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MICHIGAN

INDIAN TRIBAL COURT/STATE TRIAL COURT FORUM

1992

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Hon. Garfield W. Hood
Chairperson

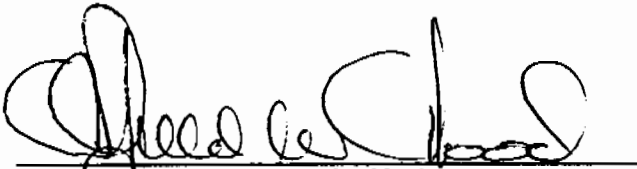
Hon. Michael D. Petoskey
Vice Chairperson

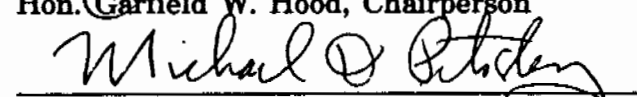
Hon. Michael F. Cavanagh
Chief Justice
Michigan Supreme Court
P. O. Box 30052
Lansing, MI 48909

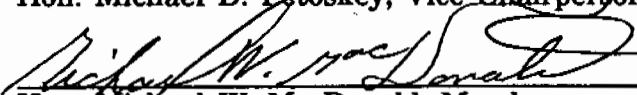
Dear Chief Justice Cavanagh:

The members of the Michigan Indian Tribal Court/State Trial Court Forum are pleased to submit our report and recommendations to the Michigan Supreme Court.

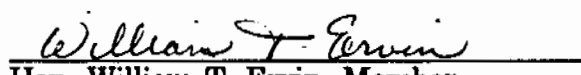
The forum has demonstrated that there are far more similarities than differences between the Michigan tribal and state judicial system. We believe that our recommendations, if implemented, will greatly enhance the ability of Michigan's judiciary and the tribal courts of this state to cooperate effectively in delivering quality court services to all of our citizens. We thank you for the opportunity to serve as forum members.

