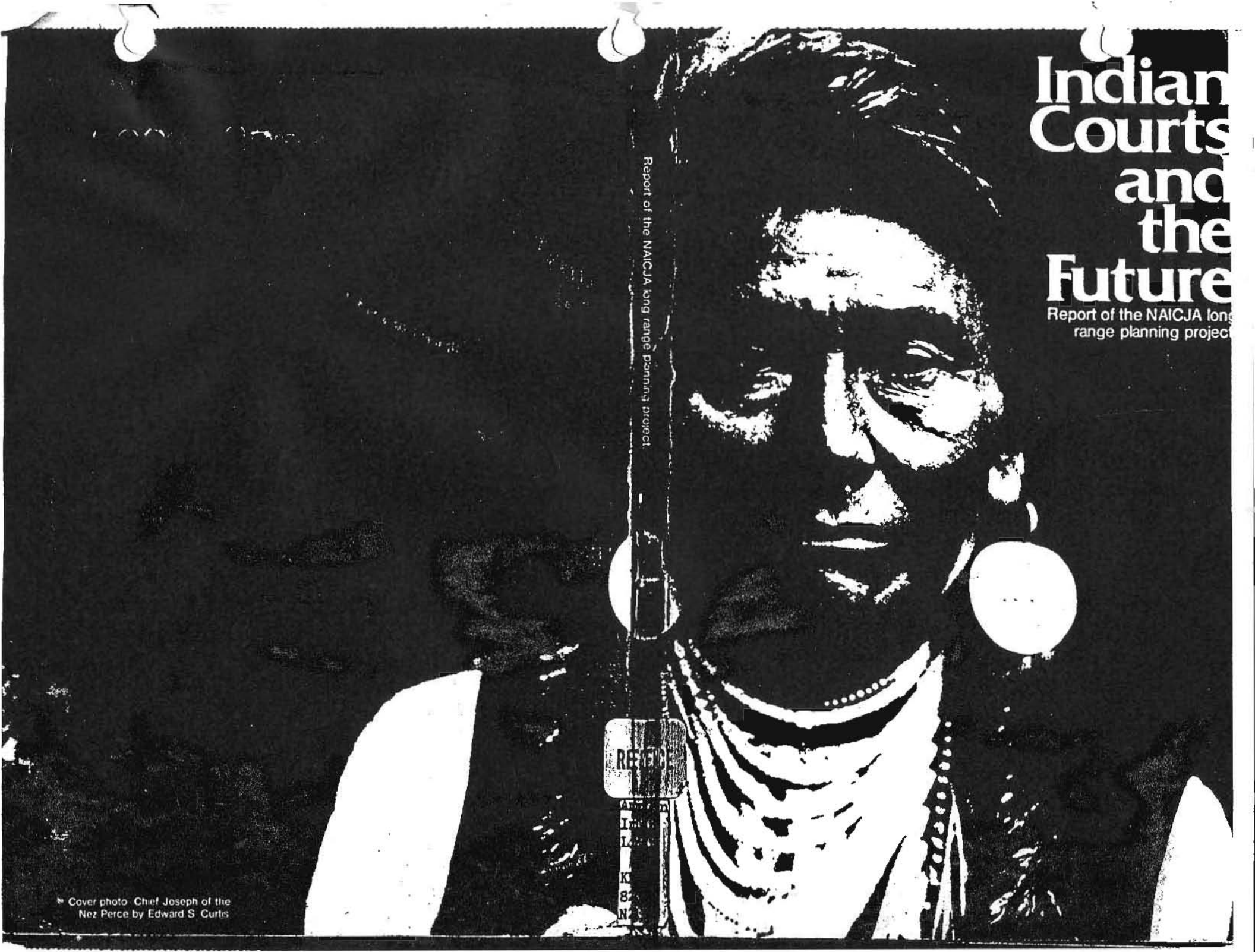

Cover photo: Chief Joseph of the Nez Perce by Edward S. Curtis

INDIAN COURTS AND THE FUTURE

Report of the NAICJA
Long Range Planning Project

Judge Orville N. Olney, Project Director
David H. Getches, Project Planner/Coordinator

The National American Indian
Court Judges Association

1978

This report was prepared under Bureau of
Indian Affairs Contract No. K51C14201023.

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402

Stock Number 024-002-00068-9

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Foreward

by

Judge Cranston Hawley, President
National American Indian Court Judges Association

Our Indian courts are necessary if tribal governments are to exercise the sovereign prerogatives of tribes as recognized by Congress and the federal courts. It is the job of Indian tribunals to interpret tribal laws and to apply them evenly to everyone under tribal jurisdiction. Congress has mandated in the Indian Civil Rights Act that this be done according to "due process" and without impairment of many individual liberties found in the federal Constitution. Before these goals can be met, we must improve the abilities of our courts. This calls for action in concert with the federal government. It was the government which initiated Indian judicial systems as we know them today, and which has prescribed requirements for how they must operate.

Our treaties and the special legal relationship between tribes and the United States promise the lawful and peaceful existence of our people on their reservations. Unfortunately, the federal government has not kept this promise. Although the efforts of most tribes have made their systems fair and respectable, reservation legal systems never have had completely adequate staffs, facilities, or training. Costs are now so high and federal statutory requirements so stringent that greater federal assistance is indispensible.

The National American Indian Court Judges Association was formed in 1968 taking as its purposes:

- to improve the American Indian court system throughout the United States of America
- to provide for the upgrading of the court system through research, professional advancement and continuing education
- to further tribal and public knowledge and understanding of the American Indian court system
- to maintain and improve the integrity and capability of the American Indian court system in providing equal protection to all persons before any Indian court
- to conduct any and all research and educational activities for the purpose of promoting the affairs and achieving the objectives of Indian courts and of the Association and to secure financial assistance for the advancement of the purposes of the Association

When the Bureau of Indian Affairs engaged the NAICJA to undertake a year long project to develop ways to improve Indian court systems, we accepted the assignment enthusiastically. It was precisely the kind of thing we were organized to do. Further, it evidenced a federal commitment to work with us and support us in the task of making all Indian courts fair, efficient, and effective ministers of justice.

We believe that the commissioning of this project by the Bureau of Indian Affairs is a sign that a long overdue obligation finally may be met. But the project is just a beginning. In the final analysis, the extent and sincerity of the commitment of the Bureau and other federal agencies will be measured by their response to the needs defined in the report which follows and by the degree to which they facilitate or ignore our recommendations. We hope that recent indications from the federal establishment of its support and dedication to meeting present and future challenges to Indian courts will be the foundation of positive action.

Acknowledgments

The work of the National American Indian Court Judges Association Long Range Planning Project was the result of a collective effort by many people and organizations; most notably, the invaluable support and encouragement of the NAICJA board of directors and steering committee. NAICJA president Cranston Hawley has taken a strong interest in the project's work and will, of course, press for implementation of this report's recommendations.

The Long Range Planning Project advisory committee, chaired by project director Judge Orville N. Olney, consisted of Judge Wilmer Peters of the NAICJA, Joseph Myers of the American Indian Lawyer Training Program, Governor Paul Tafoya of the National Tribal Chairmen's Association, and Thelma Stiffarm, later replaced by Toby Grossman, of the American Indian Law Center. Committee members came together monthly for most of the past year for long days of discussion of Indian court issues. They reviewed drafts of the Model Standards for Indian Judicial Systems (Chapter 4) and formulated the recommendations in this report (Chapter 5). The advisory committee was aided by consultants who prepared and presented discussion papers at the meetings. Their papers are reproduced in Appendix 2.

Much of the factual basis for the Long Range Planning Project report was obtained from reports of consultants who visited twenty-three Indian courts. They, along with consultants to the advisory committee, are listed on page ii of this report and deserve thanks for their great diligence and dedication.

The Bureau of Indian Affairs gave its financial and moral support to our work. The project was the brainchild of Theodore Krenzke, Director of the Office of Indian Services, who has consistently encouraged its progress. Dennis Petersen, Chief of the Division of Tribal Government Services, took a special and sincere interest in the project. Eugene Suarez, Chief of the Division of Law Enforcement Services, deserves thanks for his participation and assistance. Thanks also to David Etheridge of the Interior Solicitor's office for his input and ideas. Pat Hays only recently joined the BIA as Judicial Services Officer, yet has been very helpful as the report was being prepared. Undoubtedly, he will now work for the acceptance and adoption of our recommendations, with the cooperation of Messrs. Krenzke and Petersen.

The aid of Dale Wing of the Law Enforcement Assistance Administration is appreciated. His continuing support, too, is essential to the success of Indian court systems.

