

**CREATIVE CIVIL  
REMEDIES  
AGAINST  
NON-INDIAN  
OFFENDERS IN  
INDIAN  
COUNTRY**



**Southwest  
Center for Law  
and Policy**

# 2008 Final Report Creative Civil Remedies Against Non-Indian Offenders In Indian Country

Sponsored by the Southwest Center for Law and Policy

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# 2008 FINAL REPORT ON CREATIVE CIVIL REMEDIES FOR NON-INDIAN OFFENDERS IN INDIAN COURTS

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## INTRODUCTION:

Indian<sup>4</sup> women suffer the highest rates of domestic violence, stalking, and sexual assault of any population in the United States<sup>5</sup>. The majority of perpetrators of these crimes are non-Indian males<sup>6</sup>. Paradoxically, tribal courts may not currently exercise criminal jurisdiction over non-Indians who commit these crimes in Indian Country<sup>7</sup>.

In response to this challenge, the Office on Violence Against Women, United States Department of Justice provided funding to the Southwest Center for Law and Policy to convene a panel of Indian Country legal experts in Tucson, Arizona on January 15 – 16, 2008. The panel was tasked with developing a series of recommendations for Tribes, Pueblos, and Alaska Native Villages on the effective exercise of expansive civil jurisdiction over non-Indian offenders. Additionally, the group was tasked with developing a series of recommendations on creative civil remedies that can be imposed against non-Indians who commit crimes against Indian women in Indian Country.

Technical support for the meeting was provided by the Southwest Center for Law and Policy, a technical assistance and training provider for the Office on Violence Against Women, United States Department of Justice.

## OVERVIEW:

The mantle of tribal sovereignty weighs heavily with the responsibility to protect all persons located on tribal lands. Lack of criminal jurisdiction over non-Indians often dictates that Tribes must look to new and innovative civil legal strategies to address safety and security for their citizens/members, residents, and visitors. This report explores ways in which tribes can work within current jurisdictional limitations to impose

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<sup>4</sup> “Indian” is a legal term that is used throughout this report. There are dozens of different definitions of the legal term “Indian” throughout the federal code, case law, and tribal codes. For a further discussion, please see section IIC “Who Is An Indian?” of this report at page 12.

<sup>5</sup> American Indians and Crime: A BJS Statistical Profile, 1992 -2002, <http://www.ojp.usdoj.gov/bjs/pub/pdf/aic02.pdf>

<sup>6</sup> Ibid.

<sup>7</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

significant, meaningful, and effective deterrents and consequences for non-Indian offenders.

Each tribe is unique in respect to culture, language, laws, tradition, history, and available resources. However, all tribes share a common interest in keeping persons located within their jurisdictional boundaries safe from sexual assault, stalking, dating violence, and domestic violence. Tribes also maintain a shared interest in ensuring that perpetrators of crimes against Indian women experience meaningful consequences for their actions.

This report addresses current jurisdictional constraints and suggests strategies to maximize the exercise of sovereign powers necessary to maintain justice, safety, and order on tribal lands. Each section of the report contains a brief discussion of the relevant jurisdictional challenges and is then followed by a series of recommendations.

**2008 Roundtable Participants On Creative Civil Remedies  
For Non-Indian Offenders In Indian Country**

**The Honorable Steve Aycock**

**The Honorable Montie Deer (Muskogee Creek)**

**The Honorable Stacy Leeds (Cherokee)**

**Michelle Paquin Johnson (Red Lake Band of Chippewa Indians)**

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**The Honorable James G. White (Citizen Potawatomi Nation)**

**The participants and organizers wish to extend  
their deep and sincere appreciation  
for the assistance of the Hon. William C. Canby, Jr. who served as  
an invaluable legal resource during the meeting.**

## I. TRIBAL COURT CRIMINAL JURISDICTION

Tribes may exercise criminal jurisdiction over Indians who commit crimes in Indian Country<sup>8</sup>. However, the United States Supreme Court has ruled that tribal courts may *not* exercise criminal jurisdiction over non-Indians.<sup>9</sup>

The Indian Civil Rights Act of 1968 limits the criminal sanctions that can be imposed by a tribal court to a fine of no greater than \$5,000 and/or up to one year of incarceration<sup>10</sup>. Other limitations to the exercise of tribal criminal jurisdiction are imposed upon those tribes subject to Public Law 83-280 (commonly referred to as “Public Law 280”)<sup>11</sup>.

There is no bright line with which to determine who is an Indian for purposes of exercising criminal jurisdiction. However, tribal courts may exercise criminal jurisdiction over those persons who are citizens/members of federally recognized tribes or who are eligible for enrollment with a federally recognized tribe.

It can be challenging for tribal communities to make the determination as to whether an individual residing or present within the community is an Indian. Tribes often rely upon tribal identification cards (such as Certified Degree of Indian Blood cards) in making a determination as to whether a criminal defendant is an Indian. Other common factors relied upon include: representation of oneself as an Indian, recognition by the community as an Indian, active participation in tribal affairs, involvement in ceremonies, and marriage or a familial relationship with a tribal member .

Some tribes may choose to clarify their tribal criminal codes to create a rebuttable presumption that any person who commits a crime within their jurisdiction is an Indian

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<sup>8</sup> 25 U.S.C. §1301

<sup>9</sup> *Oliphant v. Suquamish Indian Tribe*, supra.

<sup>10</sup> 25 U.S.C. §§ 1301-03

<sup>11</sup> Pub.L. 83-280, August 15, 1953.

subject to the criminal jurisdiction of the tribal court<sup>12</sup>. Lack of citizenship/membership with a federally recognized tribe or ineligibility for citizenship/membership could then be raised by the accused as an affirmative defense. The burden of proof would also rest upon the accused to overcome the presumption that he is an Indian subject to the criminal jurisdiction of the tribal court by the applicable standard of proof (e.g. preponderance of the evidence, clear and convincing evidence, or proof beyond a reasonable doubt).

