



# APPELLATE LAW IN NEVADA INDIAN COUNTRY: THE INTER-TRIBAL COURT OF APPEALS

**JILL GREINER, ESQ.**

In 2002, despite my lack of experience or training in the Native American legal system, I was fortunate enough to be hired as the Associate Tribal Judge for the Reno-Sparks Indian Colony. The following year I was appointed by the Inter-Tribal Council of Nevada to serve as an Associate Justice for the Inter-Tribal Court of Appeals of Nevada (ITCA). These jobs have provided me with a great opportunity to learn a new area of law, become acquainted with Native American culture, and help people in a judicial setting.

Even though I moved to northern Nevada in 1989, like most people in this region, I had never heard of the ITCA prior to working for the Reno-Sparks Indian Colony. My formal training in the Native American legal system began with taking several courses on Native American law at the National Judicial College. None of these courses, however, prepared me for the real life cases that come before these courts.

Established by the Inter-Tribal Council of Nevada in 2003, the ITCA is funded by the Bureau of Indian Affairs. The court processes approximately 30 appeals per year. The mission statement for the ITCA provides that the court's objective is to "review cases on appeal from the tribal courts and to resolve disputed issues in accordance with traditional Indian values, including justice and fairness." The mission statement further states that the court "is committed to issuing clear, understandable written opinions and orders to assure the protection of rights of all who come before the tribal courts." The ITCA is utilized by 14 Nevada tribes that have passed resolutions to participate in the ITCA.<sup>1</sup>

One of the best aspects of serving on the ITCA is having the opportunity to discuss the cases and issues with the other experienced justices. Only two out of seven of those on the panel live in Nevada. The other justices fly in from New Mexico, Washington, Idaho and Utah. We have diverse backgrounds; our current panel includes a tribal prosecutor, a current tribal court judge, former tribal court judges, an administrative hearing officer, two mediators, a partner at a large firm, a civil rights attorney, a tribal housing attorney and a former legal aid attorney. For oral arguments there are three of us on the panel, with one judge assigned to write the decision. The court schedules at least four oral argument sessions per year depending on the number of appeals.

In many respects, the ITCA is similar to the state and federal appellate courts, both procedurally and substantively. Procedurally, for example, the court does not conduct trials de novo, appeals are decided on the record

of the case and a judgment must be final before it can be considered by this court. See e.g. *Mendoza v. Pyramid Lake Paiute Tribe*, ITCN/AC-CR-03 -010 (2003); Section VI of the ITCA Appellate Court Procedures. The standard of review is also similar to state and federal courts, i.e. the court will not set aside the trial court's factual findings unless they are clearly erroneous. See *Clint Hardin v. Reno-Sparks Indian Colony*, ITCN/AC-CR-05-007 (2005). Likewise, many of the U.S. Constitutional provisions are applicable to the tribal courts via incorporation through the Indian Civil Rights Act, including the proscription against cruel and unusual punishment (25 U.S.C. §1302(7)), the prohibition against double jeopardy, (25 U.S.C. §1302(7)), the right to equal protection of the law (25 U.S.C. §1302(8)) and the right to due process (25 U.S.C. §1302(8)).<sup>2</sup>

