

## A BAEDEKER TO THE TRIBAL COURT

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### I. INTRODUCTION

When I started work as a temporary judge at the Standing Rock Sioux Indian Reservation, I had set foot on the reservation perhaps a half dozen times, only one of which, my employment interview with Standing Rock Tribal Chairman Ron His Horse Is Thunder four days earlier, was other than a visit to the Prairie Knights Casino. Since law school, I had firmly believed that one could never comprehend either the rule against perpetuities or Indian law. I had never handled a matter in tribal court and assumed it to be inherently unapproachable.

As I stepped onto the Tribe's employment shuttle bus in Mandan, North Dakota, in the early morning of March 27, 2006, I had the feeling that I might just as well be heading off to be a judge in France. I felt as though I might need a Baedeker guide to the place.<sup>1</sup>

I remain firmly convinced as to the rule against perpetuities. As to practice on the reservation, however, unlike the French, the Sioux people speak very good English, and they are a consummately gracious people. As to the tribal court, I have found it to be a user-friendly amalgam of Sioux and white culture and practices.

I suspect that the vast majority of North Dakota attorneys also shy away from taking any matter which might bring them near a tribal court, for similar unfamiliarity. Thus, in addition to sharing some of my reflections on my experience with the Tribe, I am going to try to provide a guide to the uninitiated—a Baedeker to the Standing Rock Sioux Tribal Court.

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1. Some may recall the old "Baedeker" travel guides that were popular during much of the twentieth century, also memorialized in T.S. Elliot's poem, *Burbank with a Baedeker: Bleistein with a Cigar*.

## II. THE TRIBAL DOCKETS

The Standing Rock Sioux Tribal Court (Tribal Court) is divided into three distinct dockets: children's court, civil and criminal.<sup>2</sup> When I arrived, the entire court system was severely backlogged. The civil docket, which is our primary interface with the outside world, was from two to five years in arrears. Those of you who attempted to move your files through the system consistently voiced frustration to me.

We have enrollment<sup>3</sup> of about 13,500,<sup>4</sup> and a reservation population of about 7500,<sup>5</sup> spread over 2.3 million acres,<sup>6</sup> in North and South Dakota. The people of the reservation, as is common knowledge, live in difficult circumstances. A substantial number does not have any access to gainful employment<sup>7</sup> and the incomes of those employed tend to be low.<sup>8</sup> The result is inescapable: with nothing to gainfully occupy them and no realistic hope for the future, a substantial number of our people numb themselves with alcohol or drugs.<sup>9</sup> The result is an exceptionally heavy docket and an overloaded court system. And, contrary to the perception of some, we have no tax base and very limited financial resources.

The children's court functions separately from the remainder of the court, in its own building, across the street from the courthouse. It is

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2. STANDING ROCK SIOUX TRIBE, CODE OF JUSTICE tit. 6, § 6-101 (1995) [hereinafter SRST, COJ]. The children's court is a separate court. *Id.* The civil and criminal jurisdiction of the Tribal Court is vested in a chief judge and an associate chief judge who divide the docket between civil and criminal for facility of scheduling; they cover for each other, as necessary. *Id.* tit. 1, § 1-102.

3. *See generally* SRST, COJ, *supra* note 2, tit. 5 & tit. 10 (indicating tribal membership is limited to Indians officially enrolled as tribal members as of June 14, 1957, or subsequently, Indians possessing one-fourth degree of Standing Rock Sioux Indian blood and at least one parent lawfully enrolled in accordance with procedures prescribed by the Tribal Council by ordinance).

4. The Standing Rock Sioux Tribe Member List, as of July 3, 2002, lists 13,516 enrolled tribal members.

5. The 2002 Standing Rock tribal census population was 7538, of which 4992 were enrolled tribal members. STANDING ROCK SIOUX TRIBE CENSUS REPORT (2002).

6. N.D. DEP'T. OF HUMAN SERV., JOURNEY TO UNDERSTANDING: AN INTRODUCTION TO NORTH DAKOTA TRIBES 34 (n.d.), *available at* <http://www.state.nd.us/dhs/triballiaison> (follow "Booklet: Journey to Understanding—An Introduction to North Dakota Tribes" hyperlink) [hereinafter JOURNEY TO UNDERSTANDING].