The goals of the Long Range Planning Project will only be realized when leaders of Indian tribes and organizations work toward that end. Their role during the past year suggests that the report will have vocal advocates. The NTCA's conference on the Indian judiciary last fall and the public statements of its president Joseph DeLaCruz and vice-president Tafoya are most encouraging. Richard Trudell of the AILTP has worked with the project in a spirit of assistance and cooperation. The AILTP's report Indian Self-Determination and the Role of Tribal Courts and the participation of many of the organization's staff members have helped tremendously. The American Indian Law Center's assistance and backing have been important assets; Sam Deloria and his staff have been very helpful. We thank Charles Trimble of the National Congress of American Indians for contributing ideas on our reservation surveys early in the project.

The tribal chairpeople and judges who welcomed visitors from the project to their reservations should be thanked. They put up with "another study," showing courtesy and understanding.

For nearly a full year, Craig Dorsay, a third year law student at the University of Oregon, was

research assistant on the Long Range Planning Project staff. His work was exemplary. He is responsible for assembling a comprehensive collection of materials on Indian courts. He drafted the document outlining the scope of our reservation survey inquiry. After the reports of reservation visits were received, he compiled the results which are now Appendix 1 to this report. Those results became the basis of Chapter 2 of this report, the initial draft of which Craig prepared. Craig was the principal draftsman of the Model Standards for Indian Judicial Systems included in Chapter 4. The recommendations in Chapter 5 also bear his imprint. We cannot overstate our gratitude to Craig Dorsay for his work on the Long Range Planning Project.

Another Long Range Planning Project staff member, Pat Wright, merits the highest praise. Pat handled the complicated arrangements for dozens of consultants visiting reservations all over the country and for the eight advisory committee meetings. She was responsible for typing countless drafts and redrafts of the manuscript, including this final version. She coordinated the design and printing of the report as well. For her smooth administration of the project and her tireless work on this report, Pat deserves the warmest appreciation.

Many others assisted in the production of this report. MaryAnn Lunderman contributed many insightful ideas which are reflected in the report and she reviewed and commented on early drafts. Special thanks are due Robin Cunningham for his helpful editorial assistance with the lengthy manuscript. Phil Read of Communication Arts, Inc. designed the attractive cover, art work and internal layout of the report. Peggy Ann Lloyd spent many hours typing the survey results. Legal citations were checked by Claude Appel, George Mansho and Steve Timm.

We thank all who made this project and the resulting report possible. If the teamwork and sense of common purpose which characterized the project can be replicated in implementing the recommendations of this report, there is great promise for the future of Indian courts.

David H. Getches
Orville N. Olney

January, 1978

Introduction

The Need for Improved Indian Courts

Since at least 1959, it should have been clear that the existence and effective operation of tribal courts are essential ingredients of the right of tribal self-government. In that year the United States Supreme Court ruled that a non-Indian storekeeper on the Navajo Reservation could not use the Arizona state courts to collect a debt owed by a Navajo Indian living on the reservation. The Court rested its decision on the fact that allowing state court authority over such a matter would be an infringement on the Indians' right of self-government.

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of Indians to govern themselves.[1]

In deciding Williams v. Lee the Court relied heavily upon the commitment of Congress, the Bureau of Indian Affairs, and the tribe "In strengthening the Navajo tribal government and its courts." That the tribe had "greatly improved its legal system through increased expenditures and better trained personnel" and that its courts were exercising "broad criminal and civil jurisdiction" were particularly persuasive points. Nevertheless, the full import of the Court's decision was not grasped by federal officials or tribes. Most tribes

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[1] Williams v. Lee, 358 U.S. 217, 223 (1959).

did not perceive the existence of a strong, competent court system as the best defense against incursions on tribal sovereignty. Similarly, federal agencies, charged with a fiduciary responsibility to protect the integrity of Indian governments, seemed unmindful of the factors the Supreme Court said were important in Williams v. Lee. Indian courts remained underfunded, incidental parts of tribal governments. Tribes and government agencies proceeded as if Indian self-government were an abstract concept which always would be held sacred in the eyes of the law.

We know now that the Supreme Court will not decide cases upon what it calls "platonic notions of Indian sovereignty," but instead will use the doctrine as "a backdrop against which the applicable treaties and federal statutes must be read."[2] Thus, the Court can be expected to look for Congress' intent to maintain separate Indian governments as manifested in specific federal acts, programs, and appropriations. This analysis will determine whether a state's authority is preempted by federal action; and the manner and extent of a tribe's exercise of its governing powers will determine whether there is an infringement upon tribal self-government. It seems clear that the limits placed upon tribal powers or the encouragement given to their exercise by express congressional acts will fix the dimensions of tribal self-governing powers. It is fortunate that the relatively sophisticated Navajo court system, operating with copious examples of federal support, was the subject of the Court's scrutiny in several of the more recent clashes between powers of tribes and states. But the principles built upon those cases may not survive analysis in other factual settings. The courts will have difficulty excluding exercises of state power when tribes with inadequate or non-existent judicial systems are involved. The rationale of protecting tribal self-government may not apply where there is in fact no operative "authority of the tribal courts over Reservation affairs."

In measuring Indian courts, federal courts are certain to examine acts of Congress which deal with the operation of Indian judicial systems. The most sweeping and recent of such acts is the Indian Civil Rights

[2] McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 172 (1974).

Act.[3] Unquestionably, the Act limits the sovereignty of Indian tribes because it insists upon a form of government not necessarily of their own choosing. They must adhere to concepts of due process and equal protection and assure their members a list of substantive rights borrowed from the United States Constitution, which may be alien to their own traditions of government. The familiarity of non-Indian courts with the federal Bill of Rights provides a ready index for evaluating Indian courts—a gauge for their degree of effectiveness as vehicles of preemption of state governmental authority, and of their exercise of tribal self-government. Yet the response of tribes and, significantly, of the federal establishment as their mentor and trustee has not been adequate to fulfill Congress' mandate and to meet the challenge of the ICRA fully.

Limited Federal Assistance

In the past few years there has been increased attention paid to Indian courts, but it seems to have been more a response to a general concern for "law and order" than to Indian tribal needs. The Omnibus Crime Control and Safe Streets Act of 1968 established the Law Enforcement Assistance Administration as part of the Nixon Administration's program to fight crime throughout the country. Indian courts have been incidental beneficiaries of the Act, receiving over $2.5 million of the nearly $5 billion which LEAA has granted to governments for law enforcement related projects. This agency has made possible training for Indian judges and assistance to many Indian courts.

The Bureau of Indian Affairs also has made more money available to Indian courts, but again the concern has been less with strengthening tribal governments than with quelling civil unrest. Dramatically increased funds for law enforcement (including courts) were budgeted by the BIA and appropriated by Congress in the wake of the 1973 Wounded Knee disturbances. Higher funding levels have enabled Indian courts to increase their facilities, staffs, and the competence of their judges. Yet the upgrading of Indian courts tracks the available funding, not an improvement program conceived specifically to satisfy court needs. Therefore, not only have the funds

[3] 25 U.S.C. §§1301-1341.

been inadequate, but they have not been used as effectively as they might have been under a program for Indian court development.

In 1976 the Bureau of Indian Affairs established a separate Judicial Services Division as a result of recommendations in its Indian Reservation Criminal Justice Task Force Analysis 1974-1975.[4] This new division, working together with the NAICJA, the American Indian Lawyer Training Program, Inc. (AILTP), and the American Indian Law Center (AILC), soon realized that there were no articulated goals or programs for Indian courts. Indeed, there was little basic information about Indian courts. To remedy the situation, the Bureau of Indian Affairs commissioned the AILTP to survey Indian courts and collect data to assist it in making informed decisions. And the NAICJA was awarded a one year contract for a Long Range Planning Project to study Indian court systems, identify their main strengths and weaknesses, develop a set of model standards, name four model courts with whom the BIA could test the model standards, and propose a five year plan of support for Indian courts. This report is in fulfillment of the NAICJA contract.

The Long Range Planning Project

The NAICJA's Long Range Planning Project staff determined that a solid background was necessary in order to develop the results sought by the BIA. It was necessary to review all written materials relating to Indian courts, visit a cross section of Indian courts, and utilize the advice of people knowledgeable in Indian court problems. Virtually every reported court decision and every article dealing with Indian courts were read and abstracted. All reports on Indian courts by congressional committees, organizations, and others were carefully reviewed.

The available information on Indian courts proved to be incredibly sparse. The AILTP report provided more basic data on Indian courts than any other single source, but even the report's authors cautioned that it was of limited reliability. The tribes from which information had been obtained simply did not have enough

[4] Bureau of Indian Affairs, Indian Reservation Criminal Justice Task Force Analysis 1974-1975, at 107 (1975).

hard, statistical data in a form which could be correlated with other tribes' information. The Long Range Planning Project also needed opinions and impressions of Indian court operations and needs, as well as suggestions for their improvement. From the outset it was obvious that the data gap could not be filled by any survey done by the project, but would have to await the institution of a uniform national data collection system for Indian courts. The constraints of time and resources dictated that not all reservations could be visited. Instead, visits were made to a cross section of courts varying in geographic location, size, special types of problems, kind of court, and jurisdiction.

