

## INTERVIEW

### **ABBY ABINANTI, CHIEF JUDGE, YUOK TRIBAL COURT, KLAMATH, CALIFORNIA, AND CALIFORNIA SUPERIOR COURT COMMISSIONER**

*Abby Abinanti has served as Chief Judge for the Yurok Tribal Court for three years. She also serves as a Commissioner for the California Superior Court, handling juvenile delinquency cases. The Yurok Tribe has the largest Native American population in the state of California, according to the tribe's website. The Yurok Reservation extends from the mouth of the Klamath River, at the Pacific Ocean, and runs approximately 44 miles upstream, one mile on either side of the Klamath River. Prior to European contact, the Yurok Tribe had a justice and dispute resolution system that included mediation, payment or punishment as part of the resolution process. A village leader or group of leaders would listen to the complaint, dispute, or problem and arrive at a settlement. Thirteen years ago, the tribe re-established a tribal government, and the Yurok Tribal Council subsequently established a constitution and tribal court.*

*Interviewed by Juli Ana Grant\**

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\* At the time she conducted this interview, Juli Ana Grant was a manager for Domestic Violence, Sex Offense and Family Court Programs at the Center for Court Innovation. She currently works for the Office on Violence Against Women at the U.S. Department of Justice's Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking (SMART Office).

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**Do most tribal members live on the reservation or off the reservation?**

Off the reservation, but fairly close. The reason for that is basically economically-based. It's very hard to work on the reservation.<sup>1</sup> We don't tax because the economic base just isn't there. We have an unemployment rate that hovers around 70 percent plus.<sup>2</sup> We don't have any industry, so it's not really feasible to tax and it would be pretty unfair and not a good idea. In addition to the economic challenges, there are a lot of logistical challenges because to get from one end of the reservation to the other is very complicated; it takes a couple of hours.

**What types of cases do you hear as a tribal court judge?**

When I first started, we were doing a lot of fishing cases. Now we're in the process of expanding our jurisdiction. We're moving into dependency, and we've had some environmental violations. Now we have a children's code. We have a protective orders' ordinance, which is basically restraining orders for domestic violence and civil harassment. We're looking at a family code; we have a first draft of that. We're looking at a housing code; we have a first draft of that. We also now have a first draft of an elders and adults in need protection code. We do general civil, so we're pretty much on an upswing now; we're expanding.

**How have you funded the tribal court expansion?**

Trying to fund a tribal court is a complicated endeavor. You need many things to be operational as a court and it is not a money-making operation. There's no way you're going to impose enough fines and fees to make it pay for itself. It's just too demanding, so you're looking at general fund money to fund it and if you have a very poor economic base, then you're always going to struggle.

We've looked at a lot of the new funding opportunities from the federal government. We've written a lot of grants. A big part of the problem for California tribes being under Public

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1. See Robert J. Miller, *American Indian Entrepreneurs: Unique Challenges, Unlimited Potential*, 40 ARIZ. ST. L.J. 1297, 1308 (2008) (noting the "lack of economic activity in general and the horrendous unemployment rates on most reservations").

2. See BUREAU OF INDIAN AFFAIRS, U.S. DEP'T OF INTERIOR, 2005 AMERICAN INDIAN POPULATION & LABOR FORCE REPORT 39 (2006).

Law 280<sup>3</sup> is that we don't have access to Bureau of Indian Affairs' [Bureau] money for the purposes of tribal courts. Even though I understand that money is very limited, it would help us, and I think that the Bureau's basis for refusing funding to us is not meritorious.

**I know one of the challenges you have in trying to get cases to the tribal court is that the state courts have to identify the tribal members who are entering that system?**

Right, there are several challenges. You almost have to go subject matter by subject matter. If you're looking at dependency, for instance, we have 180 plus kids in the state system, so we have to work out an arrangement to transfer those kids over to share jurisdiction and then we have to look at, "Okay, if we have new offenses, are we going to file in the state court or are we going to file in the tribal court?" You have to figure out where you want to file, what services are available; it's pretty complex. For instance, although we have the ability to approve foster care homes, we cannot provide them funding. We're working on an agreement whereby we'll eventually be able to do both of those things. But each thing that you want to do is fraught with complications.