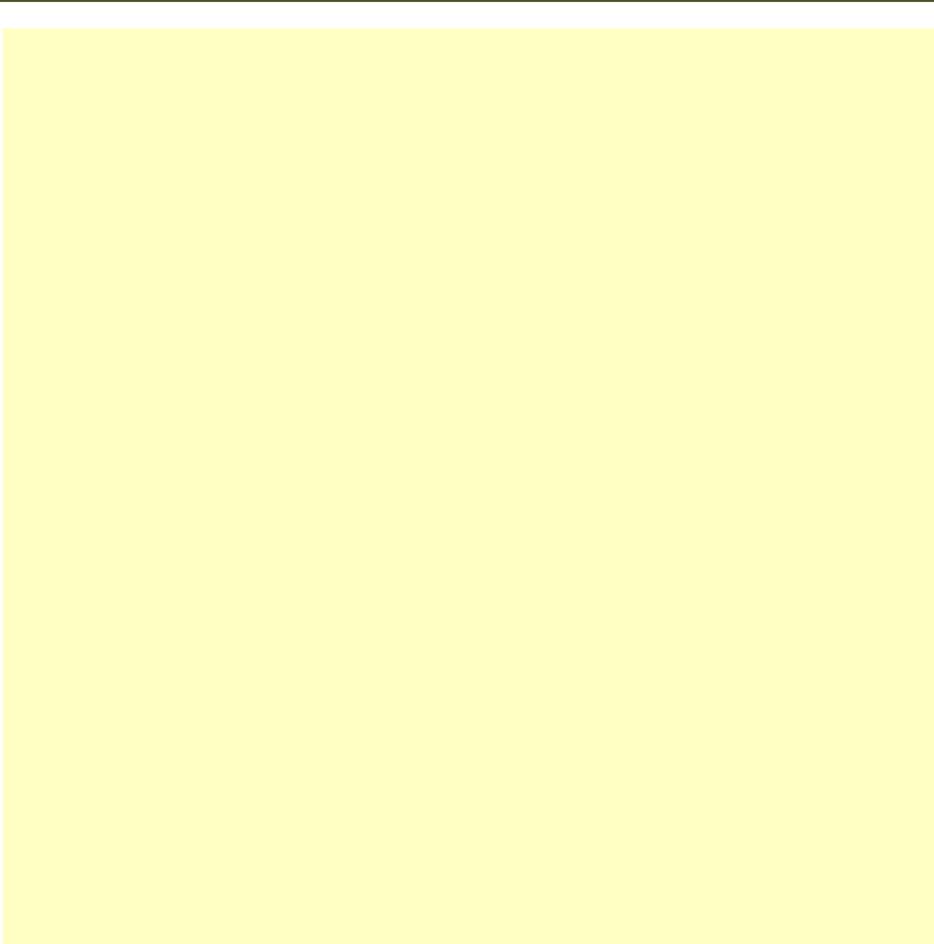
In other respects, however, the tribal court system is worlds away from the formalities of the state and federal court systems. For example, the ITCA often reviews trial court decisions that do not include specific findings of fact, legal standards, or jurisdictional rulings. Moreover, one of the court's biggest challenges is reviewing trial court cases without a complete record on appeal, despite such a requirement within our rules and the tribes' law and order codes. Some tribes do not have the resources to transcribe a hearing, or the audiotape of the proceeding gets misplaced, or the transcript is incomplete. Without a complete record on appeal it is difficult to determine whether the lower court complied with the applicable laws, and under these circumstances this court is often left with no other option but to remand the case back to the trial court for a new trial and/or sentencing hearing.

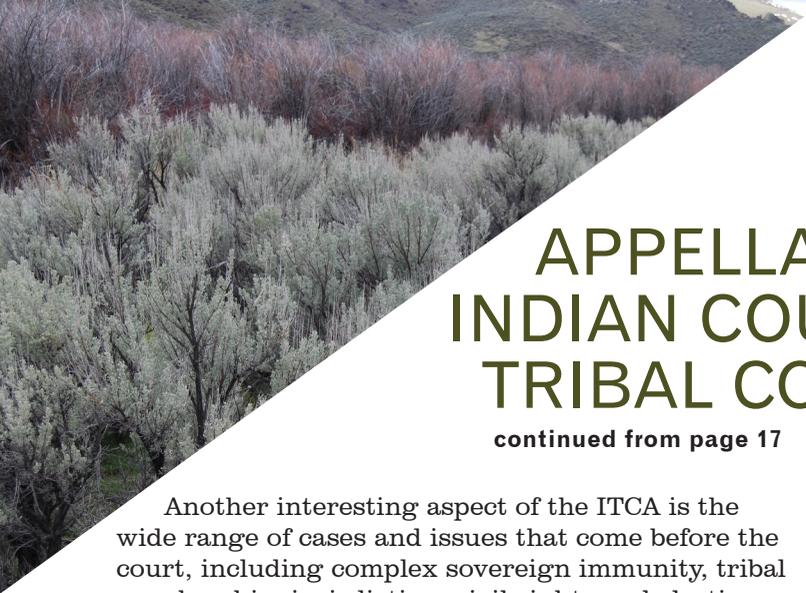
Because many of the parties do not have the resources to hire legal counsel, a large number of the cases involve pro se appellants and/or respondents. Sometimes it is difficult to determine from the party's notice of appeal and opening brief (if filed) the order or judgment from which they are appealing. Briefs from pro se parties or untrained advocates can also make it challenging for the court to understand what issues are being raised and whether or not there is actually a valid

legal argument rather than just an unhappy litigant. Although some of the parties hire advocates from Indian country, many of these advocates have little or no formal legal education, and sometimes they are just friends or relatives of the party.<sup>3</sup> On the other hand, I have observed some extremely articulate and well-reasoned legal arguments presented by both experienced lawyers and well-prepared lay persons.