7. In the 2002 Standing Rock Sioux Tribe Census, fifty percent of reservation residents were unemployed.

8. In 2000, the poverty rate for Native Americans in North Dakota was 34.6%, compared to 11.9% of the general population. JOURNEY TO UNDERSTANDING, *supra* note 6, at 31.

9. *See* Substance Abuse & Mental Health Serv. Admin., U.S. Dep't of Health & Human Serv., *Substance Abuse and Substance Disorders Among American Indians and Alaska Natives*, TRIBAL JUSTICE TODAY (Nat'l Tribal Justice Resource Ctr.), Feb. 2007, at 22 (indicating 10.7% of American Indians and Alaska Natives are reported as having current alcohol use disorders, compared to 7.6% of other racial groups, including other minorities).

legally a subdivision of the Tribal Court.<sup>10</sup> It is invested with the protection of the children of the reservation, abused, neglected or otherwise in need of court protection. Its entire docket involves Indians and their rights under Title VI of the Standing Rock Sioux Tribe Code of Justice and the Indian Child Welfare Act.<sup>11</sup> A Presenter represents the interests of our children<sup>12</sup> and the court has a full-time law trained judge, although the Code does not require a law degree.<sup>13</sup> Non-reservation lawyers generally do not have contact with the children's court. The children's court handles approximately 1000 cases a year.

Nor are non-Indian litigants or counsel generally involved in the criminal docket of the Tribal Court. The Tribe has a chief prosecutor, and it employs a full time public defender, also a licensed attorney; both must be members in good standing of the bar of any state or federal court.<sup>14</sup> Non-reservation lawyers generally do not have contact with the criminal court. The Tribal Court's jurisdiction does not extend to crimes committed by non-Indians.<sup>15</sup> I began as a civil judge, but have taken the criminal judge position, and work the civil docket, which is more labor intensive, as time permits. Our criminal docket approximates 5000 cases a year.

There is, however, a significant degree of interface between the Tribe and non-Indians in the civil docket. It is in this area that we have substantial contact with non-reservation lawyers and to which, therefore, I direct the remainder of my attention.

Non-Indians hold slightly over one-half of the Standing Rock Sioux Indian Reservation land.<sup>16</sup> In addition, non-Indians and non-Indian entities from outside the reservations have considerable contact with the Tribe and its members in the furnishing of goods and services, and in the off-reservation sales of goods and services to reservation Indians, extending the Tribal Court's jurisdiction to these transactions.

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10. SRST, COJ tit. 6, § 6-301.

11. 25 U.S.C. §§ 1901-63 (2001).

12. SRST, COJ tit. 6, ch. 4-6, 8. The Presenter serves a similar function in children's court to a prosecutor in criminal court, representing the Tribe and the best interests of the minor, in framing and presenting cases of delinquency, status offenders, children in need of supervision and termination of parental rights. *Id.*

13. *Id.* tit.1, § 1-301.

14. *Id.* tit.1, §§ 1-501, 1-509.

15. *See* *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 211-12 (1978) (holding that Indian tribal courts do not have criminal jurisdiction over non-Indians).

16. *JOURNEY TO UNDERSTANDING*, *supra* note 6, at 30. Indian lands within the reservations were opened to non-Indian settlement and ownership by the General Allotment Act of 1887, also known as the Dawes Act, resulting in a "checkerboard" pattern of non-Indian ownership within the reservation. Dawes Act, 24 Stat. 388, 388 (1887).

It is not the object of this article to make any exhaustive analysis of Indian civil jurisdiction. The interface with the non-Indian world is considerable and the Tribal Court's civil jurisdiction extensive.

The civil court's docket is the smallest in number, about 800 files per year, but the most consumptive of court time. Our civil judge is also a highly experienced licensed attorney. We share this docket, which involves the broadest and most complex array of files for the Tribal Court. The civil court handles everything from the tribal equivalent of small claims court to complex cases of every stripe, which is the contact point with the North Dakota and South Dakota practicing bar.