**Is the tribal court different in some fundamental way from state court?**

Our court is much more grounded in the citizenry and more responsive to what people want. We're very keenly aware of trying to resolve problems as opposed to apportion guilt or responsibility. It's more, "Okay, this is the issue. How are we going to resolve this so that we can go forward?" If this is a violation, is it enough to give you a fine and make this even and we can start over? What's the most important thing? The

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3. Enacted in 1953, Public Law 83-280, 67 Stat. 588 (codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360, 28 U.S.C. § 1321-1326 (2006)) mandated the transfer of the federal government's criminal and civil jurisdiction over cases occurring on tribal lands to the state governments in several enumerated states: California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska (upon statehood). The law also allowed other states the option of assuming criminal and civil jurisdiction over cases occurring on tribal lands within their borders. Public Law 280 has been the source of much controversy and has greatly complicated questions of criminal jurisdiction and law enforcement responsibility in the affected tribes and states. See, e.g., Carole Goldberg et al., *Law Enforcement and Criminal Justice Under Public Law 280* (2007), available at [http://www.tribal-institute.org/download/pl280\\_study.pdf](http://www.tribal-institute.org/download/pl280_study.pdf).

most important thing is that you don't violate the rule, because the rule—meaning fishing in this case—is important because this is an important, shared resource and this is how we've all decided to manage it. So it isn't that you just broke the ordinance or the law here. It's necessary for you to understand why the ordinance exists so you don't do it again because it's a resource we all share.

**How many cases are in the tribal court and how do you handle appeals?**

Right now there are around 300 cases in tribal court. We have an appeals court, but we're looking at redoing our appellate system in a consortium with Yurok, Hoopa, Karuk and Smith River tribes. We would provide each other with certain assistance, including an appellate panel made up of representatives from all the tribes. We've already created a Tribal Court Association and are cooperating on a four-tribe grant for CASA.<sup>4</sup> We've also received as a group a grant to do more domestic violence advocacy.

**How does the four-tribe coalition hope to address domestic violence?**

We're developing self-help access centers for domestic violence victims with advocates who can explain how to get restraining orders and hook victims up to other services. Among the four tribes, we've received funding for five access center locations and are thinking of creating a Native-specific 800 line.

**What shelter system do you use?**

At the moment we use the state shelter system. We had proposed, but didn't receive funding for, our own shelter system that would have looked somewhat like the Underground Railroad. It would have provided on-reservation places to stay on a temporary basis while victims are accessing services. The idea was to approach community members to open their homes

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4. See Court Appointed Special Advocate for Children, <http://www.casaforchildren.org/> (last visited Mar. 1, 2010). Through a grant awarded to the Northern California Tribal Court Coalition, four Tribes (including the Yurok) collaborate with CASA on issues affecting Native children. See generally ABBY ABINANTI, PASSPORTS FOR NATIVE CHILDREN: A BEST PRACTICE APPROACH FOR TRIBAL ADVOCATES WORKING WITH NATIVE CHILDREN WHO HAVE SUFFERED ABUSE (2006), [http://nc.casaforchildren.org/files/public/community/programs/Tribal/0710\\_passports\\_for\\_native\\_children\\_0000.pdf](http://nc.casaforchildren.org/files/public/community/programs/Tribal/0710_passports_for_native_children_0000.pdf).

to do that, and so it would have been a community-based short-term sheltering system. But for now, we are cooperating with county-based programs to provide services to our population.

**The collaboration between the state and tribal systems seems important in many regards. How do you envision the Yurok, other surrounding tribes, and the state courts working together? What do you think are the strengths and challenges of working together?**

As I mentioned, we have decided to work together through our Tribal Court Association on certain projects, including CASA and the domestic violence access center. A third project we're going to work on is a training program for all the tribal courts on the creation of forms. We want our forms to conform to each other's and also teach our information-technology and court staff how to create forms.

I think we're going to be—depending on what things get funded—evolving more and more protocol for transfer of cases and concurrently supervising cases, both in dependency, delinquency, and probably domestic violence and cases where the primary problem is drug or alcohol abuse. It's an intensive effort to get protocols with the surrounding state jurisdictions in place and have the services available so they really perceive us as able to do a better job. For instance, we just got funded for a person who will liaison between our kids who are on probation and the Del Norte County juvenile delinquency system, the idea being we will do much more intensive case management. As we are able to demonstrate more success than their local system, hopefully they'll transfer some of their cases to us.

**What services in the surrounding counties do the Yurok Tribal Court use?**

Right now what happens is that we're not utilizing them in the sense that, "You provide this and we provide that." What's happening is that they take cases and they do whatever, and sometimes we come in and say, "Hey, we can really do this better, this part."

We want to get to a better place where we can say, "Okay, you guys take this part of it and we'll take that part of it." Or, "You take it all" or "We'll take it all." It's really in my mind going to be driven by our ability to correct the problem that has

brought the person in contact with the system and to redress the issues.

**Do you feel that the innovations taking place in state courts, like the development of problem-solving courts, can or should inform the work of tribal courts?**

I think the funding available to them ought to inform our work. I think that we have a lot of the basic skill sets and that we need to encourage ourselves to go back to our basic skill sets, to take time in formulating how we want to approach our problem-solving and to make sure that it is really culturally evolved from how we would have solved problems.