Some defendants have attempted to escape or circumvent the criminal jurisdiction of tribal court by disenrolling themselves. It should be noted that the determining factor is the defendant's status as an Indian at the time of the commission of the crime. Subsequent attempts to disenroll or to renounce citizenship or membership do not bar prosecution for any crime committed while the defendant possessed the status of an Indian.

All tribal court orders in criminal cases should be carefully crafted to reflect that the proceedings complied with due process. Additionally, tribal court orders should detail the factors indicating that the court properly exercised subject matter jurisdiction and should provide a clear record as to whether the defendant was represented by counsel or whether the defendant knowingly and intelligently waived counsel.

Tribal court orders in criminal domestic violence cases should also carefully note the relationship between the parties and whether the crime involved the use of force, the attempted use of force, and/or the use of a deadly weapon. If the crime is one in which the defendant was entitled to a trial by jury, the final order should reflect whether the defendant waived the right to a jury trial or whether a jury trial was provided.

Some federal crimes require a qualifying prior conviction. For these crimes, the record must reflect that the defendant was represented by counsel (appointed or retained) or

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<sup>12</sup> The Navajo Nation places the burden of proof on a criminal defendant to show that he is not an Indian and recognizes that the status of being an Indian is not an element of a criminal offense. *Navajo Nation v. Hunter*, 6 Navajo Rep. 194 (Nav. Sup. Ct. 1996).

that the right to counsel was knowingly and intelligently waived in tribal court<sup>13</sup>. Although the Indian Civil Rights Act does not require tribes to provide indigent defense, tribes may wish to consider amending their codes to provide for indigent defense counsel. This may result in more successful federal prosecutions and greater accountability for dangerous criminals.

Many tribal courts admit a mixture of law school trained and non-law school trained legal practitioners to the practice of law. Court policies and procedures ensuring that the appointed defense counsel has comparable education and training as the prosecuting attorney can maintain confidence in the tribal criminal justice system and mitigate any potential claims of unfairness.

The federal government maintains a trust responsibility towards tribes. The federal-tribal relationship is to “be judged by the most exacting fiduciary standards.”<sup>14</sup> However, inadequate federal assistance coupled with restrictive federal policies and laws<sup>15</sup> often present enormous challenges for tribal courts.

Tribes subject to P.L. 280 may enter into government to government cooperative agreements with states whereby tribal prosecutors are designated by the state as “special state prosecutors.” These “special state prosecutors” can then prosecute both Indians and non-Indians charged with non-federal crimes in the state court system. This type of “special prosecutor” arrangement is currently in place in the federal system between the United States Attorney for the District of Arizona and tribal prosecutors from Arizona tribes.

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<sup>13</sup> For example: 18 U.S.C. § 922(g)(9) prohibits the possession of firearms, ammunition, or explosives by persons with a qualifying misdemeanor conviction for the crime of domestic violence.

<sup>14</sup> *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942).

<sup>15</sup> Two examples: 1.) Tribal courts may not exercise criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe*, *supra*; 2.) The maximum criminal sentence that can be imposed by a tribal court on an Indian defendant for any crime committed in Indian Country is up to one year of incarceration and up to a \$5,000 fine. Indian Civil Rights Act of 1968, *supra*.

## II. TRIBAL COURT CIVIL JURISDICTION

Civil jurisdiction in Indian Country is relatively unsettled and extremely complex. There are several analyses that must be made in all civil cases before the tribal court may exercise jurisdiction.

On the most basic level, tribal courts must possess both subject matter and personal jurisdiction in every civil case. Subject matter jurisdiction refers to the court's power to hear the general subject matter that is at the heart of the litigation. Personal jurisdiction refers to the court's power over the defendant(s) involved in the litigation.

### A. Personal Jurisdiction

Generally, the defendant in a civil action must have minimum contacts<sup>16</sup> with the tribe or must consent to the jurisdiction of the tribal court in order for personal jurisdiction to be exercised. Minimum contacts in civil cases related to domestic violence, sexual assault, and stalking can often be met simply by a showing that all or a portion of the crime was committed by the defendant(s) on tribal lands.

### B. Subject Matter Jurisdiction

The question of whether a tribal court can exercise civil jurisdiction is a question of federal law<sup>17</sup>. Generally, a tribe can only exercise subject matter jurisdiction over disputes that arise in Indian Country. The federal definition of Indian Country is set forth in 18 U.S.C. §1151:

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<sup>16</sup> "Minimum contacts" is a legal principle used to determine when a court in one jurisdiction may assert personal jurisdiction over a defendant from another jurisdiction. The United States Supreme Court has held that that it is unfair for a court to assert jurisdiction over a party unless that party's contacts with the jurisdiction in which that court sits are 1.) such that the party "could reasonably expect to be hauled into court" and 2.) do not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

<sup>17</sup> *National Farmers Union Ins. v. Crow Tribe*, 471 U.S. 845 (1985).

[T]he term “Indian Country”, as used in this chapter, means (a) all land within the limits of any Indian reservation within the jurisdiction of the United States government notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights of way running through the same<sup>18</sup>.

The United States Supreme Court has ruled that tribes have exclusive jurisdiction over any civil case involving an Indian defendant when the underlying claim arose in Indian Country<sup>19</sup>. This includes civil actions brought by non-Indian plaintiffs against Indian defendants. However, it is unclear whether the exclusive civil jurisdiction of tribal courts also extends to Indian defendants who are citizens/members of other tribes<sup>20</sup>.

Non-Indians commit the majority of domestic violence, sexual assault, and stalking crimes against Indian women<sup>21</sup>. However, the ability of tribal courts to exercise civil jurisdiction over non-Indians who commit these crimes against Indian victims in Indian Country is complex and unsettled.

The Violence Against Women Act clearly recognizes the power of tribal courts to issue and enforce domestic violence protection orders against non-Indian defendants<sup>22</sup>. However, tribes must still make a showing that the court possessed both subject matter and personal jurisdiction over the parties when both issuing and enforcing these orders.

