



THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT

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Northwest Intertribal Court System

Confederated Tribes of the Chehalis Reservation, Jamestown S'Klallam Tribe, Muckleshoot Tribe, Port Gamble S'Klallam Tribe, Sauk-Suiattle Tribe, Shoalwater Bay Tribe, Skokomish Tribe, Stillaguamish Tribe, Tulalip Tribes (Mountlake Terrace, WA)

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Courts are cornerstones of sovereign governments: they define and uphold the laws through which nations govern themselves. Too often, however, the absence or weakness of tribal courts means tribal citizens must rely on state courts that are ill-equipped to serve their needs. In 1979, a consortium of small tribes whose limited resources precluded the establishment of independent tribal courts formed the Northwest Intertribal Court System (NICS). NICS has demonstrated its commitment to protecting and advancing tribal sovereignty for over two decades by providing its member tribes with adjudication services and helping them to establish their own courts that promote fair, equitable, and uniform justice.

Salmon fishing in the coastal rivers of western Washington was so critical to the cultures and economies of local Indian tribes that these tribes carefully preserved their rights to fish in the treaties they signed with the federal government in 1854 and 1855. These rights were worn away over the next century as non-Native fishers with increasingly sophisticated equipment began to dominate the tribes' traditional fishing grounds. In the 1960s, Indian activism drew attention to this crisis, and, in 1974, Judge George Boldt issued his decision in *US v. Washington* recognizing the right of western Washington tribes to 50 percent of the State's anadromous fish. The Boldt decision, as it is commonly known, was broadly celebrated by the tribes for reestablishing a long-ignored right, but the decision presented the tribes with an immediate institutional challenge: the ability to adjudicate tribal enforcement of the fishing regulations necessary to turn their treaty rights into a sustained and well-managed harvest of salmon. Quite a few of the Washington tribes felt unprepared to meet the challenge.

The reality was that many western Washington tribes simply did not have the resources to maintain their own court systems. Some of these tribes are extremely small, consisting of a couple hundred citizens. Many of them could not provide the necessary funding or professional staff to operate independent tribal courts. And, yet, because the tribes lacked robust dispute resolution mechanisms, tribal citizens were regularly forced into state courts for the resolution of critical tribal disputes, Boldt-related and not. There, they encountered state laws that were ill-equipped to address the unique customs, cultures, and economic realities of their lives. Moreover, a continuing reliance on state, rather than tribal, arbitration was eroding the tribes' ability to implement and adjudicate important tribal policies. In sum, weak tribal court systems were an obstacle to essential self-governing power.

In 1979, a consortium of thirteen western Washington tribes created the Northwest Intertribal Court System (NICS), an organization that supports tribes in establishing tribal courts. NICS is an innovative, non-profit organization that relies on federal and tribal funding, (72 percent and 28 percent, respectively) and is overseen by a governing board comprised of representatives from each of its seven member tribes. In addition to its member tribes, NICS also serves two affiliate

tribes and a handful of tribes that contract NICS' services. Although NICS was established in response to the Boldt decision, it now supports tribal courts in their handling of a full array of civil and criminal matters, including major crimes, misdemeanors, civil suits, infractions, and a host of legal issues related to hunting and fishing offenses, child dependencies, guardianships, adoptions, gambling, zoning and land use, environmental protection, and tribal employment.

NICS is divided into several units that meet these tribal needs. One group of such units serves to provide operational support to their members. For example, the Judicial Unit hires full-time, part-time, and contract judges to preside over tribal courts (currently three staff judges and two contract judges). The NICS Appellate Unit, established in 1987, recruits and trains a roster of appellate judges (currently thirty) who are impaneled on three-member appellate benches that hear roughly thirty cases a year. The Appellate Unit also publishes a compilation of its decisions in the biennial Appellate Reporter. The NICS Prosecutorial Unit consists of prosecutors, paralegals, and assistants who work closely with tribal law enforcement leaders. These services facilitate tribal courts' effective adjudication of tribal law.

Another group of NICS' units provides assistance in the development of tribal law and codes. Its Code Development Unit consists of a code developer, a full-time legal assistant, a law clerk, and several contract code writers. This unit works closely with tribal committees to draft codes and regulations for each member tribe that reflect the unique culture, values, and traditions of the people to whom the law will apply. Without customized codes, courts could not adjudicate tribal policies justly. The Technology Unit has supported the code-developing mandate of NICS since 2001 by converting tribal codes and court forms into electronic documents that are easily accessible to member tribes' judges, prosecutors, attorneys, and staff. This electronic information also helps member tribes' courts work as efficiently as their state and federal counterparts.