With the assistance of the NAICJA board members and instructors, twenty-three courts were selected for visitation. The courts selected were:

Blackfeet	Navajo
Coeur d-Alene	Nevada Colonies
Colorado River	Oglala Sioux
Colville	Papago
Fort Peck	Red Lake Chippewa
Gila River	San Carlos Apache
Hopi	San Juan Pueblo
Isleta Pueblo	Suquamish
Jicarilla Apache	Uintah and Ouray
Menominee	Warm Springs
Metlakatla	Yakima
	Zuni Pueblo

A list of consultants to conduct the reservation visits was compiled with the assistance of members of the NAICJA board of directors and steering committee and Indian leaders throughout the country.

The Long Range Planning Project staff prepared a draft of an extensive document outlining the scope of inquiry for reservation visits. The draft was circulated widely for comment. A semi-final draft was tested in use at two reservations. A final draft that was used at all other reservations incorporated the resulting suggestions. During the spring of 1977, teams of two consultants made two day visits to each reservation. Each of the consultants submitted a written report to the Long Range Planning Project office. Information from the reports has been abstracted and compiled in a separate volume which is Appendix I to this report. The report and recommendations found in this volume draw heavily upon this information.

Early in the project, a Long Range Planning Project advisory committee was formed. It consisted of Orville N. Olney, project director, Governor Paul Tafoya representing the National Tribal Chairmen's Association, Joseph Myers representing the American Indian Lawyer Training Program, Inc., Thelma Stiffarm, who was later replaced by Toby Grossman, representing the American Indian Law Center, and Judge Wilmer Peters representing the NAICJA. The committee met eight times during the year for two or three days each time. Usually guests and consultants were invited. Consultants were asked to submit discussion papers in advance of the meetings. The papers were circulated to committee members for their review, presented by the consultants at the meetings, and discussed by those present. Many of the ideas from the papers and subsequent discussions of them are reflected in this report. A separate volume, Appendix 2 to this report, contains copies of the advisory committee discussion materials.

The advisory committee spent many hours reviewing and substantially revising staff drafts of important sections of this report—principally the Model Standards for Indian Judicial Systems (Chapter 4), and the Five Year Plan for Support of Indian Courts (Chapter 5). Both of those sections also have been reviewed by the NAICJA board and approved by action of the NAICJA executive committee.

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The following report is based on what has been learned during the Long Range Planning Project. Chapter 1 begins with material on the legal and historical basis for Indian courts, and Chapter 2 describes their present status and problems. Several strengths and weaknesses of Indian courts are identified in Chapter 3. The Model Standards for Indian Judicial Systems which were developed as a part of the Long Range Planning Project are in Chapter 4, along with a proposal that they be implemented immediately by four Indian courts serving as model courts. Chapter 5 contains a five year plan of support for Indian courts.

Chapter 1

Indian Courts in History and Law

A Brief History[1]

With the exception of a few tribes, reservation judicial systems as they exist today are unable to trace their roots to traditional Indian forums for dispute resolution. Instead, they are descended from an externally imposed Anglo system for keeping "order" among the Indians. Nevertheless, many tribes have been able to influence the character of their courts by utilizing some traditional concepts. If Indian courts have not been terribly destructive of Indian culture, it can be attributed to two facts: (1) most judges historically have been Indians, and (2) federal funding has been so lean that courts have had little influence, destructive or otherwise. Factors such as removal, war, and confinement on reservations were far more powerful.

Until late in the nineteenth centur, Indian reservations were controlled by the military, as the Bureau of Indian Affairs was part of the Department of

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[1]For a more comprehensive history of Indian courts the following sources, on which this section is based, should be consulted: Hagan, Indian Police and Judges (1966); Bureau of Indian Affairs, Indian Law Enforcement History (1975); American Indian Policy Review Comm'n, Report on Federal, State, and Tribal Jurisdiction, ch. V, at 121-124 (1976); American Indian Lawyer Training Program, Inc., Indian Self-Determination and the Role of Tribal Courts, at 13-35 (1977); and R. Bennett, "The Tribal Judiciary," unpublished paper prepared for the Long Range Planning Project advisory committee (1977) (Appendix 2 to this report).

War. Crude forms of control—principally force—led many persons in and out of government to press for civilian controls of Indian affairs. The civilian bureaucracy, with support from organized religion, prevailed. There was a feeling that inculcation of what the non-Indians understood as law and order was a necessary ingredient of the civilizing process which they saw as their mission. In order to Christianize, educate, and eventually assimilate the Indians, the institution of a legal system—not just martial law—was necessary. Some of the traditional power of chiefs among the Indians remained, and this posed a threat to the dominant authority of the government's Indian agents. Consequently, destruction of the remaining authority of the traditional leaders and the systems they represented became essential to the "civilizing" process.

A system of Indian police and courts controlled by the Indian agent on each reservation was started. In 1883 the Commissioner of Indian Affairs authorized creation of Courts of Indian Offenses to operate under a set of rules and procedures created by the Bureau of Indian Affairs. Previously, the Indian agents summarily sentenced those they believed to be guilty. By 1890 agents on most reservations were appointing Indians to serve as police and judges. As purveyors of favors and patronage, Indian agents were able effectively to control police forces by paying virtually nothing to hand-picked Indians. Thus, the military was supplanted on the reservations. Although courts had functioned on some reservations for several years, no funds were appropriated by Congress for judges until a total of $5,000 was made available in 1888.

One federal court described the early Indian courts as "mere educational and disciplinary instrumentalities by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian."[2] Judges would often take account of Indian custom when Indians came before the Indian courts. But this did not translate into leniency—it more likely meant a tougher penalty or subjection to traditional sanctions for a uniquely Indian offense. Nevertheless,

[2]United States v. Clapox, 35 F. 575, 577 (D. Ore. 1888).

several important Indian customs and religious practices such as the sun dance, medicine men, and distribution of property owned by a person on his death were outlawed, and violations were punished by Indian courts. The Indian courts, however, were not destined to fulfill their promise of assimilation, but they appeared to maintain order relatively well. Another important role of Indian courts was regulation of the activities of avaricious non-Indians (e.g., trespass, grazing on Indian lands). For them, the Washington originated law applied by the courts was as respectable as any on the frontier.

Indians on many reservations continued to resolve serious disputes among themselves outside the Courts of Indian Offenses. Such traditional sanctions as restitution, banishment, payment to a victim or his heirs, and vengeance were common. But, as the famous case of Ex Parte Crow Dog[3] illustrates, federal authorities attempted to arrest and punish Indians under federal law when the Indian remedies seemed inadequate. Crow Dog's traditional punishment for murdering Spotted Tail—payment to relatives—was seen as inappropriate and not fitting with the "civilizing" plan by many neighboring whites. When Crow Dog appealed his conviction under a federal murder prosecution, the Supreme Court reversed, holding that there was no jurisdiction to apply federal law in such disputes. Congress responded by passing the Major Crimes Act[4] to extend federal enforcement of certain enumerated crimes between Indians occurring on reservations, thereby ending the exclusivity of tribal jurisdiction in such matters. Other developments in federal policy continued to erode the tribes' ability to govern themselves. Most notably, the General Allotment Act in 1887 was intended to carve up tribal landholdings into small, individually owned parcels which were to be distributed to Indians, with "surplus" lands opened to non-Indians. Indians were expected eventually to take title to the land outright and then to become subject to the criminal and civil jurisdiction of the state or territory in which the reservation lay.

After the turn of the century, while the Courts of Indian Offenses continued to function under the

[3]109 U.S. 556 (1883).

[4]Act of March 3, 1885, ch. 341, §9, 23 Stat. 362, 385, as amended, 18 U.S.C. §1153.

control of the Indian agents, the primary thrust of law enforcement became liquor suppression. Ripe opportunities for bootleggers, degeneration of tribalism and social structure, and demoralized individuals on the reservation combined to make alcohol abuse a major problem on all reservations. More money was provided for police, but by 1925 appropriations for Indian courts had decreased to $6,500, almost one-half the 1892 level of $12,540. The number of Indian judges declined similarly. Indian courts waned in importance and were little more than tools of the Indian agents who had to approve of all court decisions.