While the court attempts to schedule oral arguments in a timely manner, sometimes cases must be continued for reasons that are uncommon in the state and federal courts. For example, it can be difficult to serve notice of the oral argument hearings on parties living in rural areas. Some of the tribal courts also experience frequent staffing changes, and oral arguments must be continued if the tribe does not have a currently employed prosecutor, advocate, tribe attorney or social services employee available to appear. Other times it is difficult to determine from an incomplete record who should be considered a party to the appeal, particularly when extended family or numerous tribal agencies are involved.

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Another interesting aspect of the ITCA is the wide range of cases and issues that come before the court, including complex sovereign immunity, tribal membership, jurisdiction, civil rights and election cases, to simple breach of contract and subsidized housing cases. Unlike state courts, in civil matters the tribal courts are specifically authorized to apply federal laws, any approved regulations by the Interior Department, any ordinances of the tribe, and any “customs by the tribe” (25 C.F.R. §11.500(a) (Emphasis added)). Moreover, although this court first considers the tribes’ applicable law and order code, sometimes the particular code provision does not cover the conduct in question, or the code is poorly written or unclear. Criminal cases in Indian

Country are also unique because the maximum permissible sentence is only one year in jail or a fine of \$5,000, or both, and the prosecution must prove beyond a reasonable doubt that the defendant is an Indian, otherwise the tribal court lacks jurisdiction (25 U.S.C. §§ 1301, 1302, and 1303; *U.S. v. Bruce*, 394 F3d. 1215, 1227 (9th Cir. 2005), citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191(1978); 25 U.S.C. §1302). And finally, an Indian charged with a crime in Indian country can be charged with the same crime in both Federal and tribal court, and it is not considered a violation of the prohibition against double jeopardy.<sup>4</sup>

The right to due process in both criminal and civil matters is a common theme among many of the decisions written by the ITCA (25 U.S.C. §1302(8)). For example, in one of our most recent decisions, *In the Matter of LRE, et. al., Minor Children*, ITCN/AC CV-10-012 (2011), the court reversed a judgment in a juvenile matter after finding that during several of the lower court hearings the tribal judge failed to swear in any of the witnesses, failed to allow cross-examination of any of the witnesses, and failed to admit any evidence into the record.<sup>5</sup>

If the ITCA was a stickler for following the procedural rules, many of the cases would be dismissed before consideration on the merits based on the failure to comply with even the most basic court procedural rules (i.e. the timely filing of briefs, written motions, service of process). Nonetheless, to take such an approach would stray from the mission of the ITCA “to assure the protection of the rights of all who come before the tribal courts.” Recently we have been revising the ITCA procedures in order to streamline court procedures, while making it user-friendly for all participants, whether represented by legal counsel or not. I am honored to serve on the ITCA, and I hope that I can continue to make a lasting contribution to this unique and interesting appellate court.

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**JILL GREINER** currently serves as an appellate court justice for the Inter-Tribal Court of Appeals, an administrative hearing officer for the Nevada State Board of Medical Examiners, a settlement judge for the Nevada Supreme Court Settlement Program, a mediator for the Nevada Foreclosure Mediation Program and an arbitrator for the Court Annexed Arbitration Program. ■

- 1 Tribes within Nevada that do not participate in the ITCA have their own appellate court system. The participating tribes have fluctuated through the years; occasionally when a tribe does not like one of the court's decisions, its tribal council has passed a resolution to withdraw from participation in the ITCA.
- 2 Congress excluded some of the U.S. constitutional provisions from the Indian Civil Rights Act, including the requirement of separation of church and state, the right to a jury trial in civil cases, and the right of indigents to appointed counsel in criminal cases.

- 3 Section V of the ITCA Appellate Court Procedures specifically states that a party representative may be "an attorney, an advocate, or other person selected by the person to speak on his behalf."
- 4 The U.S. Supreme Court has held that the source of the power to punish offenders is an inherent part of tribal sovereignty and not a grant of federal power. Consequently, when two prosecutions are by separate sovereigns, (e.g. the Navajo Nation and the United States), the subsequent federal prosecution does not violate the defendant's right against double jeopardy. *United States v. Wheeler*, 435 U.S. 313 (1978).
- 5 In this case the ITCA also found that the trial judge committed reversible error when it permitted the tribal social services agency to indefinitely continue custody of three minor children who were removed from their parent's home for school absenteeism without the filing of a complaint, and well beyond the time limitations permitted under the applicable law and order code.