One of the projects we're working on is to have a cultural component of a wellness court, which works with substance-abusing defendants, so that there's a cultural plan. And part of that plan will be that we'll provide language teachers, and they will be required to give language instruction to people who are involved in wellness court twice a week at their home.

We need to be very careful when we adopt one model and impose it somewhere else. We can borrow an idea, but how we flesh it out might be very different. And it needs to be different. And people need to be encouraged to understand and to look at the differences. Part of the big problem here is that that isn't happening. "Here's our wellness court. You guys want one?" "Sure." And then it ends up looking like their wellness court and that's a big mistake for everybody because it's not going to work. Very well-meaning people get themselves caught up in these things that end up not working and then everybody's just totally frustrated and can't understand why it's not working. In fact, it's not working because the idea is great, but the model has to be tailored to the community, and there are not a lot of people who know how to do that.

For instance, we need to have a language and a community service component. Those kinds of things have to be there and if they're not there, it's just not going to work, because community service for us is a cultural prerequisite. We also need to require participants to learn traditional practices. You get to choose from a whole bunch of things. For instance, if you decide you want to learn to can fish, there are three classes. First, you learn how to do it; in the second class you help out,

and in the third class you help out again and then you get a supply of jars and a steamer to do it yourself. If you want to learn how to smoke fish/meat, same thing. The third time we go to your house and we build a smokehouse for you. You couldn't say, "We're going to run over and do that in New York" and they'd go, "Huh?" because it doesn't work. A citizenship class will also be required.

**When you say that any court response needs to be based on how the tribe solved problems in the past, what do you mean?**

Clearly there's a couple of hundred years of time. There was a huge gap because of the invasion, and our practices didn't evolve. But that doesn't mean that the approach isn't the same. Our approach to problem-solving has to be run by an overriding philosophy and then you evolve the practices. So what I'm working on and a proponent of is an evolution of practices; not evolution of approaches necessarily, because approaches change much slower.

To have an approach change is a huge thing in any culture. Practices change as times change. For instance, we know that families are really important and that shared resources are really important. You take those important things and then you say, "OK, we had the invasion and the practices we had a couple of hundred years ago aren't going to work." We didn't have methamphetamine and we didn't have booze and we didn't have cars. There are pluses and minuses. You have to evolve your practices to meet the good and the bad that came and if we had not been in such a defensive position, we would have been doing that, but we didn't, so now you have to do it. You can't just go, "We're going to skip it and become somebody else." You know, that's been the whole effort until now, and that hasn't really worked for us.

**Do you think it's difficult to talk about tribal law and tribal justice systems when there over 560 federally-recognized tribes?<sup>5</sup>**

I think that it's hard to talk about it if you are talking about practices. I don't think it's hard to talk about it if you are talking about philosophy and how you allow people to create and

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5. See Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 72 Fed. Reg. 13,648, 13,648 (Mar. 22, 2007);

support them to do that. But there's very little support. You look at these requests for proposals and the requirements are so rigid and so, frankly, chaotic. There is nothing that says, "Okay, we're going to go out to a tribe and we're going to create a system." It's all, "Here's 47 different agencies with 177 different applications, all of them different." It is the most chaotic thing I've ever seen. If I created something like this, people would say, "Are you mad?"

**As someone who works in both systems, what do you think are the most common misconceptions that practitioners in state courts have about tribal courts?**

I think they have no confidence in us. There is this kind of overriding idea that we are wild beings on the edge of civilization and that's been true forever. And heaven forbid that you being a non-Yurok would ever end up in a Yurok court; God only knows what would happen to you. And it's like, "Geez. We can't possibly do any worse than you've done to us, so what's the problem here?" But you can't really say that because that's considered rude. But it's a fact; you know what I mean? It's very hard to take that view you see coming towards you when you see what they've done. It's like when you're in a dependency meeting and they say, "It's very important that you do this and this and have these important safeguards in and this process and this procedure." And I'm thinking, "I've been a state court judge for how long and how many kids have I placed in foster care? How many kids have been raped, abused, murdered, otherwise killed in placements I've put them in? That were licensed?" And no state system can say that hasn't happened.

The state system is not in a great position to be critical in my opinion, but it doesn't stop them. This amazing, mind-altering position they get into when they think they need to tell other people what to do. There's no ability to be humble. At my worst in tribal court I haven't done as bad as you've done at your best, so what the heck! Again, you don't say that because that is really rude and I understand that, but it's still like, "Come on!"