No specific statutory authority ever has existed for Courts of Indian Offenses. In 1921, however, the Snyder Act[5] empowered the Commissioner of Indian Affairs to expend money for a variety of services to Indians, including "the employment of . . . Indian police, Indian judges . . . ." But Congress was inhospitable to later attempts to validate the courts and to clarify their jurisdiction. More recently, courts have found that authority for establishing Indian courts exists under the general statutory powers of the Commissioner of Indian Affairs.[6]

The New Deal era brought the first thoughtful consideration of Indian self-government, including courts. By the 1930's it was obvious that the assimilationist policies of the past had failed. Allotment had caused the loss of 90 million acres by Indians, and tribal governments were largely under the thumb of the Indian agents. Life on Indian reservations was miserable. The administration was concerned not only with the lack of tribal influence in the Courts of Indian Offenses, but also the courts' rather blatant disregard for fair procedures and individual rights. The Indian Reorganization Act[7] (IRA) was passed to allow tribes to re-establish and assert their governing powers, and to redress other adverse effects of earlier policies.

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[5] 25 U.S.C. §13.

[6] 25 U.S.C. §2; Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965).

[7] Act of June 18, 1934, ch. 576, §§1-3, 48 Stat. 984, as amended, 25 U.S.C. §§461-479.

Under the IRA, tribes were to draft their own constitutions and laws and set up their own court systems. Most tribes had only a shaky recollection of their traditional systems and were most familiar with the Bureau's regulations and procedures. Consequently, the abrupt reinstitution of traditional law on reservations was not realized. Most tribes either remained under the old system or adopted codes modeled closely after the BIA code which was revised in 1935.[8] Courts adopting their own codes became known as "tribal courts." A clear trend since the IRA has been for tribes to develop codes and thereby convert from Courts of Indian Offenses or "CFR courts" as they are commonly known (rules concerning them are found in 25 C.F.R. pt. 11) to tribal courts which operate under the residual sovereignty of the tribes, rather than as agencies of the federal government.[9] But progress has been slow. Antiquated provisions, traceable to the old BIA regulations, including selection of judges by the BIA Commissioner subject to tribal council ratification, remain in a number of codes. Very few tribes—principally the New Mexico Pueblos—retain judicial systems based upon Indian custom.

Although the improvement of Indian court systems was one reason for the Indian Reorganization Act, other, more immediate needs in the post-depression era took precedence. By the 1950's, when government priorities reasonably might have addressed court improvement, policy had shifted again. Congress and the administration favored termination of the federal-Indian relationship. Some tribes were terminated by congressional legislation; others were subjected to state jurisdiction

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[8] 25 C.F.R. pt. 11. The new regulations limited the jurisdiction and sentencing authority of Courts of Indian Offenses (and of the tribal courts which used them).

[9] Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956). See generally D. Etheridge, "CFR Courts," unpublished paper prepared for the Long Range Planning Project advisory committee (1977) (Appendix 2 to this report).

under Public Law 83-230.[10] Predictably, in this period there was no support for improvement of Indian court systems. Indeed, that would have been antithetical to then current policy.

Because its destructive effects were soon evident, termination was short-lived. In the mid-1960's, federal policy again changed, moving away from assimilation toward self-determination. This policy continues today with strong Indian support. Just as the policy was being articulated and programs were being proposed to implement it, the Civil Rights Act of 1968 was passed. The Act had sweeping provisions dealing with Indian rights.[11] Some were clearly supportive of such self-determining concepts as the requirement that any future state assumptions of jurisdiction over Indians be only with Indian consent. Others restricted self-government. Until the Act, tribes were not subject to the federal Constitution. Concern over some tribes' abuses led to imposition of most Bill of Rights requirements on all tribes. Clearly, this was a limitation on the latitude of self-government which tribes had enjoyed previously. Many tribes questioned the extension of Bill of Rights protections to individual Indians vis-à-vis tribes because of the inherent clash with Indian custom and traditional values. The Act also limited the penalties which Indian courts could impose to $500 and six months in jail.

At a time when policy favored maximum self-government, it would seem inconsistent for tribes to have external limits placed on their functions. The Act not only limited Indian courts in their disposition of cases, but it imposed requirements of due process upon them. And the provision in the Indian Civil Rights Act (ICRA) for federal court habeas corpus review of tribal orders[12] created a specter of reviews of Indian court procedures by the exacting standards of the well-developed Anglo legal system. Nevertheless, the current

[10] Act of August 15, 1953, ch. 505, §2, 67 Stat. 588-590, 18 U.S.C. §1162 and 28 U.S.C. §1360, as amended, 25 U.S.C. §§1321-1326.

[11] 25 U.S.C. §§1301-1341 (1970).

[12] 25 U.S.C. §1303.

policy has enabled Indian courts to flourish more than ever before. The ICRA necessarily has drawn greater attention to the Indian court system, and the policy of federal support for Indian self-government has included strengthening Indian courts. It has not been until the last few years, however, that this has been reflected significantly in BIA programs or funding. The Law Enforcement Assistance Administration (LEAA) has aided a number of individual courts with projects to increase court capabilities and to construct facilities. The National American Indian Court Judges Association has conducted an annual national program of judicial training with LEAA support since its formation in 1968.

Overall, Indian courts have been retarded by their history. They originally were vehicles of an outside force. Later, their intended growth as integral parts of an Indian government was stunted by a lack of effective programs or funding, as well as policy vacillations. However, for the past several years it has become increasingly important that they develop as strong elements of Indian government in order to protect the residual sovereignty of tribes against incursions by state and local governments and to fulfill Congress' own requirements under the ICRA.

Legal Issues Concerning Indian Courts

The premise for Indian court jurisdiction derives from the basic tenet of Indian sovereignty: that Indian tribes retain all those powers of a sovereign nation that have not been expressly limited by special treaties and laws of the United States. As put by the Department of the Interior:

> Those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.
>
> The powers of an Indian tribe in the administration of justice derive from the substantive powers of self-government which are legally recognized to fall within the domain of tribal sovereignty. . . . In all fields the judicial powers of the tribe are co-extensive with its legislative or executive powers. . . . So long

> as the complete and independent sovereignty of an Indian tribe was recognized, its criminal jurisdiction, no less than its civil jurisdiction, was that of any sovereign power. It might punish its subjects for offenses against each other or against aliens and for public offenses against the peace and dignity of the tribe. Similarly, it might punish aliens within its jurisdiction according to its own laws and customs. Such jurisdiction continues to this day, save as it has been expressly limited by the acts of a superior government.[13]

It follows that Indian tribes are justified in assuming all jurisdiction that has not been expressly removed by the federal government.

There are relatively few federal laws which have had an effect on the power and authority of Indian courts. The principal statutes resulting in dilution of tribal jurisdiction can be summarized briefly. Specific language embodied in treaties has also affected the jurisdiction of the signatory tribes, but they are not discussed here.

The first major federal act that affected tribal jurisdiction was the General Crimes Act.[14] This Act gave the federal government concurrent jurisdiction over crimes involving United States citizens which occurred on tribal lands.

The next federal act limiting tribal jurisdiction was enacted in reaction to the Supreme Court's decision in Ex Parte Crow Dog,[15] which reaffirmed the broad

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[13] 55 I.D. 14, 19, 56-57 (1934). See also Iron Crow v. Oglala Sioux Tribe, supra note 9; Ortiz-Barraza v. United States, 512 F.2d 1176 (9th Cir. 1975); United States v. Tyndall, 400 F.Supp. 949 (D. Neb. 1975); Williams v. Lee, 358 U.S. 217 (1959). For a complete discussion of this subject see National American Indian Court Judges Association, "Examination of the Basis for Tribal Law and Order Authority," Justice and the American Indian, vol. 4 (1975).

[14] Act of March 3, 1817, ch. 92, 3 Stat. 383, as amended, 18 U.S.C. §1152.

[15] Supra note 3.

reach of tribal jurisdiction when unimpaired by the federal government. As explained earlier in this chapter, non-Indians were alarmed by the resolution of a murder by an Indian tribe in the traditional manner and their outcry led to the passage of the Major Crimes Act.[16] This Act originally gave at least concurrent jurisdiction to the federal government of seven crimes, and the number has since been increased to fourteen.[17]

The allotment era soon followed the passage of the Major Crimes Act. Although no laws were passed that directly affected the powers of the Indian judiciary, territorial jurisdiction of tribal courts decreased as vast amounts of Indian land were lost.[18]

In 1934 the Indian Reorganization Act[19] was passed. The Act was designed to restore and clarify the authority and sovereignty of Indian tribes. Although it did not directly limit Indian court authority, the widespread dependence by tribes upon BIA "boilerplates" for constitutions and codes and the BIA's interpretations of tribal jurisdiction restricted full expression of tribal sovereignty. For instance, the Interior Solicitor was of the opinion that no tribal jurisdiction was retained over felonies.

The most explicit limitation imposed by Congress upon tribal jurisdiction came in 1953. Public Law 83-280[20] extended certain aspects of civil and criminal jurisdiction over five (later six) states and allowed others to assume such jurisdiction by state action.

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[16] Supra note 4.

[17] 18 U.S.C. §1153 (1970).