The Tribal Court's civil jurisdiction is dependent on both the Code of Justice and federal case law defining the scope of tribal jurisdiction under federal law. Section 1-107 of the Standing Rock Sioux Tribe Code of Justice define the court's civil jurisdiction:

The judicial power shall extend to all cases in law and equity arising under the Tribal Constitution, the customs or the laws of the Tribe, and to any case in which the Tribe, a member of the Tribe, an Indian residing on the Reservation or a corporation or entity owned in whole or in substantial part by any Indian shall be a party.<sup>17</sup>

The limitation of action, thereon, is two years, as to all causes of action.<sup>18</sup>

This extends jurisdiction to actions by non-Indians in matters involving enrolled members and Indians, generally, who live on the reservation, including the enforcement of obligations incurred by resident Indians off reservation. I would note that, with regard to enforcement of off-reservation obligations, while these claims may not have been aggressively enforced in the past, the current Court and Tribal Council are committed to the equal application of the law.<sup>19</sup>

The Tribal Court's civil jurisdiction extends, as permitted by federal law to a substantial degree, to Indian claims, as well as against non-Indians who enter into relationships impacting the reservation, and for torts committed by non-Indians on the reservation. In *Montana v. United States*,<sup>20</sup> the Court held that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts,

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17. SRST, COJ tit. 1, § 1-107.

18. *Id.* tit. 2, § 2-501.

19. The Standing Rock Sioux Tribe Constitution, Amendment IX, section 8, extends equal protection of the law to all persons within Tribal Court jurisdiction.

20. 450 U.S. 544 (1981).

leases, or other arrangements.”<sup>21</sup> Regulation has been defined by the Ninth Circuit to include tort law: “The Tribes’ system of tort is an important means by which the Tribes regulate the domestic and commercial relations of its members.”<sup>22</sup>

Thus, the reach of the Tribal Court is substantial. Off-reservation persons and entities may have a substantial need for access to the Tribal Court, and reservation Indians may have substantial access to the court for actions against non-members and non-Indians. This is also increasingly true in domestic relations, which often present extraordinarily complex jurisdictional issues, far too arcane to address here.

The legal foundation for the Tribal Court is the Standing Rock Sioux Tribe Code of Justice. Unfortunately, it has not been uniformly updated or generally accessible. I am aware of only two off-reservation copies in the state of North Dakota: at the State Law Library in Bismarck and at the Tribal Judicial Institute at the University of North Dakota School of Law in Grand Forks. Neither is fully updated (as I might add the Tribal Court’s copies are not, either). Furthermore, the sections of the tribal ordinances, as codified, are not annotated as to dates of adoption. However, as I have alluded, there is a new direction on the Standing Rock Reservation. There is, as I write this, an up-to-date and electronically accessible copy of the Code being prepared. However, due to limited personnel and resources, it may be some time before this project is completed. In addition, the Judicial Committee of the Tribal Council is actively updating its form and content, which have not been addressed in many years.

### III. TRIBAL SUBSTANTIVE LAW

The Tribe has an extensive tribal code, which deals with a number of subjects in thirty-one titles.<sup>23</sup> Neither general contract law nor tort law are

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21. *Montana*, 450 U.S. at 565.

22. *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1140 (9th Cir. 2006) (en banc).

23. SRST, COJ tits. 1-31. The following subjects are contained within the Code of Justice:

- Title I. Courts
- Title II. Civil Procedure
- Title III. Criminal Procedure
- Title IV. Criminal Offenses
- Title V. Family Code [domestic relations]
- Title VI. Juvenile Code
- Title VII. Mental Illness and Chemical Dependence
- Title VIII. Liquor
- Title IX. Fish and Wildlife Conservation Code
- Title X. Enrollment
- Title XI. Highways
- Title XII. Extradition

legislated (the Commercial Law Title XXIV, is the Uniform Commercial Code, to which the Tribal Council has added a very simple short form repossession ordinance in Title XXIV). In these substantial areas and in many other matters not covered by Tribal legislation, the Code provides a unique “Applicable Laws” section, which states:

In determining any case over which it has jurisdiction the Standing Rock Sioux Tribal Court shall give binding effect to:

- (a) any applicable constitutional provision, treaty, law, or any valid regulation of the United States;
- (b) any applicable provision of the tribal Constitution or any law of the Tribe not in conflict with federal law;
- (c) any applicable custom or usage of the Standing Rock Sioux Tribe not in conflict with any law of the Tribe or of the United States. Where doubt arises as to such customs and usages, the Court may request the testimony, as witnesses of the Court, of persons familiar with such customs and usages.
- (d) Where appropriate, the Court may in its discretion be guided by the statutes, common law or rules of decision of the State in which the transaction or occurrence giving rise to the cause of action took place.<sup>24</sup>

This gives a tribal judge a great deal of discretion, far more than would be permitted to a state or federal judge. The practice the Standing Rock Sioux Tribal Court has followed since I have been a judge, is to favor consistency

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- Title XIII. Landlord and Tenant Proceedings
  - Title XIV. Probate
  - Title XV. Elections
  - Title XVI. Taxes
  - Title XVII. Housing Code
  - Title XVIII. Tribal Employees
  - Title XIX. Rules and Procedures for the Standing Rock Sioux Tribal Council
  - Title XX. District Organization
  - Title XXI. Protection for the Elderly
  - Title XXII. Control of Dogs
  - Title XXIII. Licensing and Regulation of Bingo and Other Games of Chance
  - Title XXIV. Commercial Law
  - Title XXV. Domestic Abuse
  - Title XXVI. Standing Rock Solid Waste Management
  - Title XXVII. [reserved]
  - Title XXVIII. Foreclosure of Real Estate Mortgages
  - Title XXIX. Environmental Quality Code
  - Title XXX. Tribal Employment and Contracting Rights Ordinance
  - Title XXXI. Pesticide Code

24. SRST, COJ tit. 2, § 2-401.

and predictability by turning to the North Dakota Century Code or South Dakota Codified Law and the common law of each state (the reservation extends into both states) in matters of tort and contract not addressed by the Tribal Code. This has met with some objection from some traditional Lakotas and Dakotas, who urge results based on traditional solutions. However, even the traditional elders do not always agree on matters of culture and tradition, and the use of state law lends continuity, which principle is generally understood and accepted by our people.

The court has also been urged, especially by our former chief prosecutor, a University of North Dakota School of Law graduate, to look to published precedent from other tribes. This is more difficult to establish, for much of it is not systematically published, but the Standing Rock Sioux Tribal Court does recognize it as persuasive precedent if it is brought to the court's attention. The degree of deference to the states will also depend upon the importance of the tribal interest being protected.

But, above all, the tribal judges have been given substantial discretion in order to assure that, ultimately, the fair and equitable result prevails, and we take this goal very seriously. Indeed, the system is a blending of law and equity, incorporating Sioux tradition and culture as they impact the conflict resolution process. In this regard, the Tribal Court fulfills an essentially different role from that of non-Indian courts, and presents a steep learning curve for the non-Indian judge.

#### IV. THE TRIBAL JUDGE—A DICHOTOMY OF ROLES

The differences between the tribal courts and state and federal courts are both cultural and structural. North Dakota has a governor and the Standing Rock Sioux Tribe has a chairman. The distinction is not simply one of title. The governor heads a distinctly hierarchical form of government. The chairman is first among equals in a Tribal Council (and, for that matter, in the larger tribal body politic) and his function is more to find consensus and to chart a prudent course which reflects that consensus. This role is more similar to the role of a prime minister in the parliamentary form of government.

Among the plains Indians, and among the Sioux tribes, the chief was in substantial part a white creation, borne of the white need to identify someone in charge, someone with whom to sign a treaty and with whom to deal as a unitary entity.<sup>25</sup> The Fort Laramie Treaty of 1868, the foundational document of today's Sioux nations, was signed by nearly two hundred

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25. See VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 80 (Univ. of Tex. Press 1983) (explaining the development of tribal governments).

native signatories, on behalf of a diversity of Indian nations, which were parties to that treaty.<sup>26</sup> Tribal leaders did not and do not dictate; they lead by example and succeed in doing so in direct proportion to the respect they enjoy for doing so.