I think there's also no recognition or no acceptance of responsibility for how a situation got to the way it is. How did reservations come about? The working model of a reservation is economically not feasible. Period. I didn't dream up reservations and neither did Yurok. Neither did any of my ancestors. So to look at us and go, "You have 70 percent plus unemployment."<sup>6</sup> Well look at the model of how they were created. It is consistent with the model. And that's what you have to look at. And we have to look at that and go, "Okay. It was consistent with the model they developed so now we have to alter that in some fashion." We cannot continue to buy into what they've created for us, which they take no responsibility for. Nonetheless, it is our life.

Every little detail contributes. There's no historical sense of how it got to that place. No historical sense of why we have this view toward this or that. So California Indians hate going into court; they hate judges; they hate the system. Now why is that? California had a slave statute,<sup>7</sup> and who was enslaved? Indians. And how would you do that? By going to court and getting orders. Some might say, "Well okay, 1850, that was a long time ago." Well, you know what it is? Memory-wise, it isn't that long ago because people have that memory inside themselves. Maybe not the specifics, but they certainly have the attitude of the people they came from towards the institutions. They may not understand where it came from, but they have it. And so now you have to go back and explain to them, "This is why, and that's not serving us, so this is what we need to do."

**How important is it for state and tribal courts to develop collaborative relationships and what do you think can effectively promote communication and collaboration? What do**

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6. See BUREAU OF INDIAN AFFAIRS, *supra* note 3.

7. 1850 CAL. STAT. 133, available at <http://www.indiancanyon.org/AC-Tof1850.html>. Entitled, "An Act for the Government and Protection of Indians," the law technically prohibits outright slavery; however, the only risk for the white man who enslaves an Indian is a \$50 fine. *Id.* The law also allows for various forms of "indentured" servitude, including forcing Indians deemed "vagrants" to be forced to work for four months for the "highest bidder." *Id.* § 20. Whites can also "contract" for the labor of an Indian minor. *Id.* §§ 3, 19. Understandably, some people informally call this the "California Indian Slave Act." See, e.g., Diana G. Tumminia, California Indians Memorial: Timeline, <http://www.csus.edu/in-div/t/tumminia/MEMORIAL.HTM> (last visited Mar. 1, 2010).

**you think state courts can learn about the administration of justice from tribal courts?**

We're institutions that occupy the same space. We're similar and we can and should share. I think if we can create a successful model, and I think we have a fairly good chance of it, we can actually provide them with a lot of assistance, just like this whole collaborative court, wellness court stuff.

I think what can be learned depends on—like anything else—which tribal court you're talking about. I think they could learn a lot from ours in the way that we are really committed to solving the problem and in making the people feel like this is theirs. This is not me fining them and taking the money; these are our resources and this is why we're doing it. And if you think it's wrong, then tell me why you think it's wrong and let me talk to someone from fisheries and see if they agree. Let me see . . . this is not something that I do to you, this is something we are doing together. I just think the whole philosophy, if you sit through month after month with us up there, it's just different. And you go, "Well, okay, you didn't do very well with your kids this month. I know you and you must feel bad about that and what are we going to do about it to make it better? Everybody in this courtroom wants to make it better—I don't care what side of the table, so what are we going to do? And if you can't make it, I understand that, because sometimes people can't." So you just go with that. It's not me versus them. It's us together coming to that decision.

**Where would you like to see innovations in tribal court?**

Part of the problem with being innovative is that we've been encouraged to create systems that really mirror state court systems. I think if I had the ability I'd go back out there with the tribal courts and go, "You know what? We need to take a serious look at how we want to do this, and how you want to train people to be in your court." What is your philosophy? How are you going to do this? Most tribal courts are going to say, "We want a culturally-consistent tribal court," but then have a really hard time with how to establish those practices and principles. I think a lot of work needs to be done.

**What do you see as the next steps for the Yurok Court system?**

I think to continue to grow our court system we have to do a community needs assessment. It's key because the community needs to start thinking about—in its own mind and hearts—what it means to have a place you go to try to resolve problems and how is that going to look for us and how are we going to make it ours and why is it important for it be to ours. How is this going to take us into the next hundred years and make us and our kids and our grandkids have a better life? How is this going to restore harmony to our community and allow us to go forward in a positive way? Without harmony what are we?

We really have to find a way to come back to our sense of what it is to be “Yurok” and have our institutions reflect that, which is not to say you don't have to draw the line sometimes and say, “You can't do that because you can't. It's not right.” A lot of people in the dominant society don't want to go, “Well you can't say it's right or wrong.” Actually in our culture, you can. “It's not right to treat children like this. And if you're going to do something that's not right, we're going to say ‘no,’ you can't do that.”