[18] H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934).

[19] Supra note 7.

[20] Supra note 10. See generally Goldberg, "Public Law 280: The Limits of State Jurisdiction Over Reservation Indians," 22 UCLA L. Rev. 535 (1975); and B. Becker, "The Role of Indian Courts in Public Law 280 States," unpublished paper prepared for the Long Range Planning Project advisory committee (1977) (Appendix 2 to this report).

The most recent legislation limiting tribal jurisdiction is the Indian Civil Rights Act.[21] The Act was billed as a measure in furtherance of Indian self-determination, but the present uncertainty over the extent of the permissible reach of federal court review of Indian court decisions leaves a potential for great inroads on tribal sovereignty. In the last ten years the ICRA has caused many changes in the workings and operations of tribal courts because tribes are held to due process standards. Unfortunately, the federal obligation to help provide the means to carry out Congress' mandate has not been met fully. The outcome of a case currently before the Supreme Court, Martinez v. Santa Clara Pueblo,[22] relative to the ability of tribal members to seek review of tribal decisions in civil actions in federal courts, will determine how much the ICRA impacts Indian sovereignty.

Cases Dealing with Jurisdiction and Authority of Indian Courts

Federal courts have recognized the principle that Indian tribes have all powers and jurisdiction not expressly limited by congressional acts. Indians in Indian country are ordinarily subject to jurisdiction of tribal courts although there are some federal laws and treaties providing for limitations on that tribal authority.[23] In Ortiz-Barraza v. United States the court stated the doctrine as follows:

> Intrinsic in the sovereignty of an Indian tribe is the power of a tribe to create and administer a criminal justice system and the tribe may exercise a complete criminal jurisdiction over its members and within the limits of the reservation subordinate only to the expressed

[21] Supra note 11.

[22] 540 F.2d 1039 (10th Cir. 1976), cert. granted, 431 U.S. 913 (1977).

[23] Felicia v. United States, 495 F.2d 353 (8th Cir. 1974), cert. denied, 419 U.S. 849 (1974). Accord, Glover v. United States, 219 F.Supp. 19 (D. Mont. 1963); Long v. Quinault Tribe, No. C-75-67T (W.D. Wash. Sept. 2, 1975), appeal dismissed, No. 75-3553 (9th Cir. 1976); United States v. Tyndall, supra note 13.

limitations of federal law.[24]

Some federal courts have held that Indian courts have the power to interpret their own law to allow tribal judicial authority over persons and subjects so long as it is not specifically barred by tribal law.[25] Other courts have said that whatever is not expressly stated in the tribal law is beyond the power of the tribal court. For instance, a recent New Mexico case, State v. Railey,[26] held that the Zuni court lacked the power to issue a search warrant for use on reservation lands because there was no explicit grant of authority in any tribal law.

Many cases concerning tribal courts have arisen as a result of the Indian Civil Rights Act. A good statement of the purposes of that Act is found in O'Neal v. Cheyenne River Sioux Tribe:

> Congress wished to protect and preserve individual rights of the Indian peoples, with the realization that this goal is best achieved by maintaining the unique Indian culture and necessarily strengthening tribal governments.[27]

The O'Neal court added that "Congress did not intend to detract from the continued vitality of the tribal courts by passage of this legislation."[28] This policy has not always been followed. Federal courts often ignore Indian culture and tradition, and instead interpret the ICRA as they do similar requirements in the United States Constitution.[29]

[24] Supra note 13 at 1179. See also American Indian Lawyer Training Program, Inc., Manual of Indian Criminal Jurisdiction (1977).

[25] Conroy v. Frizzell, 429 F.Supp. 918 (D. S.D. 1977), appeal pending; McCurdy v. Steele, 506 F.2d 653 (10th Cir. 1974).

[26] 87 N.M. 275, 532 P.2d 204 (Ct.App. 1975).

[27] 482 F.2d 1140, 1144 (8th Cir. 1973).

[28] Id. at 1144, n. 1.

[29] See Clark v. Land and Forestry Comm'n of the Cheyenne River Sioux Tribal Council, 380 F.Supp. 201 (D. S.D. 1974).

Some federal courts, however, have applied the Act flexibly. In Crowe v. Eastern Band of Cherokee Indians the court said:

> The proceedings of the council need not, of course, be conducted with all the trappings of a court of law since formalities and procedural requisites are to be determined by the circumstances of any particular case. . . . The proceedings must, however, be addressed to the issues involved in a meaningful fashion and pursuant to adequate notice.[30]

In Dodge v. Nakai[31] the court stated that a tribe is not required to establish distinct branches of government patterned after the federal system. In McCurdy v. Steele similar reasoning prevailed:

> [T]he fact that tribal procedures for handling internal political disputes . . . are not specifically provided for in the tribal constitution would not justify immediate intervention by the courts. Inherent in the authority to govern itself is the authority of the tribe to determine the manner in which differences are resolved. . . .[32]

Finally, in a recent case a federal district court found that tribal adoptions need not follow formal procedures where tribal tradition is "to act informally through blood relatives in affairs of the family."[33]

Although most of the cases under the Act have dealt with tribal procedures or decisions other than those of the tribal court, a number of cases have defined responsibilities of the tribal judiciary pursuant to the ICRA.[34] The power and authority of the tribal court has

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[30] 506 F.2d 1231, 1237, n. 14 (4th Cir. 1974).

[31] 298 F.Supp. 26 (D. Ariz. 1969).

[32] 506 F.2d 653, 656 (10th Cir. 1974).

[33] Wisconsin Potowatomies of the Hannahville Indian Community v. Houston, 393 F.Supp. 719, 733 (W.D. Mich. 1973).

[34] Tom v. Sutton, 533 F.2d 1101 (9th Cir. 1976) (right to counsel); Big Eagle v. Andera, No. 74-1290 (8th Cir. 1975) (due process—vagueness of criminal

been generally upheld. The court in Lohnes v. Cloud said:

> While [the Indian Civil Rights Act] has indeed encroached upon, and redefined, tribal sovereignty . . . it is clear that the Act is not meant to substitute a federal forum for the tribal court.[35]

Indeed, tribal law, shrouded with a mantle of federal protection, becomes preemptive of state law. In Fisher v. District Court[36] the Supreme Court stated that enactment of a tribal ordinance implements an overriding federal policy that acts to defeat any state jurisdiction that may have been exercised before the ordinance was enacted, and that power of enforcement rests in the tribal court.

Federal courts have shown deference to the actions of the tribal courts in the exercise of their legitimate authority. A recent federal court of appeals case held that "deference should be given to tribal courts in regard to their interpretation of tribal constitutions,"[37] just as it is to state court interpretations of state constitutions. Another court stated, "This court has neither the inclination nor the power to review or overturn that determination [of the tribe's highest court] by forcing concepts of Anglo-American law on the tribe."[38] These cases follow the principle that once a tribal court

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(footnote 34 continued)
statute); Reagan v. Blackfeet Tribe, No. 2850 (D. Mont. 1969) (right to counsel); Low Dog v. Cheyenne River Sioux Tribal Court, Civ. No. 69-210 (D. S.D. 1969) (right to jury trial); In re Pablo, Civ. No. 72-99 (D. Ariz. 1972) (rights of indigent defendants); Richards v. Pine Ridge Tribal Court, Civ. No. 70-74W (D. S.D. 1970) (probation revocation); Spotted Eagle v. Blackfeet Tribe, 301 F.Supp. 85 (D. Mont. 1969) (adequacy of detention facilities); Wounded Knee v. Andera, 416 F.Supp. 1236 (D. S.D. 1976) (due process—need for prosecutor).

[35] 366 F.Supp. 619, 621 (D. N.D. 1973).

[36] 424 U.S. 382 (1976).

[37] Tom v. Sutton, supra note 34 at 1106.

[38] Conroy v. Frizzell, supra note 25 at 925.

has proper subject matter jurisdiction of an action, the federal courts will not interfere.[39]

In a pre-ICRA case, Colliflower v. Garland, the Ninth Circuit Court of Appeals acknowledged the general powers of a tribal court.

> These tribal courts do still have considerable jurisdiction and such jurisdiction is still, to a considerable extent, exclusive. This is the normal rule as to criminal offenses . . . and as to suits against Indians arising out of matters occurring on the reservation.[40]

But the court went on to decide that the Court of Indian Offenses at the Fort Belknap Indian Community was an arm of the federal government so that its actions were reviewable by a writ of habeas corpus in a federal court. While purportedly limited to the facts, the decision has been followed in a recent case involving a tribal court, United States v. Wheeler.[41] A contrary decision has been handed down by the Eighth Circuit Court of Appeals, United States v. Walking Crow,[42] and the conflicting principles should soon be clarified by the Supreme Court. These cases are important for the future of Indian courts because, if tribal courts are held to be arms of the federal government or federal instrumentalities, their independent power to apply tribal values may be impaired. In other contexts the courts have held that tribes are not federal instrumentalities.[43]

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[39] Cornells v. Shannon, 63 F. 305 (8th Cir. 1894).