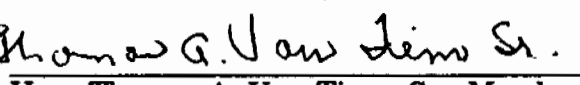

Hon. Garfield W. Hood, Chairperson


Hon. Michael D. Petoskey, Vice Chairperson

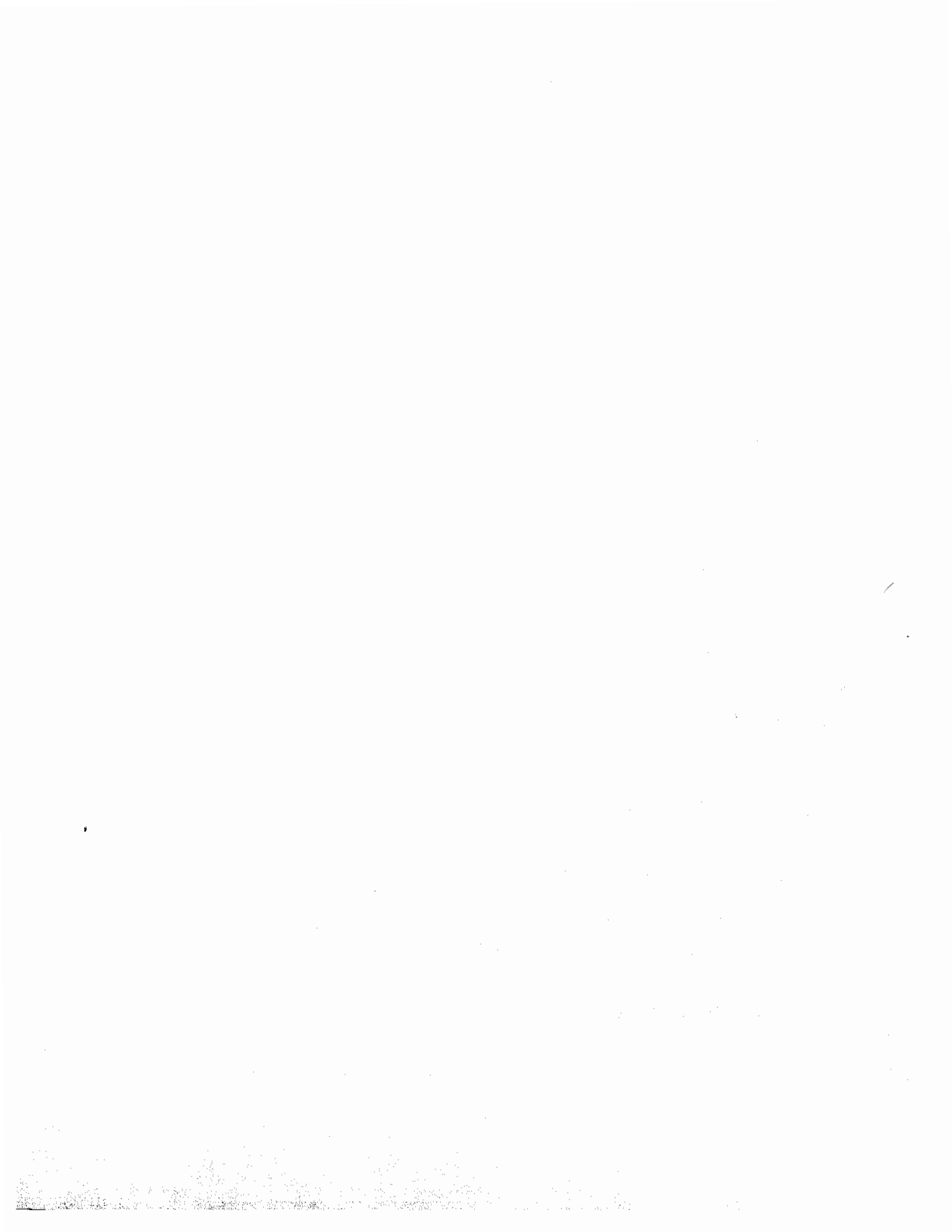

Hon. Michael W. MacDonald, Member


Hon. Michelle Boyer, Member


Hon. William T. Ervin, Member


Hon. Thomas A. Van Tiem, Sr., Member

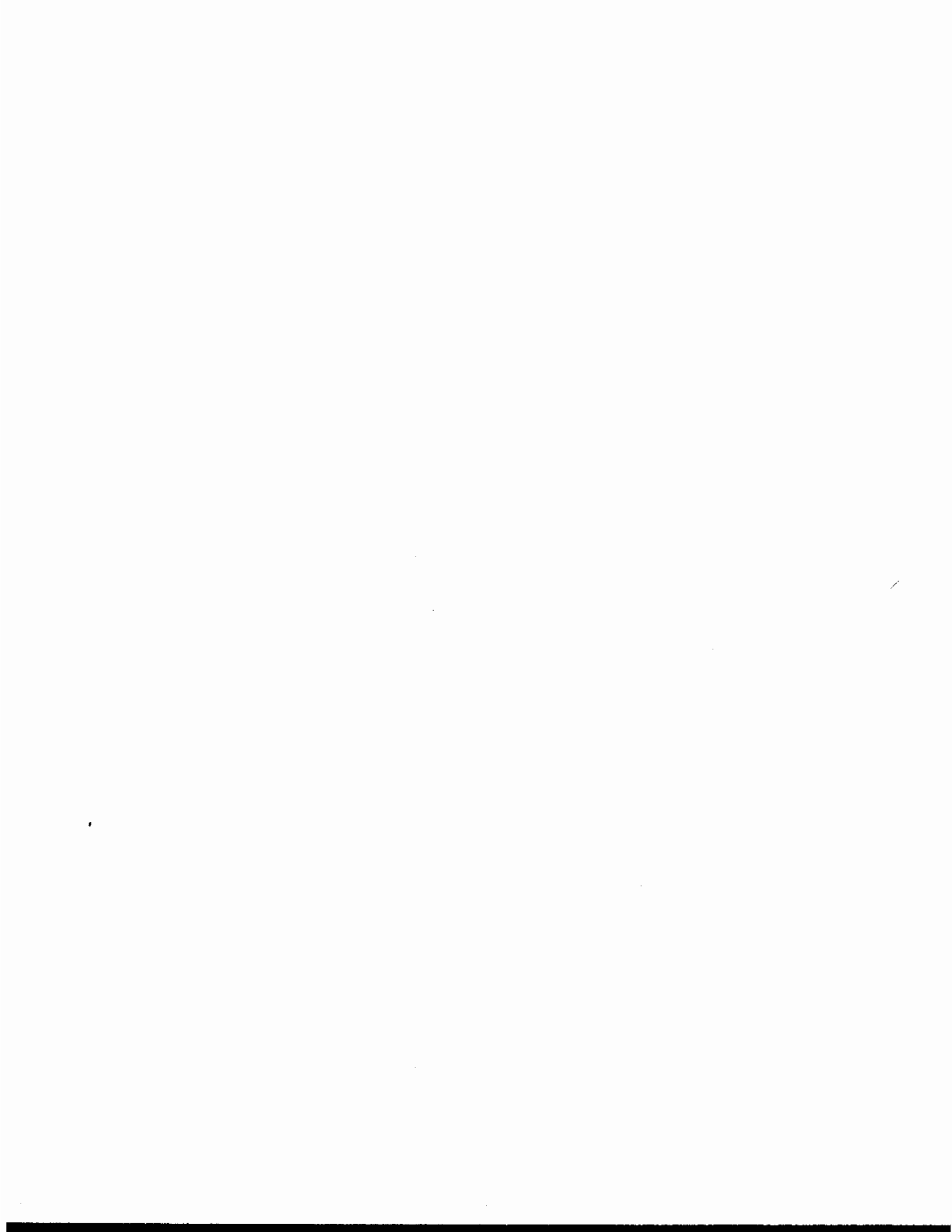

Hon. Bradley Dakota, Member





**State
Justice
Institute**

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REPORT OF THE STATE COURT AND TRIBAL COURT FORUM

I. INTRODUCTION

There are seven federally recognized tribes in Michigan that operate their own justice systems. There are thus eight governmental entities within Michigan borders (the State and these seven Indian tribes) that exercise various degrees of civil and criminal jurisdiction. The Michigan Supreme Court appointed the State Court and Tribal Court Forum to foster cooperation between the State and Tribal justice systems within Michigan. This project was initiated and funded through a grant from the State Justice Institute of the National Center for State Courts (NCSC).

Members of the Forum, listed at the end of this report, included three tribal court judges, four state court judges, plus consultants and support staff. The Forum met four times during 1992 to identify problems with the interrelationship between the tribal and state justice systems, and develop a plan of action to address these problem areas. The morning sessions of the second and third meetings, held in Peshawbestown and Sault Ste. Marie, Michigan, were reserved for public comment. A large cross section of people having contact with tribal courts, such as tribal attorneys and social workers, Michigan Department of Social Services workers, state and local law enforcement personnel, and state judges attended these meetings and offered their input.¹

The seven American Indian tribes in Michigan that currently operate tribal courts are the Lac Vieux Desert Band of Lake Superior Chippewa Indians (near Watersmeet), the Keweenaw Bay Indian Community (Baraga), the Hannahville Indian Community (Wilson, close to

¹ The minutes of each meeting including lists of those who attended are attached as appendix 1.

Escanaba), the Bay Mills Indian Community (Brimley), the Sault Ste Marie Chippewa Tribe (Sault Ste Marie) in the Upper Peninsula, and the Grand Traverse Band of Ottawa and Chippewa Indians (Peshawbestown, 20 miles North of Traverse City), and the Saginaw Chippewa Tribe (Mount Pleasant) in the Lower Peninsula. Each tribe is a separate sovereign entity with its own constitution, codes and ordinances.

A brief explanation of tribal sovereignty follows. A more complete explanation of this subject is contained in several Michigan Bar Journal articles.² Indian tribal self government predates the coming of Europeans. Tribes exercised complete jurisdiction over tribal members and non-tribal members within their territories prior to European contact. The United States Supreme Court repeatedly stated that tribes' aboriginal right of self-government continues to exist to the extent that it has not been expressly limited by the United States Congress.³ Thus, tribes possess what is termed "inherent sovereignty."

