



Beaded replica of the Pyramid Lake Indian tribal seal by Burton Pete.

TRIBAL COURTS IN NEVADA ALIVE AND WELL

BY BILL KOCKENMEISTER, ESQ.

There are currently 565 federally recognized Indian Tribes.¹ Of those, 26 are located, in whole or in part, in Nevada. Federal recognition is important because it establishes a government-to-government relationship between the tribe and the federal government. Federally recognized tribes are considered domestic dependent nations. As a quasi-sovereign entity, a federally recognized tribe has the right to self-governance, to define its own membership, to manage tribal property and to regulate tribal business and domestic relations. An essential component of tribal self-governance is an independent tribal court. A tribal court helps protect the public health and safety and preserve the tribe's cultural heritage.

The predecessors to tribal courts were "Courts of Indian Offenses," which were first established by the Department of the Interior in 1883 as the result of a case that occurred on what is now the Rosebud Indian Reservation in South Dakota. A Lakota Indian named Crow Dog allegedly killed another Lakota named Spotted Tail. At the time of the killing, the Lakota utilized traditional methods of resolving disputes. The United States government believed that traditional dispute

resolution did not protect public health and safety in Indian country. As a result, the Major Crimes Act² was enacted. This Act gave federal courts jurisdiction to prosecute Indians who committed specifically defined major crimes on reservations. The Department of the Interior also established "Courts of Indian Offenses," which handled less serious criminal acts. Courts of Indian Offenses, including two in Nevada, are still in existence. Courts of Indian Offenses are not established or controlled by the tribes and therefore do not protect and preserve tribal sovereignty.

With the passage of the Indian Reorganization Act of 1934,³ Indian tribes were allowed to operate tribal courts, enforcing tribal laws enacted by the tribe.⁴ In Nevada, almost all of the federally recognized tribes have established their own courts. Court clerks, prosecutors, social service staff, advocates and attorneys participate in tribal court proceedings.

Tribal courts in Nevada exercise criminal and civil jurisdiction. Jurisdiction in Indian country is a complex matter. To determine jurisdiction in criminal cases, the ethnicity of the defendant and the type of crime alleged to have been committed must be considered. A tribal court (as well as a Court of Indian Offenses) has jurisdiction over all crimes, except specifically enumerated major crimes, committed on a reservation by an Indian. In tribal court, each charge is punishable by incarceration of up to one year in jail, or a fine of \$5,000, or both. Major crimes committed by Indians in Indian country are prosecuted in federal court.

Crimes committed by non-Indians where the victim is an Indian are prosecuted in federal court whereas a crime committed by a non-Indian against a non-Indian is prosecuted in state court. A corollary issue is who is considered an "Indian" for purposes of tribal court jurisdiction. Most tribes consider an individual who is a member of any federally recognized tribe to be an "Indian" for purposes of tribal court jurisdiction. Some tribal courts have extended their criminal jurisdiction by finding that any individual, regardless of membership in a tribe, who considers himself to be an Indian, is subject to the tribal court's criminal jurisdiction. Tribal court jurisdiction has always been a source of contention in Indian country. Most tribes seek to extend their criminal jurisdiction to include non-Indian offenders. Congress and federal courts have often rejected these efforts.

Tribal courts have broad authority to hear civil disputes, particularly in the area of domestic relations, adoption, child custody and child protection. Civil jurisdiction extends to disputes involving non-Indians when the non-Indian enters into a consensual relationship with the tribe or an individual member of the tribe. In the area of domestic violence, any protection order issued by a tribal court with jurisdiction over the matter must be afforded full faith and credit.⁵

The Indian Child Welfare Act (ICWA)⁶ plays a particularly important role in both state and tribal courts. ICWA was enacted in 1978 because of the high removal rate of Indian children from their traditional homes and, most importantly, from

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Indian culture as a whole. ICWA provides that Indian Tribes: (1) have the unqualified right to intervene in a state case involving foster care or termination of parental rights of an Indian child tribal member; and (2) may have the proceeding transferred to tribal court.