The tribal courts evolved, in large part, as an imposition upon the tribes by the federal government. The role of the tribal chiefs and elders as conciliators of intra-tribal disputes has devolved upon and become a function of the modern tribal court, then, laying the mantle of conciliator upon the shoulders of the tribal judge.<sup>27</sup>

The Standing Rock Sioux Tribal Court is what I would call a “pro se friendly” court. Very few people on the reservation have the resources to hire a lawyer, nor are the matters before the court, at least in the civil docket, often substantial enough to justify it. But they are matters of importance to the litigants or they would not be in court.

Therefore, the Tribal Court recognizes and licenses lay advocates, peers of the parties who have as little as twenty hours of legal training, to practice on equal footing with our admitted lawyers.<sup>28</sup> Even so, the substantial majority of litigants are without counsel and it is for the court to ensure the process is fair to everyone.

The tribal judge must be a consensus builder. Unless his or her conduct in the courtroom and judicial decisions are accepted as fair and equitable, the judge will become the victim of “tribal politics,” and not entirely without justification, for any political system must, among its other attributes, remain culturally responsive to its constituents. So, I listen a lot.

The Tribe has accommodated itself remarkably well to the non-Indian legal system by statutorily insulating its judiciary from political pressure, by providing a high bar to dismissal of judges for cause (felonies, misdemeanors involving dishonesty or immorality and gross incompetence) once a judge has been approved by the Tribal Council.<sup>29</sup>

The Tribal Court has adopted the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Evidence, and we have our own Rules of Court, similar to those in the state or federal courts.<sup>30</sup> Thus, particularly in the bigger cases involving lawyers for all parties, there is not a substantial difference from state and federal courts and the judge functions very much like a judge in the non-Indian courts.

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26. Fort Laramie Treaty art. 17, Apr. 29, 1868, 15 Stat. 635.

27. See DELORIA & LYTLE, *supra* note 25, at 110-25 (discussing tribal judges in the modern tribal court system).

28. SRST, COJ tit. 1, § 1-601(b).

29. SRST, COJ tit. 1, § 1-307.

30. STANDING ROCK SIOUX TRIBE, RULES OF COURT 1-3.

The rules of pleading, however, are governed by tribal code, and the only specific requirement of the complaint is that it be verified under oath by the party (rather than Fed. R. Civ. P. Rule 11 subscription by counsel).<sup>31</sup> As to responsive pleading, including the answer, counterclaim or cross-claim, the code provides that the court shall hold a hearing and determine the issues which should be raised in defense or whether any counterclaim, crossclaim or third party claim is appropriate, thereby acting as advocate for the parties, as well as adjudicator.<sup>32</sup> Thus, answers are optional and generally interposed only when lawyers are involved.

Thus, in most civil matters the judge is not just a neutral referee, but, in the great majority of matters, must promote and advance the interests of all parties, eliciting and delineating the issues and facts, as an advocate of both sides, while impartially adjudicating the issues so raised and framed. This requires an intellectual honesty and mental agility on the part of the court, which can be very difficult to execute. Thus, the system functions in direct relation to the integrity and skill of the judges and court staff.

## V. PRACTICE POINTERS

My first advice would be to look to the Standing Rock Sioux Tribe Code of Justice and Rules of Court, which are available from the Tribal Court's administrator. My second advice would be that, particularly if appearance before the Tribal Court is a new or infrequent experience, we

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31. SRST, COJ tit. 2, § 2-101.

32. *See id.* tit 2, §2-103.

At the time the verified complaint is filed, the clerk shall schedule a hearing on the claim not less than fifteen (15) days after the complaint is filed. The clerk shall furnish the plaintiff with a copy of the notice showing the time and place of the hearing and shall affix such notice to the copy of the complaint to be served on each defendant. At the hearing the presiding Judge shall ascertain whether:

- (a) The defendant has any defenses to the claim, or wishes to present any counterclaim against the plaintiff or cross-claim against any other party or person concerning the same transaction or occurrence;
- (b) Any party wishes to present evidence to the Court concerning the facts of the transaction or occurrence;
- (c) The interests of justice require any party to answer written interrogatories, produce any documents or other evidence, or otherwise engage in any pre-trial discovery considered proper by the Judge;
- (d) Some or all of the issues in dispute can be settled without a formal adjudication; and
- (e) The claim is ready for trial.
  - (1) If the claim is ready for trial, the Judge may try it immediately or set a subsequent date for trial.
  - (2) If the claim is not ready for trial, the Judge shall set a subsequent date for trial and order such preparation by the parties as he deems necessary.