[40] Supra note 6 at 376.

[41] 545 F.2d 1255 (9th Cir. 1976), cert. granted, 46 U.S.L.W. 3214 (Oct. 4, 1977).

[42] 560 F.2d 386 (8th Cir. 1977).

[43] Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973); Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971), cert. denied, 405 U.S. 933 (1972); Fort Mojave Tribe v. San Bernardino County, 543 F.2d 1253 (9th Cir. 1976), cert. denied, 430 U.S. 983 (1977).

Current Issues

The resolution of many pending questions will affect the power of Indian courts. The most critical problem areas or issues of current importance are: state jurisdiction over Indians on the reservation; comity or full faith and credit for the decisions of Indian courts; tribal jurisdiction over non-Indians; interpretation of the Indian Civil Rights Act; and application of the Major Crimes Act. These complex issues and some of the cases involving them are discussed next.

State Jurisdiction

State jurisdiction within Indian reservations is an issue that refuses to be resolved completely. From the original case of Worcester v. Georgia,[44] states rather consistently have been held to have no jurisdiction over Indians on Indian reservations unless expressly authorized by Congress. And for just as long states have been ignoring or trying to circumvent this principle. There are suggestions that Worcester no longer has the vitality it once had because the tides of history have changed the situation of Indians that made the Worcester principle relevant.[45] But in McClanahan v. Arizona Tax Comm'n the Court said: "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that state laws shall apply."[46] Some states have received limited concurrent jurisdiction over Indian reservations as a result of Public Law 280,[47] but, except for this legislation, there has been no general limitation on the jurisdiction of tribes.

There also is an anomalous line of cases in which the Supreme Court implied a limit on tribal jurisdiction. United States v. McBratney[48] and Draper v. United

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[44] 31 U.S. (6 Pet.) 515 (1832).

[45] Kake v. Egan, 369 U.S. 60 (1962); Bad Horse v. Bad Horse, 517 P.2d 893 (Mont. 1974).

[46] 411 U.S. 164, 170-171 (1973).

[47] See Goldberg, supra note 20.

[48] 104 U.S. 621 (1881).

States[49] declared that Indian tribes have no interest in crimes in their territory by a non-Indian against a non-Indian. This is a court-made exception to the general rule that tribal jurisdiction exists to the extent it has not been expressly curtailed by Congress. Similarly, in Agua Caliente Band of Mission Indians v. County of Riverside[50] the state was held to have a right to tax non-Indian leasehold interests on the reservation.

The test for whether state jurisdiction can enter reservation lands was put forth in Williams v. Lee:

> Essentially, absent governing acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.[51]

Although this test was used in Williams to bar state jurisdiction, it has been applied in a few cases to open the door to state jurisdiction. Kake v. Egan[52] turned the Williams test around, maintaining that unless the federal government has acted to preempt state jurisdiction, state authority does not infringe on tribal government. Other courts have followed the Kake interpretation.[53] McClanahan v. Arizona Tax Comm'n[54] and Bryan v. Itasca County[55] should have cleared up the confusion. In those cases the Supreme Court stated unequivocally that courts will first examine the governing acts of Congress to determine if they preempt state authority and, absent any such preemption, will examine the situation to see if application of state law interferes with tribal self-government.

The tension between state and tribal authority continues, however, and court decisions are mixed. In

[49] 164 U.S. 240 (1896).

[50] Supra note 43.

[51] Supra note 13 at 220.

[52] Supra note 45.

[53] E.g., Norvell v. Sangre de Cristo Development Co., Inc., 372 F.Supp. 348 (D. N.M. 1974).

[54] Supra note 46.

[55] 426 U.S. 373 (1976).

Quechan Tribe of Indians v. Rowe[56] and Francisco v. State[57] the courts held that while the state properly had subject matter jurisdiction of a case, its officers did not have the authority to enter an Indian reservation to make arrests or serve legal documents without permission of the tribe involved. Other courts have begun to allow state authorities to enter reservations freely, without obtaining permission of the tribe. These decisions ignore the territorial integrity of the tribe as a sovereign distinct from the state, and seem motivated by the current non-Indian backlash movement. The premiere case demonstrating this trend is Little Horn State Bank v. Stops.[58] The Supreme Court of Montana held that when a valid judgment is entered against an Indian for actions done off the reservation, the state has the authority to execute that judgment on the reservation. The Crow Tribe did not provide a forum where such state judgments could be enforced except where both parties would stipulate to jurisdiction. The court said that until the tribe provides a forum for such disputes, state action does not infringe on tribal government and authority. The court also said that since the Crow Tribe will not honor state court judgments, the state has the authority to execute judgments on the reservation. The court's determination runs counter to the principles in McCurdy v. Steele[59] and Wisconsin Potowatomies of the Hannahville Indian Community v. Houston.[60] However, the implications for tribes with no courts or with courts which are inadequate forums for such disputes is clear.

One suspects that the Montana court's decisions are colored by a less than hospitable attitude toward such cases. The Little Horn case begins: "This appeal adds another chapter to the never ending story of Indian jurisdiction."[61] And in another Indian jurisdiction

[56] 531 F.2d 408 (9th Cir. 1976).

[57] 113 Ariz. 427, 556 P.2d 1 (1976).

[58] 555 P.2d 211 (Mont. 1976), cert. denied, 431 U.S. 924 (1977).

[59] Supra note 32.

[60] Supra note 33.

[61] Supra note 58 at 211.

case, Bad Horse v. Bad Horse, the court said:

> The myth of Indian sovereignty has pervaded judicial attempts by state courts to deal with contemporary Indian problems. Such rationale must yield to the realities of modern life, both on and off the reservation.[62]

Other cases evidencing this attitude include Wippert v. Burlington Northern, Inc.[63] and Alexander v. Cook.[64]

The fishing issue and the political power of sports and commercial fishermen has led to similar results in Washington. The Puyallup[65] series of cases is the showpiece. Battle waged for thirteen years as state agencies, supported by state courts, consistently ignored the dictates of the United States Supreme Court or found new ways to twist the Court's language to their own interpretation to regulate Indian off-reservation treaty fishing. At last the state's persistence was rewarded in Puyallup III,[66] where, after a court of appeals decided in another case that much of the area previously thought to be off-reservation actually was still part of the reservation,[67] the Supreme Court acquiesced in the exercise of state jurisdiction there.

Indian Civil Rights Act Review

Another pressing issue concerns judicial interpretation of the Indian Civil Rights Act. The extent and manner of application of the ICRA should be decided soon by the Supreme Court in Martinez v. Santa Clara Pueblo.[68]

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[62] Supra note 45 at 897.

[63] 397 F.Supp. 73 (D. Mont. 1975).

[64] 566 P.2d 846 (Ct.App. N.M. 1977).

[65] Puyallup I: Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968); Puyallup II: Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973); Puyallup III: Puyallup Tribe v. Department of Game, 45 U.S.L.W. 4837 (June 23, 1977).

[66] Supra note 65.

[67] United States v. Washington, 496 F.2d 620 (9th Cir. 1974), cert. denied, 419 U.S. 1032 (1976).

[68] Supra note 22.

Application of the principle that the ICRA should protect individual Indian rights by "maintaining the unique Indian culture and necessarily strengthening tribal governments," as articulated above in the O'Neal case,[69] while keeping in mind the canon that all statutes affecting Indians are to be liberally construed, and doubtful expressions are to be resolved in favor of the Indians,[70] reduces the likelihood that application of the Act will encroach on Indian self-government. But, while some courts have been deferential toward Indian values and have interpreted the Act narrowly,[71] other courts have been inclined to apply normal federal concepts of constitutional protection. Some recent cases are illustrative. The appellate court in Martinez v. Santa Clara Pueblo[72] held that tribal rights cannot be different as between male and female members without offending the ICRA guarantee of equal protection. In Wounded Knee v. Andera[73] the court found that due process requires the presence of a prosecutor in tribal court. And in Clark v. Land and Forestry Comm'n of the Cheyenne River Sioux Tribal Council the council had provided for a hearing in grazing permit disputes, but the federal court prescribed the requisites of due process as "a full due process hearing . . . including notice of three days to the interested parties. The right of appeal to the tribal council, if desired, shall be granted to the party receiving the adverse decision."[74] Martinez stated forthrightly that: "The Indian Bill of Rights is modelled after the Constitution of the United States and is to be interpreted in light of constitutional

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[69] Supra note 27.

[70] See Choate v. Trapp, 224 U.S. 665, 675 (1912); and Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918).