Since 1979, NICS member tribes have experienced great success in reclaiming jurisdiction over civil and criminal matters affecting their communities. The Prosecutorial Unit is currently handling 1,910 cases that might otherwise be in state courts. Through NICS support, the Tulalip Tribes have undertaken a retrocession of PL 280 criminal jurisdiction from Washington. Since retrocession, the number of criminal complaints filed in Tulalip's tribal court has risen dramatically from 56 in 2001 to 262 in 2002. Without the support of NICS, this major reassertion of tribal sovereignty would not have been possible: the Tribes would simply not have had the capacity to take up this new caseload. Other member tribes are experiencing similar empowerment. In the past year, the caseload for some tribes has increased 100 percent as they have assumed responsibility for increasingly numerous and complex legal issues.

As NICS member tribes assert and expand their jurisdictional authority, they strengthen their status as self-governing sovereigns. The essence of sovereignty is the right to establish, implement, and interpret the laws by which a community is governed. Although states share some civic goals with tribes, non-Indian and Indian values, norms, and cultures differ in substantial ways. Inherently, the policies of the states and the tribes must differ, too. NICS member tribes know from experience that establishing, implementing, and interpreting laws in ways that reflect the unique cultural values of their communities inspires increased compliance among tribal citizens and greater chances of success in implementation.

Legitimate concerns have been expressed over the whether a tribe particularly a small tribe can pool its talents and resources with others without forfeiting a measure of control. NICS' member tribes' experiences, however, suggests that creating a shared system for their courts as an important, and bold, exercise of their sovereignty. They contend that their decision to pool resources is, in itself, a sovereign choice and, further, that pooling of resources allows them to sustain courts that they would not otherwise have. The administration of justice has a steep learning curve and requires substantial investments in recording precedents, codes, and processes. NICS member tribes share the knowledge, funds, and, most importantly, the human capital necessary to administer justice effectively and efficiently.

Critically, NICS never loses sight of the tribes' specific circumstances. Deference to tribal norms is an important element of NICS organizational culture. Its staff members describe themselves as guests of member courts. This attitude is a natural outgrowth of the NICS organization: NICS governing board is made up of tribal representatives who establish its policy and select its administrators and judges; NICS staff salaries are paid by a combination of federal tribal priority allocations, pass through self-governance funds, Administration for Native Americans grants, and enhanced services contracts. Individual tribal governments retain, with the full support of NICS staff, the power to make critical decisions about their jurisdiction. The member tribes choose which of the program services they will accept, which judges can be impaneled on their appellate courts, and what issues their codes will address. All of these features of member tribes' participation reinforce NICS's deference to individual tribal cultures.

To be certain, neutrality and competence are critical features of the NICS arrangement. The challenge of developing, organizing, and funding effective and fair tribal courts is well known in Indian Country, yet the NICS member tribes have recognized the critical importance of neutral dispute resolution for the health of Indian nations and built an arrangement that provides it. A tribal court similar to the ones supported by NICS, whose basis of authority derives from tribal values and laws, allows tribes to adjudicate disputes within a system of justice created on their own terms. A tribal court can legitimately adjudicate constitutional crises and thereby strengthen the legitimacy of tribal institutions of government. A competent criminal court can help maintain law and order and provide the basis for retrocession of tribal criminal jurisdiction. Though NICS is very clear that they only staff the court and are not the court per se, the existence of the NICS organization helps buffer the court proceedings from political pressure. The judge is contracted and paid by the NICS, and the tribes each have an opportunity to accept or reject judges on the rosters annually. In sum, NICS tribal courts, like effective tribal courts elsewhere, strengthen tribal sovereignty and advance their citizens' well-being.

Finally, the tribes' experience within the Northwest Intertribal Court System demonstrates that effective tribal courts may emerge out of the consortium form. Several of NICS past member tribes the Lummi, Suquamish, Nisqually, and Squaxin Island tribes now have entirely autonomous tribal courts. This independence is consistent with the NICS mission of assisting tribes in the exercise of their sovereignty. So, too, however, is the continuing cooperative pooling of resources that empowers its current member tribes. Choosing to establish a tribal court autonomous or shared is a vital step toward enhanced tribal sovereignty.

Lessons:

- Creating a court-services consortium can be an act of tribal sovereignty. The courts can remain tribal organizations operating under a tribe's own laws, codes, cultural prerogatives, and procedures. It is not necessary for the consortium to supply the court per se, but simply support a tribal court with contracted staff.
- Pooling tribal resources (including judges, prosecutors, code-writing staff, and so on) to create a court-services consortium can benefit from economies of scale and thereby overcome the cost obstacles to creating a critical institution necessary for tribal success: an independent court.
- A consortium can be established in a way that allows its member tribes to decrease their reliance on the consortium as they gradually develop their own courts. This fluid process helps ensure that the consortium remains responsive to the needs of its member tribes.