Two United States Supreme Court cases from the 1980’s and 1990’s directly address tribal court civil jurisdiction over non-citizens/members and over non-Indian defendants. *Montana v. United States*<sup>23</sup> held that tribal courts have no civil regulatory authority over

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<sup>18</sup> 18 U.S.C.A. § 1151

<sup>19</sup> *Williams v. Lee*, 358 U.S. 217 (1959), *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

<sup>20</sup> *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

<sup>21</sup> *American Indians and Crime: A BJS Statistical Profile, 1992 -2002*,

<http://www.ojp.usdoj.gov/bjs/pub/pdf/aic02.pdf>

<sup>22</sup> 18 USC § 2265

<sup>23</sup> *Montana v. United States*, 450 U.S. 544 (1981).

non-Indian defendants on fee land owned by non-Indians that is located within a reservation unless one of the following factors apply: 1) the parties had entered into a consensual relationship with the tribe or its members through commercial dealing, contracts, leases or “other arrangements” or 2) the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. In *Strate v. A-1 Contractors* the United States Supreme Court held that a tribe had no civil jurisdiction over non-members involved in a traffic accident that occurred on non-Indian fee land ( a state right-of-way running through the reservation). The Court further held that, absent Congressional direction enlarging tribal court jurisdiction, the civil authority of Indian tribes and their courts over non-Indian fee lands generally does not extend to the activities of non-members of the tribe. Therefore, if neither of the two *Montana* factors listed above apply, tribal courts may not exercise civil jurisdiction over non-members on fee lands<sup>24</sup>.

Left unaddressed in the above cases is whether tribes may exercise civil jurisdiction over non-Indians and over non-citizen/member Indians in actions arising on tribal lands. In the absence of any specific guidance from the United States Supreme Court, the most prudent approach is for tribal courts to make specific findings in every civil case as to:

- whether the Due Process requirements of the Indian Civil Rights Act<sup>25</sup> of notice and opportunity to be heard have been complied with; *and*
- whether the defendant is a citizen/member of the tribe, a non-Indian, or a citizen/member of another tribe; *and*
- whether the incident giving rise to the civil litigation occurred on tribal land, on fee land, or on non-tribal rights-of-way ; *and*

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<sup>24</sup> The “Duro fix” returns tribal criminal jurisdiction over non-member Indians on fee lands and on rights-of-way. 25 U.S.C. Sec. 1301(2) and 18 U.S.C. Sec 1151(a). Tribes may therefore possess greater criminal jurisdiction (which involves the loss of personal liberty) than civil jurisdiction over non-citizen/member Indians. Also see *United States v. Lara, 541 U.S. 193 (2004)*.

<sup>25</sup> 25 U.S.C Sec. 1301 et seq.

- whether the parties had entered into a consensual relationship with the tribe or its members through commercial dealing, leases, or “other arrangements,”  
*or*
- whether the conduct in question threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

It can be helpful for tribal court orders to reference any relevant federal and tribal laws relied upon by the court. For example, a tribal court order may reference the court’s power to enforce domestic violence protection orders under 18 U.S.C. § 2265 (e) of the Violence Against Women Act in addition to referencing relevant tribal code provisions<sup>26</sup>. Referencing applicable federal laws can only help bolster a tribal court’s determination of jurisdiction if the matter undergoes federal appellate review.

### **C. Who Is An “Indian”?**

In addition to making a determination as to the location of where the incident giving rise to the civil litigation occurred, tribal courts are also tasked with making a determination as to whether the defendant in the civil action is a non-citizen/member “Indian,” a non-Indian, or a citizen/member of the tribe.

There are dozens of different definitions of the term “Indian” under federal law. Two of the many examples include:

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<sup>26</sup> In order to receive the widest possible recognition and enforcement, tribal court protection orders should contain language indicating that the order was issued after a hearing in which the defendant had notice and opportunity to be heard; that the order was issued to restrain the defendant from harassing, stalking, or threatening an intimate partner, or child of such person, or engaging in other contact that would place an intimate partner in reasonable fear of bodily injury to the partner or child; that a finding has been made that the defendant represents a credible threat to the physical safety of the intimate partner or child (or specifically prohibit the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury). Tribal orders should also advise defendants of any applicable federal firearms prohibitions.

1. The Indian Child Welfare Act of 1978<sup>27</sup> defines an Indian child as a child who is a member or who is eligible for membership in a federally recognized tribe; and
2. The Indian Reorganization Act (IRA) of 1934 (also known as the Wheeler-Howard Act)<sup>28</sup> includes in its definition of the term “Indian” the descendants of Indians who resided within the boundaries of any reservation on a specified date.

Commonly, tribes define “Indian” as an enrolled member of a federally recognized tribe or a person eligible for membership. Many tribes utilize the same definition of “Indian” in both the civil and criminal arenas and do not distinguish between citizens/members of their own tribes and citizens/members of other tribes. Tribes may wish to adopt separate definitions of the term “Indian” for purposes of exercising civil and criminal jurisdiction.

In the civil context, the definition of the term “Indian” can be broadened in tribal codes to encompass more individuals. Some tribes may even wish to enact codes that allow civil sanctions to be imposed against “any person” committing a prohibited act<sup>29</sup>.

## **D. Citizenship/Membership**

Tribes are free to determine their own citizenship/membership<sup>30</sup>. For purposes of civil jurisdiction, tribes may wish to adopt very expansive definitions of who may be considered a citizen/member. It is common for tribal codes to include within their definition of the term “citizen/member” adopted persons as well as lineal descendants of a tribal citizen/member.

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<sup>27</sup> 25 U.S.C. § § 1901-1963

<sup>28</sup> 25 U.S.C. § 461 et seq.

<sup>29</sup> The Tohono O’odham Nation exercises civil jurisdiction over “any person who does an act or who causes an act to occur within the territorial jurisdiction of the Tohono O’odham Nation, or does an act which has an effect within the territorial jurisdiction of the Nation, upon which a cause of action can be stated.” Title III, Chapter 1-101(b)(2) of the Tohono O’odham Civil Code.