[71] See, e.g., Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971); McCurdy v. Steele, supra note 25; O'Neal v. Cheyenne River Sioux Tribe, supra note 27; Wounded Head v. Tribal Council of the Oglala Sioux Tribe of the Pine Ridge Reservation, 507 F.2d 1079 (8th Cir. 1975).

[72] Supra note 22.

[73] Supra note 34.

[74] Supra note 29 at 204.

law decisions."[75] But in Conroy v. Frizzell the court said:

> It seems clear that a claim that tribal courts have failed to follow a "majority rule" of Anglo-American law does not, standing alone, amount to a civil rights claim that might trigger this court's narrow review powers under 25 U.S.C. §1302 [ICRA].[76]

The conflict must be unravelled by the Supreme Court.

The inclination of courts to interpret the ICRA using Anglo concepts of constitutional rights is often based on the fact that tribal court and government structures are structured after Anglo institutions. In Howlett v. Salish and Kootenai Tribes of the Flathead Reservation the court stated: "Where, however, the tribes' election and voting procedures are parallel to those commonly employed in Anglo-Saxon society, we then have no problem of forcing an alien culture, with strange procedures, on [these tribes]."[77] In Daly v. United States[78] the court declared that where the Indian tribe's election procedures were analogous to those found in Anglo culture, the equal protection clause of the Indian Civil Rights Act would be interpreted as the equal protection clause of the Constitution is interpreted. In Wounded Knee v. Andera the court said:

> The judicial system [of the tribe] is Anglo-American and assuredly not Indian; adding the safeguards guaranteed in Anglo-American law certainly is no more of an encroachment upon the Indian way of life than the tribal court itself.[79]

Similar sentiments are expressed in White Eagle v. One Feather[80] and Means v. Wilson.[81]

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[75] Supra note 22 at 1047.

[76] Supra note 25 at 925.

[77] 529 F.2d 233, 238 (9th Cir. 1976).

[78] 483 F.2d 700 (8th Cir. 1973)

[79] Supra note 34 at 1241-1242.

[80] 478 F.2d 1311 (8th Cir. 1973).

[81] 522 F.2d 833 (8th Cir. 1975).

For federal courts to apply non-Indian standards to an Indian tribe with governmental forms that are similar to Anglo forms is inconsistent with the notion that Indian self-government should be furthered by the ICRA. Further, it puts courts in the impossible position of evaluating tribal governments on their degree of Anglo-ness. This task is especially formidable in that a great number of tribes govern themselves under Indian Reorganization Act constitutions—documents which clearly are intended to gird a tribe's independent governing powers, but which create (at the hands of the federal government) Anglo forms for exercising those powers. Perhaps the most manageable resolution would be to narrow the scope of federal court review. This can be done by insisting that a case be reviewed fully at all applicable levels of the tribe as has been done in the many federal cases which require exhaustion of tribal remedies.[82] This resolution will be effective ultimately only if the tribes maintain and use a system of internal review, such as an effective appellate court.

Federal scrutiny of Indian tribal actions would be limited if the Martinez court rules that federal courts lack jurisdiction to review tribal actions, except for the habeas corpus remedy specifically provided in the Act.[83] It has been held that exhaustion of tribal remedies should be required before habeas corpus is available in federal court.[84] However, every federal appeals court to consider the matter has ruled that there is federal court jurisdiction under the statute providing for review in civil rights disputes under the federal Constitution.[85] The prevailing rule, then,

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[82] See O'Neal v. Cheyenne River Sioux Tribe, supra note 27; and McCurdy v. Steele, supra note 25.

[83] 25 U.S.C. §1303 (1970).

[84] United States ex rel. Cobell v. Cobell, 503 F.2d 790 (9th Cir. 1974).

[85] 28 U.S.C. §1343(4). E.g., Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 933 (10th Cir. 1975); Crowe v. Eastern Band of Cherokee Indians, Inc., supra note 30 at 1234; Johnson v. Lower Elwha Tribal Community, 484 F.2d 200, 203 (9th Cir. 1973); Luxon v. Rosebud Sioux Tribe, 455 F.2d 698, 700 (8th Cir. 1972).

reads the ICRA as abrogating a tribe's sovereign immunity in such cases.

Once the doors of the federal courts are open to Indians claiming violations of the ICRA, the dilemma of applying an act which replicates federal constitutional provisions without treading improperly upon Indian self-government arises. A major question is what remedies are available in the federal court. In non-Indian cases under the Constitution it has been held that the court has broad authority to fashion whatever remedies are appropriate.[86] In Loncassion v. Leekity[87] the court followed that principle and held that a claim for damages is allowable under the Indian Civil Rights Act. The case says that the law governing actions against individuals for damages under the Fourth and Fifth Amendments should also be applied to the Indian Civil Rights Act. This is contrary to later indications from courts that the ICRA applies to tribes, not to tribal officials,[88] and that the Fifth Amendment does not apply through the Indian Civil Rights Act.[89]

Other courts have seized on the rationale of Loncassion.[90] But the high water line in abrogation of tribal sovereign immunity under the ICRA was reached in Dry Creek Lodge, Inc. v. United States.[91] There the court ruled that Congress had waived the tribe's immunity and remanded a claim by a non-Indian, that the access road to land owned on the reservation had been unlawfully blocked by tribal action, to the district court for trial. The court awarded $525,000 in damages

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[86] Bivins v. Six Unknown Named Agents, 403 U.S. 388 (1971); Bell v. Hood, 327 U.S. 678 (1946).

[87] 334 F.Supp. 370 (D. N.M. 1971).

[88] See Means v. Wilson, supra note 81.

[89] Groundhog v. Keeler, supra note 71; McCurdy v. Steele, supra note 25.

[90] See, e.g., Daly v. United States, supra note 78; Dry Creek Lodge, Inc. v. United States, supra note 85; Martinez v. Santa Clara Pueblo, supra note 22; Spotted Eagle v. Blackfeet Tribe of the Blackfeet Indian Reservation, 301 F.Supp. 85 (D. Mont. 1969); Johnson v. Lower Elwha Tribal Community, supra note 85.

[91] Supra note 85.

against the tribe.[92] A number of courts have held that a tribe's immunity is not waived by the Act.[93] Therefore, the extent to which federal courts will hold tribes liable for damages under the Indian Civil Rights Act and allow invasion of tribal coffers has yet to be determined.

Comity/Full Faith and Credit

The extension of full faith and credit to the decisions of Indian courts is an important current issue, especially as interaction between Indian and non-Indian communities increases and the need to enforce tribal judgments outside reservation boundaries grows.[94] The assessment of tribal courts in the next chapter notes that very few reservations have existing agreements with other jurisdictions providing for reciprocal recognition of judgments.

The problem of comity or full faith and credit is a confusing one, particularly when Indian tribes are involved.[95] It is not clear that full faith and credit as a concept of federal law,[96] should apply only among states. Some courts have declared the principle applicable to tribal judgments by holding that a tribe is a "territory" of the United States.[97] Others have enforced

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[92] Dry Creek Lodge, Inc. v. Canan, No. C74-74A (D. Wyo. July 20, 1977).

[93] Namekagon Development Co. v. Bois Forte Reservation Housing Authority, 517 F.2d 508 (8th Cir. 1975); Tewa Tesque v. Morton, 498 F.2d 240 (10th Cir. 1974); Yazzie v. Morton, 59 F.R.D. 377 (D. Ariz. 1973).

[94] See American Indian Lawyer Training Program, Inc., Issues in Mutuality (1976); and M. West, "Reciprocity Issues for Tribal Courts," unpublished paper prepared for the Long Range Planning Project advisory committee (1977) (Appendix 2 to this report).

[95] See Ragsdale, "Problems in the Application of Full Faith and Credit for Indian Tribes," 7 N.M. L. Rev. 133 (1977).

[96] U.S. Const. art. IV, §1; 28 U.S.C. §1738 (1970).

[97] Mackey v. Coxe, 59 U.S. (18 How.) 100 (1855); Standley v. Roberts, 59 F. 836 (8th Cir. 1834); Raymond v. Raymond, 83 F. 721 (8th Cir. 1897); Jim v. CIT Financial Services Corp., 87 N.M. 362, 533 P.2d 751 (1975).

tribal judgments as a matter of comity[98] or where essential tribal relations are involved.[99] A decision to recognize a judgment on the basis of comity usually entails a finding that it would not be inconsistent with local public policy. In order for tribal courts to be respected as arbiters of justice within their own jurisdictions, they must be able to have their judgments enforced in other jurisdictions. Otherwise, people will flee or remove property from the reservation to escape the reach of the court, thereby eroding its authority and effectiveness.