Tribes now possess exclusive jurisdiction over misdemeanors involving Indians within their reservations, and concurrent jurisdiction with the federal government over those crimes enumerated in federal law. Tribal civil jurisdiction extends to both Indians and non-Indians for matters arising in Indian country. In cases where diversity of citizenship or a federal question

² Jannetta, *Reciprocity Between State and Tribal Legal Systems*, 1992 Mich BJ 400 (May, 1992); Petoskey, *Tribal Courts*, 1988 Mich BJ 366 (May, 1988); Bransky, *Tribal Court Jurisdiction*, 1988 Mich BJ 370 (May, 1988); Shannon, *Tribal Court Advocacy*, 1988 Mich BJ 377 (May, 1988); Petoskey, *The Fundamentals of Federal Indian Law: A Brief Overview*, 1986 Mich BJ 438 (May, 1986); Bransky, *The Political Status of Indian Tribes in Michigan*, 1986 Mich BJ 44 (May, 1986); Levine, *The Indian Child Welfare Act: Federal Indian Law in State Probate*, 1986 Mich BJ 452 (May, 1986).

³ See i.e. *Santa Clara Pueblo v Martinez*, 436 US 49 (1978).

is present, the parties must exhaust all tribal court remedies before bringing a federal court action.⁴

Although tribal jurisdiction has ancient roots, the creation of tribal courts as a vehicle for exercising this jurisdiction is a recent phenomenon. All of the Michigan tribes operate tribal governments under the Indian Reorganization Act of 1934 (IRA). The IRA revived tribal identity and self government, but did so in a way that the non-Indian world could better relate to than traditional decentralized Indian societies. Under the IRA tribes formed constitutional governments. Tribal courts are mandated in the tribes' constitutions or created through tribal ordinances. The Keweenaw Bay Indian Community, Hannahville Indian Community, the Bay Mills Indian Community and the Saginaw Chippewa Tribe all formed IRA governments during the 1930's. The Lac Vieux Desert Band of Lake Superior Chippewa Indians, the Sault Ste Marie Tribe of Chippewa Indians, and the Grand Traverse Band of Ottawa and Chippewa Indians formed IRA governments during the 1970's and 1980's.

Contemporary tribal courts are in their early stages of development. They are subject to scrutiny by the non-Indian world, and are often regarded suspiciously. Discrete measures to cultivate an ongoing mutually beneficial relationship between the state and tribal courts are set out below.

⁴ *National Farmers Union Ins Co. v Crow Tribe*, 471 US 845 (1985); *Iowa Mutual Ins Co v Laplant*, 480 US 9 (1987).

II. ACTION PLAN

Forum members and members of the public who attended the meetings raised a plethora of specific technical matters that require cooperation between state and tribal justice systems. These include service of process on and off the reservation, the issuance of subpoenas, traffic violations, law enforcement, child welfare, enforcement of custody and support orders, and extradition. The forum devised a three part strategy to address these concerns. First, resolution of all of the issues raised requires the consistent application of full faith and credit between the tribal and state courts. To achieve this the Forum drafted state and tribal Court Rules to set out procedures for granting full faith and credit between state and tribal courts. Second, the existing legislative efforts in the areas of child welfare and law enforcement certification must be supported. Third, the State and Tribal courts must put systems in place to foster ongoing education and cooperation.

A. COURT RULE FOR CONSISTENT APPLICATION OF FULL FAITH AND CREDIT

The lack of consistent enforcement of tribal court judgments by state courts, and state court judgments by tribal courts, limits the effectiveness and authority of both systems. Many of the areas of concern raised at the public meetings, such as enforcing support and custody orders between the systems and service of process, require reciprocal enforcement of judgments and acts. The need for reciprocity between the systems is demonstrated by the following examples:

1. A child support order is entered in a state trial court. The parent who has the duty to pay support subsequently moves on to a reservation. The order is unenforceable unless the

tribal court chooses to honor the state order. The reverse is also true. If a tribal court enters a support order and the parent with the support obligation subsequently moves off the tribe's reservation, the order is not enforceable unless the state chooses to honor it.