<sup>30</sup> *United States v. Wheeler*, 435 U.S. 313 at 322 (1978).

The Comanche Nation has enacted a Membership Code that includes lineal descendents as citizens/members of their Nation and also includes a provision for disenrollment:

ARTICLE III - MEMBERSHIP (Pursuant to Amendment V, adopted May 29, 1976, Amendment D, adopted February 23, 2002)

Section 1. The membership of the Comanche Nation shall consist of the following:

(a) All persons, who received an allotment of land as members of the Comanche Nation under the Act of June 6, 1900 (31 Stat. 672), and subsequent Acts, shall be included as full blood members of the tribe.

(b) All living direct descendants of allottees eligible for membership under the provisions of Section 1 (a) of this Article born on or before the date of adoption of this constitution.

(c) All descendants of allottees eligible for membership under the provision of Section 1.(a) of this Article, having one eighth (1/8) or more degree of Comanche Indian Blood.

Section 2. Applications for new membership in the Comanche Nation under Section 1 (c) must be supported by authenticated copies of birth certificate or other records recognized by State or Federal recorders. All evidence so submitted shall be retained by the tribe to support the record.

Section 3. Any person eligible for membership in the Comanche Nation under the provisions of Section 1 of this Article shall be considered a member of the Comanche Nation unless:

(a) The person is an adult and submits in writing to the tribal chairman a statement of withdrawal from the Comanche Nation and relinquishment of all rights of tribal membership, signed by him

or her and attested by two (2) witnesses, which statement shall automatically effect a permanent withdrawal from membership in the Comanche Nation and a relinquishment of all rights and benefits thereunder; or

(b) The person is at the time of the adoption of this constitution an enrolled member of another tribe or has in the past received and accepted or, if a minor, whose parents or legal guardian has received and accepted for said minor, material or monetary benefits as a member of another Indian tribe and who fails or whose parents or legal guardian fails, if a minor, within ninety (90) days after the adoption of this constitution to declare in writing to the tribal chairman preference for membership in the Comanche Nation and at the same time in writing renounces membership in said other tribe; or

(c) The person after the adoption of this constitution by his or her affirmative action or, if a minor, by the affirmative action of his or her parents or legal guardian becomes a recognized or enrolled member of another Indian tribe with the full rights, privileges and powers of membership under the rules of said other tribe, which said affirmative action and subsequent recognition or enrollment shall automatically effect a permanent withdrawal from membership in the Comanche Nation and a relinquishment of all rights and benefits thereunder; or

(d) The person after the adoption of this constitution receives and accepts or, if a minor, his or her parents or legal guardian accepts for said minor, material or monetary benefits as a result of membership in another Indian tribe, which such receipt and acceptance shall automatically effect a permanent withdrawal from membership in the Comanche Nation and a relinquishment of all rights and benefits thereunder.

Under current federal law, it may also be possible for tribes to “naturalize” citizens/members who otherwise do not meet any of the current federal definitions of an “Indian.” A tribal naturalization law could encompass persons who are married to a tribal citizen/member and/or who reside on tribal lands. A person who wishes to become a naturalized citizen/member would have to take affirmative steps to do so. This would

further bolster arguments that the naturalized citizen/member had entered into a consensual relationship with the tribe.

These provisions are not without some consequences. Naturalized citizens or persons encompassed under a broader definition of “citizens/member” would have the right to vote in tribal elections and the responsibility to serve on juries in tribal court. They may also have the right to receive tribal per capita distributions and the right to other tribally funded benefits. Although untested, it may also be possible for tribes to naturalize citizens/ members for limited purposes only.

### **III. Updating Tribal Codes**

It is important to preserve and to protect tribal sovereignty and the powers of tribal courts. Civil jurisdiction in Indian Country is complex and requires great attention to detail when drafting tribal civil codes.

#### **A. Legislative History**

Federal and tribal courts of appeal often look to the legislative history of a code or statute to determine the intent of the legislative body in adopting the new law. Memorializing and preserving the discussion and concerns of the legislative body can provide considerable guidance for the court<sup>31</sup>. Preservation of written notes, debate, and testimony reflecting the underlying need for the legislation as well as the factors relied upon in determining can be important<sup>32</sup>. Because of the complexity of civil jurisdiction in Indian Country, it can be important to preserve any legislative history

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<sup>31</sup> The full minutes of the Constitutional Convention to the Cherokee Nation’s 1999 Constitution have been preserved in multiple formats. These minutes provide a valuable insight into legislative intent and will provide guidance for the courts and for Cherokee citizens for generations to come.

<sup>32</sup> The United States Congress preserves its legislative history of federal statutes (including the Violence Against Women Act) by publication in the *Congressional Record*. Legislative history is important to courts in cases where they are required to determine the legislative intent of a particular statute.

detailing whether the matter affects the health, safety, political integrity or welfare of the tribe

Tribal elders can provide insightful testimony and information when drafting tribal codes. Preservation and inclusion of elders' testimony can provide significant guidance to courts upon review<sup>33</sup>.

## **B. Preamble or Purpose Section**

The preamble or purpose section of a code provides the context and overall intent of the drafters. Inclusion of language in the preamble that the matter (e.g. domestic violence, elder abuse, etc.) affects the health, welfare, and safety of the tribe and threatens the social structure of the tribe can provide support against future legal challenges to the exercise of subject matter jurisdiction<sup>34</sup>.

## **C. Definition of Terms**

Tribes may wish to broadly define persons over whom they may exercise jurisdiction. Tribal codes that provide for jurisdiction to be exercised over "any Indian" may have the effect of limiting the class of persons over whom jurisdiction may be exercised. Tribal codes can be broadened to include language allowing civil jurisdiction to be exercised over "any person."<sup>35</sup>

Tribes may wish to define within their codes the factors indicating that a person has

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<sup>33</sup> Elders are an extremely important legal resource for Tribes. Their knowledge of traditional law, values, and principles are recognized as an invaluable contribution to tribal legal systems. See 1 Navajo Nation Code §203 (G).