*Id.*

are here to help. As of this writing, we have a new court administrator, new chief clerk, and almost an entirely new staff, in addition to new civil and criminal judges. Hiring has been done with the utmost attention to competence and professionalism. The Council and the Judicial Committee have been completely supportive and my staff and I are proud of the results.

Felix S. Cohen's *Handbook of Federal Indian Law* is generally considered the preeminent treatise on American Indian law and is generally available.<sup>33</sup> However, I have found another treatise that I think is better, the *American Indian Law Deskbook*, put together by the Conference of Western Attorneys General, and published by the University of Colorado.<sup>34</sup> It is readily available on Amazon.com and is updated annually. And, not to be overlooked, is the *American Indian Law in a Nutshell Series*<sup>®</sup>, also available on Amazon.com, or from Thomson West.<sup>35</sup>

In an article in the State Bar's *Gavel* last fall, Dean LeBel lamented: "The bedrock principle of a fair and independent judiciary is under attack."<sup>36</sup> I am pleased and proud to say that, on the Standing Rock Sioux Indian Reservation, the winds of change are blowing in the opposite direction. Talented people are returning to the reservation and the changes in the Tribal Court reflect this.

Finally, I would hope that the Tribe's practicing bar, which is expanding rapidly, will continue to grow, and that we will see more of our people represented by the practicing bar. You will find yourselves welcome in Fort Yates.

## VI. REFLECTIONS

I retired early from the practice of law, at age forty-nine, in 1996. I was burned out and, frankly, disillusioned by the waning civility at all levels of the bar and in myself, and, I would add, in the courts. I know that I was not alone in that assessment. However, my first love and real competence is the law and, though I did not want to return to practice, I sorely missed the challenge and service that is the profession of law.

Dean LeBel, in his article, which was about judicial service, also said: "For many people in our profession, judicial office is the culmination of the service that lawyers can offer to the public."<sup>37</sup> I agree, completely.

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33. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Neil Jessup Newton et al. eds., 2005) (1941).

34. CONF. OF W. ATT'YS GEN., AMERICAN INDIAN LAW DESKBOOK (Univ. Press of Colo., 3d ed. 2004).

35. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL (4th ed. 2004).

36. Paul LeBel, *Judging Fairly*, THE GAVEL (State Bar Ass'n of N.D.), Nov. 2006, at 8.

37. *Id.*

As one enters Fort Yates, there is a homemade sign proclaiming: “Native pride.” The Indian people everywhere, but the Lakota and Dakota of Standing Rock in particular, have struggled mightily with the bad hand their people have been dealt. But, I found myself, from the very first day, welcome. The two cultural traits I have observed and most admired, are respect and consideration for others and a gracious good humor. In working with my staff and those who come before us, these are the attributes I want most to exemplify our court, and I believe we are succeeding.

If there is one overriding theme concerning the tribal courts today, it is sovereignty. The federal courts, while never following a consistent course as to Indian sovereignty and jurisdiction, are chipping away at tribal sovereignty. This was recently addressed by the director of the National Tribal Justice Resource Center, in an editorial comment: “Our future depends on applying fundamental fairness through due process and is critical to the continued strengthening of our sovereignty.”<sup>38</sup>

Not only off the reservation but also among our own people, there is a consensus that the tribal courts need improvement. The tribal court serves the Indian people in ways the state and federal courts could never replicate. The tribal court is essential to the preservation of Indian culture and must be preserved and reformed to serve the needs of the modern reservation. I am honored that the Chairman and the Council have seen fit to trust me to be their judge.

We are neither a copy of a state district court, nor some ad hoc tribal tribunal, but a successful amalgam of what is to be valued from both systems. It is my assessment that, with good people operating it, the Standing Rock Sioux Tribal Court is becoming precisely that, and will serve both our Indian and non-Indian constituents fairly and responsibly.

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38. Vincent Knight, *Message From the Director*, TRIBAL JUSTICE TODAY (Nat’l Tribal Justice Resource Ctr.), Aug. 2006, at 2.