



# BUREAU OF INDIAN AFFAIRS OVERSEES TRIBAL GOVERNANCE AND COURTS

BY PATTY D. CAFFERATA, ESQ.

Fred Drye oversees the western Nevada tribal courts, and he graciously consented to explain the role of the Bureau of Indian Affairs in their operations. Since 1990, Drye has been the Tribal Operations Officer of the Bureau of Indian Affairs (BIA), Western Nevada Agency, Carson City, Nevada. A Southern Paiute, he moved to Nevada from Arizona in 1985. He worked for the BIA as the Indian Self-Determination Specialist for the Western Nevada Agency until he was promoted to his current position.

Drye spent over an hour explaining the BIA's role in overseeing the Nevada tribal courts for the edification of the State Bar of Nevada's members. Two walls of his office are filled with federal laws and regulations and with copies of all the tribes' constitutions, bylaws, law and order codes, and ordinances. He quickly referred to these sources as he described his work and covered the high points of the BIA's oversight of the Nevada tribal courts.

## Officer Responsibilities

Drye reports to the superintendent of the Western Nevada Agency. His duty is to ensure that tribal laws and courts comply with federal laws, treaties, U.S. Supreme Court decisions, tribal constitutions and other related tribal policies. Tribal and appellate courts are created, pursuant to tribal constitutions, and are subject to tribal council's actions and administrative oversight. The

court procedures are governed by the tribal law and order codes.

Overall, Drye provides technical assistance to the tribes; his primary responsibilities cover all areas of tribal government including tribal councils' roles and responsibilities, tribal courts, 25 Code of Federal Regulations (CFR) courts, appellate courts, law and order codes, ordinances, constitutional reform, court reviews and other related matters.

### No Separation of Powers

According to Drye, the Nevada tribes have no separation of powers doctrine written into their tribal constitutions. Therefore, the tribal council (legislative branch) and the tribal administration (executive branch) manage all court activities, including the hiring and firing of judges. A council contracts for its judge, usually for one to two years, but the judge serves at the council's pleasure. Drye believes this practice creates a political situation within the tribal courts as well as a lack of fair due process. Technical assistance is ongoing to adopt separation of powers, but tribal sovereignty makes it difficult for tribes to accept this concept.

As Drye explains, the Indian Reorganization Act of June 18, 1934, as amended several times, was the first step in self-governance for the tribes. Subsequent federal statutes furthered the development of tribal self-governance. P.L. 93-638, as amended, the Indian Self Determination and Education Assistance Act passed by Congress in 1975 permitted tribes to contract for court and law enforcement services that were previously run by the BIA. The law also allowed the tribes to establish their own law and order codes, pursuant to their constitution and bylaws. Some of these codes, however, might be subject to the approval of the Secretary of the Interior.

### Funding

Drye says that the BIA funds the court staff, judges, clerks, prosecutors and incarceration costs; if this money is not sufficient, some tribes supplement the funding. For short-term sentences, the BIA contracts with the local detention centers to hold the prisoners. Long-term sentences

are served in Owyhee, Nevada (20 to 25 beds); Peach Springs, Arizona; or Gallup, New Mexico. In the western region (Utah, Arizona and Nevada), Nevada has the highest incarceration costs because of transportation to out-of-state facilities and because fees have increased at local detention centers.

### Tribal Court Reviews

Drye mentions that, upon the request of a tribe, the BIA offers tribal court reviews on issues including staffing, judges, prosecutors, advocates, procedures, due process, equal opportunities, law and order codes, tribal councils and administration. In approximately one-and-a-half weeks, a reviewer may examine the administrative programs and case files. The reviewer also interviews court staff, tribal council members, defendants and other interested parties. All discussions are confidential for the privacy of the interviewees. A report is completed and presented to the tribal council with recommendations for improvements.

### Evolution of the Appellate Court System

According to Drye, in 1992 only six regional appellate courts operated across the country.

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Through funding from the BIA Central Office in Washington, D.C., the Western Nevada Agency received \$50,000 to initiate the establishment of an appellate court. Later, this appropriation became a permanent item in the Western Nevada Agency budget base. The funds pay for an Inter-Tribal Council of Nevada (ITCN) coordinator and five to six judges. The judges are all Tribal Indian Law trained attorneys. The court meets quarterly and has a procedural manual, but must follow the law and order code of the tribe of the case.

The ITCN coordinated a mutual agreement with the National Judicial College to use its courtroom and recording facilities. While the court serves all the Nevada tribes, not all Nevada tribes have enacted resolutions, or have joined this appellate court. (See Jill Greiner's article on page \_\_.)

## Violent Crimes

The latest law Congress passed in 2010 is the Tribal Law and Order Act that addresses domestic violence and other violent crimes against Native American women. This law permits tribes to prosecute certain crimes and seek increased criminal penalties of up to three years in prison (currently the maximum sentence is one year) and obtain fines in amounts over \$5,000. Major crimes, however, are still prosecuted by the U.S. Attorney.

Each tribe must decide whether or not to adopt this new law and, if so, the tribe must change its criminal codes to be consistent with the federal law and Indian Civil Rights Act of 1968. Adopting the law will cost the tribes more money. Since they do not have a new revenue source, not many tribes have adopted the law. Thus, some tribes are looking for economic development to raise more revenue to take advantage of this law.

In addition, an Indian Law and Order Commission is now conducting a comprehensive study of law enforcement and criminal justice in tribal communities on jurisdiction, detention, juveniles, impact of the Indian Civil Rights Act and other related issues; it will develop recommendations on tribal law and order on Indian reservations. The commission's report is due in 2012.

## Jurisdiction

According to Drye, jurisdiction has always been an issue to be considered when dealing with members of federally recognized tribes, and state and local governments. On August 15, 1953, Congress passed P.L. 83-280, (popularly known as P.L. 280), a law that authorized six mandatory states to exercise civil and criminal jurisdiction on Indian reservations. Later, additional states were granted the option to participate under this law, and Nevada became one of the optional states. Pursuant to Nevada Revised Statutes (NRS) 41.430, Nevada retroceded jurisdiction back to the Federal government. In 1968, Congress amended P.L.280 authorizing the United States to accept a retrocession (or return) of any jurisdiction previously acquired by a state under this law. See 25 U.S.C. §§ 1321-26.

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Moreover, under P.L. 93-638, these tribes were authorized to contract BIA services and to establish law and order codes that authorized the enforcement and adjudication of crimes committed on Indian reservations. The codes must be consistent with federal law and tribal constitutions.

The jurisdictional issues between the tribes, state, county and city governments has improved with the negotiations of Memorandums of Agreements (MOUs) between these governments.

## Traffic Offenses

A significant U.S. Supreme Court case to which Drye referred to was *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978). In this case, the U.S. Supreme

Court held that the tribes and tribal courts had no criminal jurisdiction over non-Indians. At the time, most tribes included traffic offenses in the criminal section of their codes, so the tribes could not enforce these violations against non-Indians. Now, many of the tribes have changed their codes to include traffic matters in their civil sections, so the tribes can charge non-Indians for traffic offenses on tribal land. The fines collected in these cases go toward support of the tribal courts. ■

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<sup>1</sup> Retrocession. In the civil law, when the assignee of heritable rights conveys his rights back to the cedent. BLACKER'S LAW DICTIONARY 1184 (5th ed. 1979).