<sup>34</sup> An example of this type of preamble or purpose section can be found in Title 38, Chapter 37.01 of the Turtle Mountain Band of Chippewa Indians Domestic Violence Code.

<sup>35</sup> See Title III, Chapter 1-101(b)(2) of the Tohono O'odham Civil Code, *supra*. Prairie Band Potawatomi Nation allows jurisdiction to be exercised over "any person" on the Prairie Band Potawatomi Indian Reservation to the extent not prohibited by federal law. Potawatomi Law and Order Code, Title 1, Chapter 1-1.

entered into a consensual relationship with the tribe. Some factors may include that the defendant has established a residence in Indian Country, that the defendant is married to a tribal citizen/member, that the defendant works or attends school in Indian Country, and that the defendant accesses tribal services (such as tribal law enforcement, Indian Health Services, etc.) on tribal lands. Specific language can also be included indicating that an intimate partner relationship with a citizen/member that occurs within the exterior boundaries of the reservation is *a fortiori* a consensual relationship with the tribe<sup>36</sup>.

When modifying domestic violence codes and defining terms, tribes may also consider mirroring the exact language contained in the Violence Against Women Act to provide for enhanced enforcement of tribal orders in foreign courts<sup>37</sup>. While many states and tribes have protection order codes that allow the order to remain in effect for one or two years, some states have adopted codes that allow protection orders to remain in effect

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<sup>36</sup> The Oglala Sioux Tribe Law and Order Code, Chapter 2, Section 20(a) has defined classes of non-citizen/member persons who have been deemed to have entered into a consensual relationship with the Tribe as follows:

(a) Any person who is not a member of the Oglala Sioux Tribe shall be deemed as having consented to the jurisdiction of the Oglala Sioux Tribe, by doing personally through an employee, through an agent or through a subsidiary, any of the following acts within the exterior boundaries of the Pine Ridge Indian Reservation.

1. The transaction of any business.
2. The commission or omission of any act which results in a tort action.
3. The ownership use or possession of any property situated within the exterior boundaries of the Pine Ridge Indian Reservation.
4. Engaging in any employer-employee relationship.
5. Leasing or permitting of any land or property.
6. Residing on the Pine Ridge Indian Reservation.
7. Commission of any act giving rise to claims for spousal support, separate maintenance, child support, child custody, divorce or modification of any decree of divorce or separate maintenance proceeding.
8. Any contractual agreement entered into within the exterior boundaries of the Pine Ridge Indian Reservation.

<sup>37</sup> The Tulalip Tribes Domestic Violence Ordinance #117 contains numerous provisions that closely mirror the language of the Violence Against Women Act including the protection order and firearms disqualification sections of the Ordinance.

indefinitely<sup>38</sup>. Tribes are similarly free to adopt codes that enable the order to remain in effect for several years or for a person's lifetime.

#### **D. Custom and Tradition**

Tribal codes can specify that custom and tradition provide important guidance for the courts. Tribes may consider having elders provide advice and counsel during the code writing process<sup>39</sup>. Codes can also include specific remedies available to the court that reflect traditional practices and notions of fairness<sup>40</sup>.

#### **E. The Indian Civil Rights Act And Equal Protection**

Some tribes include due process and equal protection rights, similar to those contained in the Indian Civil Rights Act of 1968, within their Constitution and codes<sup>41</sup>. Although not required, memorializing these rights in tribal codes and Constitutions may help protect against future encroachments on tribal sovereignty and safeguard the exercise of jurisdiction over non-citizens/members and over non-Indians.

Some tribes may wish to modify their Constitutions and codes to recognize the right to meaningful appellate review under tribal law<sup>42</sup>. Similarly, inclusion of the right to counsel (although not required) can also protect against challenges to the broad exercise of tribal court jurisdiction<sup>43</sup>. Some tribes may require legal practitioners to successfully

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<sup>38</sup> New Jersey, Missouri, and Florida allow state court judges to use their discretion in ordering restraining or protection orders to remain in effect indefinitely.

<sup>39</sup> Ibid.

<sup>40</sup> Navajo Nation Code §203 (G) recognizes the importance of inclusion of elders, medicine people, and teachers of traditional laws, values, and principles in guiding the courts in their imposition of remedies and in providing a framework for the administration of justice.

<sup>41</sup> See Article III of the Constitution of the Cherokee Nation of Oklahoma.

<sup>42</sup> For an interesting discussion on indigenous justice systems, including courts of appeal, see Pecos Melton, Ada, *Indigenous Justice Systems and Tribal Society*, [www.aid.ainc.net/Publications/ij\\_systems.htm](http://www.aid.ainc.net/Publications/ij_systems.htm)

<sup>43</sup> Two of the largest tribes in the United States provide the right to counsel. See Constitution of the Cherokee Nation, Article III Sec. 2 and Navajo Nation Policy on Appointment of Counsel

pass a tribal bar examination to ensure competency of counsel and familiarity with tribal laws, custom, and tradition<sup>44</sup>.

## **IV. Contempt of Court**

All courts have the inherent power to punish those persons who have shown disrespect to the individual judge or to the judicial system or who have engaged in behaviors which are intended to disrupt the administration of justice. Courts also have the power to take actions to encourage persons to comply with orders previously issued by the court.

There are three types of contempt proceedings: criminal contempt, summary contempt, and civil contempt. A person who has committed contempt of court is referred to as a “contemnor.”

### **A. Criminal Contempt**

Tribal court judges may hold a person in criminal contempt for acts that are intended to show disrespect to the court and/or to obstruct the administration of justice. A court may cite a person for criminal contempt for willfully disobeying a lawful order of the court.

Criminal contempt proceedings are punitive in nature and can result in incarceration, a fine, or both. These proceedings are intended to punish past conduct and are usually initiated by the tribal prosecutor. The contemnor is entitled to all of the tribal and Indian Civil Rights Act protections otherwise provided to persons charged with a crime. These include the right to Due Process, the opportunity to obtain legal counsel to assist with the defense, and the right to a trial. The burden of proof in a criminal contempt action is

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and Indigency (1992). Tribes that utilize CFR Courts rely upon the Code of Federal Regulations, Title 25 Sec. 11.205 which provides defendants the right to appointed counsel in criminal matters.