2. A state court enters a garnishment order. The garnishee subsequently moves onto a tribe's reservation and obtains employment on the reservation. The garnishment order can now only be enforced through tribal court. As before, the reverse is equally true.

3. A party in a tribal court proceeding needs to subpoena a witness who resides off of the reservation. The state court must honor the subpoena for it to be effective. Similarly, a state court may not be able to subpoena a reservation resident without the tribal court honoring the subpoena.

A Court Rule that requires state courts to afford full faith and credit to any tribal court that reciprocates would greatly improve the current situation. The doctrine of full faith and credit requires a state to recognize and enforce the laws and judgments of another state. Under the United States Constitution, "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State."⁵ This constitutional mandate allows parties to avoid repeat litigation, confirms the finality of judgment, and promotes a coordinated administration of justice.

However, the United States Constitution does not extend the doctrine of full faith and credit to Indian tribes. States are required by the Indian Child Welfare Act to "give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to

⁵ U.S. Const. art. IV, § 1.

Indian child custody proceedings . . ."⁶ Absent administrative guidance in all other circumstances, tribal and state courts are left to ad hoc determinations of when to enforce each others acts. A number of states have taken legislative or judicial action to promote a more consistent administration of justice between their states and Indian tribes.⁷ Under Michigan law, full faith and credit between the state courts and Indian tribes should be dealt with through Court Rule. The Michigan Legislature delegated the Supreme Court the authority to promulgate rules to govern the administration of the Court systems:

The supreme court has authority to promulgate rules governing practices and procedure in the supreme court and all other courts of record, . . .⁸

In the words of the Supreme Court "the judicial powers derived from the constitution include rule-making, supervisory and other administrative powers as well as traditional adjudicative ones. They have been exclusively entrusted to the judiciary by the Constitution and may not be diminished, exercised by, nor interfered with by the other branches of government without constitutional authorization."⁹ Under Michigan law, guidelines and procedures for the admissibility of evidence are governed by Court Rules. Full faith and credit is essentially an

⁶ 25 USC § 1911 (d).

⁷ SD CLA § 1-1-25 (1990); ND Cent Code, § 27-01-09 (1991), 1991 Wisc Act 43; *Jim v. CIT Financial Services Corp.*, 87 N.M. 362, 533 P.2d 751 (1975); *In re Buehl*, 87 Wash 2d 649, 555 P.2d 1334, 1342 (1976) (both cases finding application of full faith and credit through 28 USC § 1738; *Brown v. Babbit Ford, Inc.*, 117 Ariz. 192, 571 P. 2d 689 (1977) (finding full faith and credit does not extend to Indian tribes, but tribal law should be honored as matter of comity)

⁸ MCLA § 600.223

⁹ *In re Sunshine Law*, 1976 PA 267, 255 NW 2d 635, 636, 400 Mich. 660 (1976).

evidentiary issue.¹⁰ As noted in the seminal writings of United States Supreme Court Justice Story:

The Constitution did not mean to confer any new power upon the States, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of other states domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them as evidence.¹¹

The consistent application of full faith and credit between the courts of the State of Michigan and Indian tribes is therefore an administrative matter falling under the Supreme Court's rule making authority.

As noted above, the federally recognized tribes operating court systems are all separate sovereign entities. Each tribe must decide for itself whether to enter into the system of reciprocity set out in the Court Rule, and will have the option of doing so. The Forum recommends that the State Court Administrative Office (SCAO) keep a list of the tribes that have opted in to the system of reciprocity. To opt in, a tribe would send a copy of its court rule or ordinance providing for the enforcement of state court judgments, along with a statement certifying that a permanent record is kept of all of its judicial proceedings, to the SCAO. When presented with a tribal court order, the state trial judge would contact the SCAO to see if that tribe has opted into the system of reciprocity. This would save state trial judges the burden of researching the status of individual tribes, and ensure that full faith and credit is applied consistently.

¹⁰ See i.e. *Wisconsin v Pelican Ins Co.*, 127 US 266, 291 (1888); *Anglo-American Provision Co. v Davis Provision Co. No. 1*, 191 US 374 (1903); *People of State of California ex re. McColgan v Bruce*, 129 F 2d 421, cert. denied 317 US 678, reh'g denied 317 US 710 (1942).

