, President