<sup>44</sup> Two examples: The Pascua Yaqui Tribe is one of the more recent tribes requiring legal practitioners to pass a bar examination. The Navajo Nation also requires passage of a bar examination before admission to practice in tribal court.

on the tribal prosecutor to prove each and every element of the charge(s) beyond a reasonable doubt. As in other criminal actions, tribal courts may not hold non-Indians in criminal contempt of court.

## **B. Summary Contempt**

Summary contempt is also sometimes referred to as “direct contempt. It is a tool available to tribal courts to maintain the orderly administration of justice. Courts may find a defendant in summary contempt to suppress acts of violence or disrespect that occur in open court. <sup>45</sup>Two examples of summary contempt include shouting expletives inside the courtroom while the court is in session or physically attacking (or threatening to physically attack) court personnel in the courtroom while the court is in session. All courts have the inherent power to maintain the safety, order and integrity of the court. In the examples cited above, a tribal court judge could summarily (e.g. immediately) detain a non-Indian contemnor to preserve the safety, integrity, and order of the court.

## **C. Civil Contempt**

Civil contempt of court differs from criminal contempt in that its purpose is to encourage prospective, future compliance with a previously issued court order. It is remedial in nature and cannot be used to punish. Unlike criminal contempt, civil contempt is not an offense against the dignity of the court. Rather it is a tool that courts may use to encourage or prompt a party to comply with an order that has been previously issued for the benefit of another person or party.

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<sup>45</sup> “To preserve order in the courtroom for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense. Such summary vindication of the court’s dignity and authority is necessary. It has always been so in the courts of common law and the punishment imposed is due process of law. “*Pounders v. Watson*, 521 U.S. 982 (1997) citing *Cooke v. United States*, 267 U.S. 517 (1925).

Generally, civil contempt is ordered as a result of a “show cause” hearing. The burden of proof, typically by a preponderance of the evidence, is on the contemnor to demonstrate that the alleged contemptuous behavior was not willful or intentional. The contemnor must further prove that he did not have the ability to comply with the court’s order.

Civil contempt can result in the imposition of fines and/or in the detention of the contemnor. Detention cannot be ordered as punishment. Rather, it can only be ordered as a means to force compliance with a court’s previously issued order. The contemnor “holds the keys to the jail” and can earn his freedom by compliance with the previously issued court order. Detention is commonly used against contemnors who repeatedly fail or refuse to comply with a court order.

Tribal courts may hold non-Indians, non-citizen/member Indians, and citizens/members in civil contempt of court. Although civil contempt may result in detention, the proceedings are civil in nature and do not trigger the same right to counsel or due process safeguards as in criminal contempt proceedings. Before any civil contemnor may be held in detention, the court must make a finding that the contemnor willingly or intentionally violated the court’s order and that he had the ability to comply with the order.

An example: a non-Indian contemnor could be detained in the tribal jail until he made significant progress towards payment of victim restitution previously ordered in a tribal court domestic violence protection order. However, detention could only be ordered after the court made specific findings that the contemnor failed to prove, by a preponderance of the evidence, that he did not willfully violate the order and that he was objectively and reasonably unable to comply with the order.

Whenever a civil contemnor has been incarcerated (especially when the contemnor is a non-citizen/member Indian or non-Indian), tribal court orders should precisely detail:

- the previous relevant order(s) of the court; and

- the conduct that gives rise to the incarceration; and
- the legal authority of the court to impose incarceration; and
- the purpose of the incarceration to encourage compliance with the previously issued order; and
- the act or acts that could be performed by the contemnor that would constitute compliance.

The order should also include a statement that the contemnor will be immediately released from incarceration upon the court's determination that the contemnor is in substantial compliance with the previously issued order.

Tribal codes should clearly distinguish between the civil and criminal contempt powers of the tribal court. The code may also wish to include language recognizing that the power to issue contempt orders is an inherent power of the court necessary to protect the safe, orderly, and respectful administration of justice.

## **V. Civil Remedies**

In addition to contempt of court, there are numerous other civil "remedies"<sup>46</sup> that can be imposed by tribal courts. This section contains a list of suggested civil remedies designed to provoke further dialogue and discussion in Indian Country. The list of remedies provided in this report is by no means exhaustive.

### **A. Monetary Penalties**

Monetary penalties are civil remedies commonly ordered by state, federal, and tribal courts. In addition to fines, tribal codes may also allow the court to assign attorneys' fees, supervised child visitation costs, and court costs to a defendant found responsible

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<sup>46</sup> Black's Law Dictionary defines a remedy as "The means by which a right is enforced or the violation of a right is prevented, redressed, or compensated." Black, Henry Campbell, *Black's Law Dictionary*, St. Paul (1983).

for a civil offense. Fines and costs are payable to the tribe while attorneys' fees are generally made payable to the opposing party.

Fining non-Indian defendants in tribal court civil matters routinely happens when non-Indians violate tribal civil traffic codes. If the tribal code provides for this remedy, a non-Indian who has violated a civil domestic violence code may also be fined by the tribal court.

There are some limits to the amount of a fine that can be imposed on a defendant in a civil action. The Indian Civil Rights Act mirrors the 8<sup>th</sup> Amendment to the United States Constitution in its prohibition against the imposition of *excessive* fines. 25 U.S.C. §1302 (7).

## **B. Community Service**

Many tribal codes include language in their preamble that domestic violence (and other offenses against Indian women) harms the community as well as the victim. Therefore, tribal courts may wish to order community service hours, in addition to fines, for civil offenses committed against the community.

Community service can also be ordered in lieu of fines when the defendant does not have the ability to pay the fine or when payment of the fine would divert funds from restitution or other monies owed to the victim.