¹¹ Story, Conf. L. § 609, quoted in *Thompson v Whitman*, 18 Wall. 457, 462-63.

The Forum recommends adoption of the following Court Rule:

Indian Tribal Courts: Full Faith and Credit

(1) The judicial acts, proceedings, records, and valid judgments of an Indian tribal court of a federally recognized Indian tribe within the State of Michigan shall be granted the same full faith and credit in the courts of this state as do the acts, records, and valid judgments of any other state in the United States, if the court of the Indian tribe grants full faith and credit to the judicial acts, proceedings and valid judgments of the courts of this state. When presented with a tribal court document, the state trial court shall contact the State Court Administrative Office to determine whether the tribe grants full faith and credit to the courts of this state.

(2) A list of the tribes that grant full faith and credit to the courts of this state shall be kept by the State Court Administrative Office. Any tribe within the this state may send the SCAO a copy of a tribal ordinance signed by its tribal chair, or tribal Court Rule signed by its chief judge granting full faith and credit to the courts of this state, along with a certification that a permanent record is kept of the tribe's judicial proceedings. Subpart (1) of this section shall apply to all Indian tribes within the state of Michigan that supply the SCAO with said materials.

The Forum also recommends amending MCR 2.112 (Pleading Special Matters) (G) and (J) to read as follows:

(G) Judgment. A judgment or decision of a domestic or foreign court, a ***federally recognized Indian tribe***, a judicial or quasi-judicial tribunal, or a board or officer, must be alleged with sufficient particularity to identify it; it is not necessary to state facts showing jurisdiction to render it.

(J) Foreign Law; Notice in Pleadings. A party who intends to rely on or raise an issue concerning the law of

- (1) a state other than Michigan,***
- (2) a United States territory, or***
- (3) a foreign nation or unit thereof, or***
- (4) a federally recognized Indian tribe***

must give notice of that intention either in his or her pleadings or in a written notice served by the close of discovery.

The Forum recommends that tribes enact the following language as a court rule or ordinance to opt into the system set out in the proposed Michigan Court Rule:

The judicial acts, proceedings, records, and valid judgments of a Michigan state court shall be granted full faith and credit in the courts of this Tribe to the same extent that the State of Michigan recognizes and enforces the acts, records, and valid judgments of this Indian tribe.

B. SUPPORT OF EXISTING LEGISLATIVE EFFORTS

1. The Michigan Indian Family Preservation Act. The Michigan Department of Social Services appointed a Native American task force during the late 1980's to explore ways of improving the social conditions of Indian people within Michigan. The task force produced a report that was sent to the Director of MDSS in 1989, and published for the general public in 1990. A committee consisting of MDSS and tribal representatives formed as a result of this task force. The committee drafted a comprehensive piece of legislation to protect and preserve Indian families within Michigan.¹² The issues raised at Forum meetings regarding Indian child welfare, such as funding for tribal court placements, are dealt with in the Michigan Indian Family Preservation Act. This legislation would go a long way toward promoting the welfare of Indian tribes and families in Michigan.

¹² The full text of the Michigan Family Preservation Act is attached as appendix II.

2. Law enforcement officer certification. Tribes and local units of government have entered into law enforcement agreements so those committing crimes may be apprehended regardless of the entity that will be exercising jurisdiction over the matter. However, under current Michigan law, tribal officers who have received their training through the Bureau of Indian Affairs cannot be certified as state law enforcement officers. This creates an obstacle to setting up agreements for effective law enforcement both on and off reservation.

The federally recognized tribes in Michigan held grand assemblies in Sault Ste. Marie in 1989 and 1990. The tribes identified issues of common concern at these grand assemblies. A tribal legislative action team was formed to work on the issues identified at the grand assemblies. Legislation has been introduced through these efforts that would provide for state certification of BIA trained law enforcement officers. This legislation would remove impediments to cooperative law enforcement between the State and Indian tribes.