As a result, tribal courts hear many, if not most, foster care and termination proceedings involving Indian children. ICWA is very important in preserving tribal sovereignty and tribal culture and traditions. For example, Indian children are often placed with grandparents as the extended family has historically played an important role. If an extended family member is not available for placement, tribal law and order codes almost universally require tribal courts to place children in Indian foster homes if at all possible.

Tribal courts have broad authority to adopt their own procedures in civil cases. While most civil

actions in tribal courts resolve disputes using the adversarial system common in state and federal courts, tribal custom and tradition are often utilized to resolve disputes. Tribal dispute resolution is based on consensus. Parties are permitted to discuss their positions at length in an attempt to build consensus. Tribal elders are accorded great respect and are often asked to discuss tribal customs and traditions, and to help build consensus.

The Indian Civil Rights Act of 1968⁷ makes many, but not all of the guarantees of the Bill of Rights applicable to tribes and tribal courts. The act did not impose the Establishment Clause, the guarantee of a republican form of government, the requirement of separation of church and state, the right to a jury trial in civil matters, and the right to appointed counsel in criminal cases. The Act does require tribal courts to afford due process.

In addition to the requirements of the Major Crimes Act, the Indian Child Welfare Act and the Indian Civil Rights Act of 1968, tribal courts in Nevada share other similar characteristics. These include the enactment of tribal law and order codes with similar criminal and civil jurisdictional provisions, the recording of court proceedings and the right to appeal.⁸ Additionally, most tribal law and order codes contain provisions that provide that if the tribal code does not address a matter, the court is to look to federal law for guidance and then to the tribe's customs and traditions. The

Nevada Revised Statutes are only used for guidance as a last resort. All tribal courts permit licensed attorneys to appear upon the payment of a modest annual or per-case fee. Tribal courts also permit lay advocates to represent clients. Lay advocates are often tribal members with knowledge of court practices and procedures.

The old adage "If you've seen one you've seen them all" certainly does not pertain to tribal courts in Nevada. Some courtrooms are set up to look like a courtroom in state court; other tribes hold court in small rooms in the tribal headquarters building. Some tribal courts are in session on a daily basis, some weekly or bi-weekly, some monthly, and some on an intermittent basis. A few tribal courts employ licensed attorneys as full-time prosecutors and provide for the appointment of counsel for indigent defendants in criminal proceedings and in child welfare cases. These tribal courts are very much like state courts. Other tribal courts employ prosecutors and advocates with minimal legal training. Some courts do not provide advocates in any matters. In these courts, tribal judges have to be very sensitive to due process rights of the parties and must ensure that a thorough and complete record is developed in order to render a fair and impartial decision.

Generally, tribal judges are appointed by the tribal council and are considered part-time independent contractors. At one

time, many tribal judges were not licensed attorneys. Now, however, most tribal judges are members of the Nevada bar. Tribal judges must be available to hold emergency telephonic hearings, issue warrants and other emergency orders. A tribal judge is involved with a wide variety of issues, including criminal matters, child protection, domestic violence and family law. A tribal judge is a true generalist.

While tribal courts are diverse, they are all essential components of a system that protects the public health and safety in Indian Country, promotes tribal sovereignty and assists in preserving the tribe's customs and traditions. Tribal courts are alive and well in Nevada. ■



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1 To obtain federal recognition by the United States Department of the Interior, an Indian Tribe must meet seven historical, anthropological and genealogical requirements.

2 18 USC 1153

3 25 USC 461

4 Some states, such as California, operate under what is known as Public Law 280, 18 USC 1162. In these states all individuals who commit crimes on the reservation are prosecuted in state courts. PL 280 is a controversial act, many tribes in PL 280 states feel that the law infringes on tribal sovereignty. Nevada is not a PL 280 state.

5 18 USC 2265

6 25 USC 1902

7 25 USC 1301 to 1303

8 The Inter-Tribal Court of Appeals located in Reno is the venue for appeals of Nevada tribal court orders with the exception of appeals from the Fallon-Paiute Shoshone Tribe, which has its own appeals court.