Many tribal codes contain language indicating that domestic violence is not traditional. Therefore, tribal courts may wish to impose traditional forms of community service in civil cases. For example, a defendant who has been found to have violated a civil protection order may be ordered to cut wood for a community ceremony or to clear and clean ceremonial grounds.

## C. Restitution

Restitution can be ordered in a civil case to make the victim as whole as possible and to compensate her for her losses. It is intended to indemnify the victim for any loss, damage, or injury that occurred as a result of the defendant's conduct.

Restitution orders commonly include ordering the defendant to make payment for a victim's loss of income, healthcare or medical expenses, transportation costs, child care expenses, and repair or replacement of damaged items related to the defendant's unlawful conduct. In some tribal communities, defendants have been ordered to pay restitution to cover the costs of ceremonies or the services of medicine people.

Tribal courts can also order more traditional forms of restitution to compensate the victim for her losses<sup>47</sup>. It can be helpful for tribal codes to contain specific language indicating that traditional forms of restitution can be imposed by the tribal court<sup>48</sup>. Some tribal codes may also wish to detail the traditional forms of restitution that may be imposed<sup>49</sup>.

It is important to note that tribal courts may impose the remedy of restitution against non-Indians, non-citizen/member Indians, and citizens/members. Some traditional forms of restitution in a civil case include ordering the defendant to:

- Gather and deliver firewood
- Hunt or otherwise provide meat or food
- Tend the victim's garden or farm

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<sup>47</sup> Tribes that utilize Peacemakers, Sentencing Circles, and other traditional "restorative justice mechanisms" rely upon customary and traditional law in imposing restitution with a focus on making victims whole. Coker, Donna *Restorative Justice, Navajo Peacemaking and Domestic Violence*, *Theoretical Criminology*, Vol. 10, No.1, 67-85 (2006); Rieger, Lisa *Circle Peacemaking*, *Alaska Justice Forum* 17(4), Winter 2001.

<sup>48</sup> See Navajo Nation Government Title VII Amendments, *Applying Dine' Original Laws*

<sup>49</sup> *Ibid.*

- Provide access to equipment such as allowing use of a freezer, backhoe, chainsaw, or piece of heavy equipment
- Dig a ditch or well for water
- Pay for ceremonies or contributing specific items for ceremonies to help heal the victim

If the tribal court elects to order restitution, the court order should clearly indicate that restitution was ordered to compensate the victim for her particular losses and was not ordered to punish the defendant.

#### **D. Shame**

Shame can be a very important tool to curb a defendant's behavior. Some tribal communities traditionally used shame to publicize the defendant's wrongdoing and to prevent future wrongdoing by the defendant and by others.

Tribal courts in civil cases may order the defendant to be subject to some mechanism designed to cause him shame. One extreme example would be ordering the defendant to wear a sign for 30 days that says "I beat my wife and kids."

#### **E. Injunctions**

Tribal courts have the power to issue injunctions prohibiting the defendant from committing, attempting to commit, or threatening to commit specified acts (e.g. contacting a victim, visiting certain locations, attending certain events, committing new crimes, etc.). A domestic violence protection order is one of the more common examples of an injunction.

#### **F. Forfeiture**

Tribal criminal and civil codes can contain forfeiture provisions that allow the tribe to seize property that has been used in the commission of a crime. These provisions

should be carefully drafted to comply with the Due Process clause of the Indian Civil Rights Act of 1968.

Forfeiture proceedings may take two different forms: criminal and civil. Generally, in a criminal forfeiture proceeding, the property subject to forfeiture must be identified in the criminal complaint to serve as notice to the defendant. The defendant must also be given an opportunity to contest the criminal forfeiture. Additionally, the tribe must give notice of the criminal forfeiture proceedings to all third parties who have an interest in the property (e.g. co-owners, lien holders, etc.).

Civil forfeiture proceedings differ from criminal forfeiture in three respects: (1) Criminal forfeiture proceedings are *in personam* (against the person) and are punitive in nature; (2) Civil forfeiture proceedings are *in rem* (against the property) and are remedial; and (3) No criminal charge or conviction is necessary in civil forfeiture, only a valid seizure based on probable cause that the property was used in the commission of a crime.

Typically, once the property has been seized in a civil forfeiture proceeding, notice of the intended forfeiture is given to the owner(s) of record of the property (if known). If the owners are unknown, notice is typically given through publication in a local newspaper for a designated period of time. If no one contests the forfeiture during the allotted time, the property may be disposed of or converted to its own use by the seizing agency. If the civil forfeiture is challenged, then the matter is set for hearing.

The civil forfeiture hearing may require the government to show that it had probable cause to believe the property was used to commit a crime. Once the government makes that showing, the burden then shifts to the owner to show that the property was not used to commit a crime.

The three primary defenses to civil forfeiture include 1.) "innocent owner" (the person did not know and reasonably could not have known that the property would be used in

criminal activity); 2.) no probable cause existed to support a lawful seizure of the property; and/or 3.) no nexus between the crime committed and the property.

Forfeiture can be a useful deterrent against criminal activity. The sale of forfeited property can also benefit the tribe by providing supplemental funds that can be placed in a victim's compensation fund or donated to victim services programs. The forfeited property can also be used by tribal agencies. Forfeited property in civil proceedings commonly includes cash, vehicles, weapons, trailers, and real property.

### **G. Exclusion or Banishment**

Tribes retain the right to exclude non-Indians (who do not otherwise have a federal right to be present) from tribal lands<sup>50</sup>. Tribal codes may allow either the court or the legislative branch of government to issue orders banishing or excluding persons from tribal lands. Generally, the term "exclusion" is used for non-Indians and non-citizens/members and banishment is used for citizens/members.

More limited forms of exclusion and banishment may include prohibiting the defendant from being present at tribal government offices or at tribally owned businesses. It may also be possible to issue revocable easements against non-Indians who live on fee lands within the reservation in order to force compliance with a civil order of the court.

### **H. Posting of a Peace Bond**

Tribal codes may include a civil provision for the posting of a "peace bond." Peace bonds are a type of surety bond issued against a person who has threatened another person or their property. They can also be issued against someone with a long history of misconduct or who has threatened to breach the peace.