C. INSTITUTIONALIZE RELATIONSHIP

Forum members decided that it is critical to put permanent mechanisms in place to move state and tribal courts toward a symbiotic relationship. The following actions have been, or are recommended to be taken:

1. **MAKE STATE COURT ADMINISTRATIVE OFFICE, CONTINUING LEGAL EDUCATION AND MICHIGAN JUDICIAL INSTITUTE SERVICES AVAILABLE TO TRIBAL COURTS**

Tribal courts are a recent development on Michigan's Indian reservations. As discussed in the section on full faith and credit, legal matters often cross reservation boundaries. Efficient tribal court case management would be useful to both tribal and state courts. The SCAO has extensive experience in case management systems. For instance, the SCAO's programs for computerized case management could prove very useful to tribal courts. The Forum recommends that tribes be given the opportunity to contract with the SCAO for administrative services now provided to state trial courts. Tribal court and SCAO personnel should meet to identify the services that would be helpful to tribal courts and determine the costs of such services.

The Forum recommends that the Institute for Continuing Legal Education notify tribal judges of events and publications. Continuing Legal Education Programs should be open to tribal court personnel. The Forum also recommends that the Michigan Supreme Court open Michigan Judicial Institute programs to tribal judges and court staff.

2. CROSS VISITATION

If state and tribal judges are to work together for more effective administration of justice both on and off reservation, they should become familiar with each others systems. Tribal court judges should be invited to annual meetings and conferences of state judges. Tribal Court judges should invite state court judges to visit their reservations and attend tribal judges seminars. It is understood that fees are generally charged for such events.

3. LISTING TRIBAL COURTS IN STATE BAR JOURNAL DIRECTORY

Large numbers of non-Indians visit Michigan's Indian reservations for gaming, pow wows and other activities. There are some non-Indians living on reservations in Michigan. A growing number of non-Indians have business dealings with Indian tribes. Indian children and parents throughout the state may be subject to tribal court jurisdiction in proceedings that fall under the Indian Child Welfare Act. For all of these reasons, an increasing number of attorneys are involved in tribal court cases. Most attorneys have no ready source of information on tribal courts, so can easily be flustered when a client falls under tribal court jurisdiction. To remedy this situation, starting in April 1993, future issues of the April directory edition of the Michigan Bar Journal will contain a section listing tribal courts. The information for the first listing will be provided to the Michigan Bar by consultant James Bransky. The Michigan Tribal Judges Association will provide the Bar with annual updates. If the Bar Journal editors see fit, a brief introduction on tribal court jurisdiction will be included with the listing.

4. MATERIALS AT STATE LAW LIBRARY

Most attorneys in the State have no source readily available to them for information on Indian law issues, and the laws of the individual tribes. The State law librarian, Susan Adamczak, offered to make the State Law Library a central repository for tribal codes and ordinances. James Bransky will initially collect these materials. He will then provide the library's mailing address to the Michigan Tribal Judges Association and the chief judge of each tribal court. The tribes, with the help of the Michigan Tribal Judges Association, will be responsible for keeping the library updated. Ms. Adamczak also expressed an interest in acquiring basic materials on federal Indian law. The Forum provided the library a list of suggested materials to add to its collections.

5. FORMATION OF AN INDIAN LAW SECTION OF THE STATE BAR

Many attorneys in the state now confront Indian law issues in the course of their practice. Tribal attorneys, legal services attorneys, United States Attorneys, Michigan attorney generals, county prosecutors, state judges, and private attorneys who have occasion to appear in tribal court all encounter Indian law issues. Forum members identified a need for an ongoing source of information on Indian law for members of the State Bar, and other interested parties.

The formation of an Indian law section of the State Bar of Michigan would put a permanent body in place for this purpose. To that end, the Forum contacted the State Bar and organizers of recently formed sections to assess the feasibility of forming an Indian law section. Given the wide range of attorneys whose practice includes Indian law issues, members concluded that formation of an Indian law section would be viable and useful.

The initial organizational work will be done by a committee consisting of James Bransky, James Jannetta, Kathryn Tierney, Monica Lubiartz, Dawn Duncan, Joseph O'Leary and Ronald Douglas. Associate memberships will be available to non-attorneys who work with tribal courts. A goal was set to officially charter the section at the 1993 annual meeting of the State Bar of Michigan.

6. **INFORM ATTORNEYS THROUGH MICHIGAN BAR JOURNAL**

The long term success of the steps being taken and recommended hinges in part on the interest and support of attorneys throughout the State. Consultant James Bransky and Chair Garfield Hood will prepare an article on the work of the Forum to be published in the May 1993 edition of the Michigan Bar Journal to make members of the State Bar aware of the Forum's agenda.

7. **IMPLEMENTATION THROUGH FORMATION OF ONGOING COMMITTEE.**

As described above, steps are already being taken to institutionalize the relationship between state and tribal courts. The program set out in this report requires an ongoing body for implementation. The application of full faith and credit between the State and Indian tribes will undoubtedly raise substantive and procedural issues once established. A body should be in place to address issues as they arise. The final and most critical recommendation is that the Supreme Court appoint an advisory committee to carry on the work started in this Forum.

CONCLUSION

The effective administration of justice in Michigan requires the cooperation of the state and tribal systems. This Forum laid the groundwork for a productive relationship between the state and tribal systems based on mutual respect. The state and tribal judges who met with each other found that their similarities far outnumber their differences, and that they can accept and learn from their differences. State and tribal courts must work together to ensure that the work started in this Forum continues.

ACKNOWLEDGMENTS

The members of the Forum would like to thank the National Center for State Courts, the Michigan Supreme Court, and the State Court Administrative Office for initiating and coordinating this project. The Forum extends special appreciation to NCSC Consultant H. Ted Rubin for his invaluable counsel and encouragement, and to James A. Bransky, who wrote this report, for his guidance and dedication. Research assistance was provided by Michigan Indian Legal Services law clerks Linda Sauer and John Mitchell. The Forum commends Michigan Chief Justice Michael F. Cavanagh and State Court Administrator Marilyn K. Hall, whose time and support made this effort possible.

MEMBERS OF THE FORUM

State Court Judges

Hon. Garfield W. Hood (Chair)
12th Judicial Circuit
Courthouse
401 E. Houghton
Houghton, MI 49931

Hon. William T. Ervin
Isabella County Probate Court
County Building
200 N. Main Street
Mt. Pleasant, MI 48858

Hon. Michael W. MacDonald
91st District Court
City-County Building
325 Court Street
Sault Ste. Marie, MI 49783

Hon. Thomas A. Van Tiem, Sr.
36th District Court
Suite 3068
421 Madison Avenue
Detroit, MI 48226

Tribal Court Judges

Hon. Michael D. Petoskey(vice-chair)
Northwestern Michigan College
1701 East Front Street
Traverse City, MI 49684-3016

Hon. Michelle Boyer
Sault Ste Marie Tribe of Chippewa Indians
206 Greenough Street
Sault Ste. Marie, MI 49783

Hon. Brad Dakota¹³
Keweenaw Bay Indian Community
Rt 1 Box 45
Baraga, MI 49908

Project Consultant

James A. Bransky
Michigan Indian Legal Services
160 East State Street
Traverse City, MI 49684

NCSC Consultant

H. Ted Rubin
National Center for State Courts
1331 Seventeenth Street, Ste 402
Denver, Colorado 80202-1554

Project Coordinators

Jack Crandall
Regional Court Administrator
State Court Administrative Office
400 W. Main Street, Ste 15
P.O. Box 100
Gaylord, MI 49753

William H. Newhouse
State Court Administrative Office
611 Ottawa, Box 30048
Lansing, MI 48909

Kathryn Tierney
Bay Mills Indian Community
Route #1
Brimley, MI 49715

¹³ Judge Dakota replaced Patricia Harris, past tribal judge of the Saginaw Chippewa Tribe, who served on the Forum through the first two meetings. Her contribution to this effort is greatly appreciated.

APPENDICES

- I. Minutes of the Meetings of the Forum
- II. Directory of Tribal Courts
- III. Written agreements entered into between tribes and other units of government
- IV. Text of the Michigan Family Preservation Act
- V. Text of Legislation for Certification of Tribal Law Enforcement Officers