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<sup>50</sup> *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144-145 (1982).

Defendants may be ordered to post a sum of money as a peace bond to ensure compliance with a court order. Upon compliance with the court's order, the money posted by the defendant will be returned.

## **I. Civil Commitment**

Tribal courts may issue civil commitment orders to forcibly commit a person to a mental health facility for an indeterminate amount of time or to compel a person to receive mental health treatment. The court must typically find, by clear and convincing evidence, that the person is an immediate danger to himself or others prior to issuing the order because of mental illness. Counsel must be provided (if the person can not afford counsel) and due process must be complied with during the proceedings. The purpose of civil commitment must be to obtain treatment for a person with a mental disorder who, as a result of that disorder, is a danger to himself or others.

Most civil commitment codes allow for private persons to petition the court or for a tribal health officer, law enforcement officer, or judge to initiate proceedings. The civil commitment must be ordered pursuant to a hearing and the person must be allowed an independent psychiatric or psychological examination. The commitment order must be reviewed periodically. Treatment must be provided at the facility where the individual has been committed involuntarily. This remedy can be extremely expensive.

The United States Supreme Court has ruled that sexually violent offenders who have a "mental abnormality" or "personality disorder" may be subject to involuntary civil commitment<sup>51</sup>. The Supreme Court noted that such proceedings are civil, do not constitute punishment, and do not trigger double jeopardy concerns. The court further noted that the civil commitment statute required considerable evidence of past violent sexual behavior, a present mental inclination to repeat that violent sexual behavior, and required the release of the confined person once he became mentally stable and no

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<sup>51</sup> *Kansas v. Hendricks*, 521 U.S. 346 (1997)

longer constituted a danger. The Court also noted that prior criminal conviction is not a pre-requisite for civil commitment of sexually violent predators

## **J. Treatment and Classes**

Tribal courts may also issue orders in a civil case for a defendant to attend parenting classes or batterer reeducation programs. Counseling and successful completion of substance abuse or alcohol treatment can also be ordered. Completion of job training courses or GED classes is other options for available remedies.

## **K. Civil Arrest**

Tribal courts have the power to issue civil arrest orders against any person for failing to comply with a court's previously issued order. Pursuant to the civil arrest order, the person can be apprehended and detained by tribal law enforcement for a reasonable amount of time until the court can convene an evidentiary hearing to determine whether a violation has occurred. Tribal court judges should include language in the civil arrest order linking its issuance to the prevention of future violations of a previously issued court order.

Civil arrest orders can be an extremely useful tool for tribal courts in domestic violence protection order cases. A tribal court judge can issue the civil arrest order any against person who has violated a previously issued protection order. That person could be detained for a reasonable amount of time until a hearing can be convened.

## **L. Civil Regulatory Powers**

Tribes retain considerable powers to regulate persons on tribal lands. Several suggested steps tribes may use to regulate the conduct of persons on tribal lands include:

- removing the name of a person (such as a batterer, a rapist, or someone who has committed child sexual abuse) from the lease of a tribal housing property or reassigning the lease to the victim
- restricting access or rescinding a business license with the tribe
- limiting a person’s access to tribally funded benefits (such as barring small business loans or limiting access to the tribally funded gym)
- restricting or rescinding hunting or fishing licenses or privileges
- disenrolling the person as a member of the tribe
- rescinding future per capita disbursements
- restricting access to tribal employment or to certain types of tribal employment (such as positions working with youth, the elderly, or other vulnerable persons)

## **VI. Policy Recommendations**

In addition to upgrading tribal codes and ensuring that tribal court civil orders are carefully drafted, tribal nations can take other steps to improve the administration of justice in their communities.

### **A. Collaboration and Cross-Training**

Tribes should consider expanding collaboration with neighboring tribal, state, and federal jurisdictions. Cross-training tribal court personnel and justice professionals with their state and federal counterparts can yield increased collaboration and respect for tribal orders and judgments.

Tribes may consider attending training hosted by neighboring jurisdictions. They may also consider extending invitations to their counterparts to attend training on tribal lands. Increased rapport between courts and agencies can greatly improve the administration of justice across jurisdictions.

Some jurisdictions have had tremendous success developing and participating in tribal-state-federal consortiums. These consortiums can provide an important forum to develop collaborative strategies and to maximize resources for participants. Arizona and New Mexico boast successful tribal-state-federal consortiums that have led to ground breaking and innovative policies, procedures, and agreements.

## **B. Resources, Training, and Technical Assistance**

The federal government has a trust responsibility to tribal nations. Many tribal courts and governments rely upon funding from the federal government to carry out important governmental and judicial functions. Increased funding from the Bureau of Justice Administration and the Office on Violence Against Women when combined with meaningful, relevant training can vastly improve the administration of justice in Indian Country.

Ideally, training and technical assistance provided to tribal courts, governments, agencies, and communities should:

- be developed and delivered by providers experienced with criminal and civil justice issues, domestic violence, sexual assault, stalking, dating violence, and other crimes in Indian Country
- include training for lay legal advocates who practice in tribal courts.
- address civil and criminal jurisdictional issues
- provide sample codes, policies, procedures, orders, and motions relevant to tribal jurisdictions
- include training on making and recording legislative history, code development,
- be delivered at conferences and trainings nationally, regionally, and locally
- include distance learning opportunities such as teleconferences, webinars, list serves, and 1-800 help-lines
- include training and technical assistance on the use of technology

## **VI. Conclusion**

Tribes have the responsibility to protect all persons located on tribal lands. Lack of criminal jurisdiction over non-Indians need not bar the use of innovative civil legal strategies to maintain safety, order, and justice. When used effectively, tribal courts can impose significant, meaningful, and effective civil deterrents and consequences for all perpetrators of crime in Indian Country. Sustained, consistent use of all available criminal and civil justice remedies can significantly increase safety and security for tribal citizens/members, residents, and visitors.