Perhaps the most promising way for tribes to attain foreign enforcement of orders and judgments and extradition is through mutual agreements and legislation. These devices are free of the uncertainty that ensnares reliance on full faith and credit or comity principles. Where arrangements with other jurisdictions are articulated in legislation or agreements, there is some assurance that so long as a reciprocity statute or agreement is effective, a tribe's judgments will be enforceable elsewhere. Although there are many informal arrangements between tribes and states and local governments and with other tribes, few formal agreements or statutes exist. Most agreements are one-way: tribes recognize state and local judgments, but not vice-versa. There are reasons for this lack of reciprocity: (1) there is a paucity of tribal court cases in need of outside enforcement; (2) tribes are reluctant to enter agreements with states and counties; and (3) states are unfamiliar with tribal judgments. In addition, states are skeptical about the competence of Indian courts.

It appears that tribes will have to take the initiative to develop greater recognition of Indian court judgments. If state and county governments are to accept tribal judgments, they will have to understand the Indian court system better. Also, the Indian courts must establish themselves as courts of record. While it is not a universal legal requirement that a court be a

[98] In re Lynch's Estate, 92 Ariz. 354, 377 P.2d 199 (1962); Red Fox v. Red Fox, 542 P.2d 918 (Ore.App. 1975).

[99] Wakefield v. Little Light, 276 Md. 333, 347 A.2d 228 (1975); Duckhead v. Anderson, 87 Wash.2d 649, 555 P.2d 1334 (1976).

court of record, this requirement sometimes is used by states to deny enforcement of tribal judgments. Generally, a "court of record" can fine or imprison for contempt, utilizes a clerk and a seal, and records its acts and judicial proceedings.[100] Recordkeeping is the area of greatest concern because it can reveal whether due process was present or not. Although many Indian courts need better recordkeeping systems, most already can satisfy court of record requirements.

It should be clear to tribes that they have something to offer states. If states want court orders enforced and persons extradited from the reservation, it must be with tribal permission.[101] Therefore, the basis for reciprocity does exist. If Indian courts meet fundamental standards of fairness as required by the ICRA and maintain records of their proceedings, a state has no rational basis for refusing to enter into an agreement or enact legislation for reciprocal enforcement and extradition. It is important that Indian courts have assistance in upgrading their facilities, personnel, and training so they can meet such standards.

Jurisdiction Over Non-Indians[102]

Jurisdiction over non-Indians is another issue of current importance which soon should be decided by the Supreme Court.[103] As tribes have realized their authority in this area, the number of Indian reservations exercising jurisdiction over non-Indians has increased in the last few years. Significantly, the Bureau of

[100] D. Dodge, "Indian Tribal Courts as Courts of Record," unpublished paper prepared for the Long Range Planning Project advisory committee (1977) (Appendix 2 to this report).

[101] Williams v. Lee, supra note 13; Arizona ex rel. Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969).

[102] See generally D. Bird Bear, "Tribal Exercise of Civil Jurisdiction Over Non-Indians," unpublished paper prepared for the Long Range Planning Project (1977) (Appendix 2 to this report).

[103] Oliphant v. Schlie, 544 F.2d 1007 (9th Cir. 1976), cert. granted sub nom., Oliphant v. Suquamish Indian Tribe, 431 U.S. 964 (1977).

Inc. Affairs has ceased rejecting tribal ordinances that assume such authority. Of 100 reservations surveyed by the American Indian Lawyer Training Program in 1976, 39 percent exerted jurisdiction over non-Indians, 46 percent were in the process of changing their laws to assert such jurisdiction or wished to do so, and 15 percent of tribes did not wish to exert such jurisdiction.[104]

Except for the United States v. McBratney[105] rule that state courts generally have jurisdiction over offenses committed on an Indian reservation when only non-Indians are involved, Indian courts have been held to have jurisdiction over non-Indians violating tribal law on the reservation.[106] Until the decision in Oliphant, administrative agencies had followed dicta in an 1878 case[107] indicating that Indian tribes do not have jurisdiction over non-Indians. But in recent years the Supreme Court consistently has held that tribes and their courts have authority over their reservations, even if a non-Indian is involved.[108] The issue is raised directly in Oliphant and a Supreme Court decision should provide a definitive answer which will avert future challenges by non-Indians. Without jurisdiction over non-Indians, tribes will be left only with their power to exclude persons determined to be undesirable or who may have violated state or federal law from the reservation as trespassers. This power permits tribal authorities to deliver offenders to the appropriate authorities on the border of the reservation.[109]

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[104] AILTP Report, supra note 1 at app. C-11.

[105] Supra note 48.

[106] Oliphant v. Schlie, supra note 103; Belgarde v. Morton, No. C74-683S (W.D. Wash. Aug. 18, 1975), cert. granted sub nom., Oliphant v. Suquamish Indian Tribe, 431 U.S. 964 (1977).

[107] Ex parte Kenyon, 14 F.Cas.353, No. 7,720 (W.D. Ark. 1878).

[108] United States v. Mazurie, 419 U.S. 544, 558 (1975); Williams v. Lee, supra note 13.

[109] See Ortiz-Barraza v. United States, supra note 13; Quechan Tribe of Indians v. Rowe, supra note 56; Dodge v. Nakai, supra note 31.

Prosecution of Major Crimes in Indian Country

Another current issue is tribal jurisdiction over major crimes. On almost all reservations there is great dissatisfaction with the current situation regarding prosecution of major crimes violations. The federal government has explicit jurisdiction over fourteen major crimes,[110] but, as with state enforcement in Public Law 280 jurisdictions, federal enforcement of major crimes violations on the reservation has been inadequate.[111] The rate of declinations to prosecute by U.S. Attorneys is very high. Investigation of crimes by the FBI is slow, and many Indians believe that prosecution and investigation are more vigorous when non-Indians are involved. The crimes investigated under the Major Crimes Act tend to be those in which the offense had "high visibility."

In reply to criticism of their declinations from Indians and their supporters in the Interior Solicitor's office, federal authorities claim they treat Indian country cases the same as all other criminal cases. A Department of Justice task force study, while cautioning about the accuracy of statistics, said that the declination rate for Indian cases is no higher than other cases, about 75 percent. However, the task force concluded that treating Indian cases in the same manner as other cases ignores the fact that there is usually no prosecutor other than the U.S. Attorney, while in other cases, state or local prosecutors stand ready to take over a case declined by the federal government.[112] A number of special difficulties with prosecuting Indian cases were cited, including refusal or inability of witnesses or victims to testify due to intoxication, language and cultural differences, and alienation from the federal court system.[113]

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[110] 18 U.S.C. §1153 (1970).

[111] See National American Indian Court Judges Association, "Federal Prosecution of Crimes Committee on Indian Reservations," Justice and the American Indian, vol. 5 (1974).

[112] U.S. Department of Justice, Report of the Task Force on Indian Matters, at 45 (1975).

[113] Id.

Since 1975, the BIA and tribal law enforcement authorities have been entitled to receive advice of declinations. This enables the tribe to prosecute, but because of the ICRA limitation on tribal court punishments of $500 and six months in jail,[114] it is difficult to deal adequately with the most serious crimes. On the other hand, many federal declinations are made because the matter does not seem important enough to capture the attention of the federal system, regardless of the importance to the tribal government and the reservation residents. Unlike many other issues in this section, this one can be addressed, at least in part, by tribal action. Crimes can be prosecuted in tribal court when the federal authorities fail to act.

Although there are arguments to the contrary, it would seem that tribes retain concurrent jurisdiction over the crimes included in the Major Crimes Act because that jurisdiction never has been expressly terminated.[115] Federal administrative policy has been that the federal government has exclusive jurisdiction over these crimes, and tribal codes including the enumerated major crimes sent to the Secretary of the Interior for approval have been rejected. Some courts have suggested that the federal government has exclusive jurisdiction over the major crimes.[116] Other cases have taken a different view. Some courts have taken the position that the Major Crimes Act must be construed as narrowly as possible.[117] Since the Major Crimes Act did not expressly take away tribal jurisdiction, it could be argued from these cases that tribes still possess such jurisdiction. No courts yet have held that tribes and

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[114] 25 U.S.C. §1302(7) (1977 Supp.).

[115] See 55 I.D. 14, 59-60, supra note 13; Cohen, Federal Indian Law, at 147 (N.M. ed. 1971).

[116] See United States v. Celestine, 215 U.S. 278 (1909); Sam v. United States, 385 F.2d 213 (10th Cir. 1967); Felicia v. United States, supra note 23; Glover v. United States, supra note 23.

[117] See Keeble v. United States, 412 U.S. 205 (1973); United States v. Analla, 490 F.2d 1204 (10th Cir. 1974); United States v. Tyndall, supra note 13; Kills Crow v. United States, 451 F.2d 323 (8th Cir. 1971).

the federal government share concurrent jurisdiction. However, in Belgarde v. Morton[118] the court said that neither 18 U.S.C. §1152 nor Public Law 280 conferred exclusive jurisdiction on either government.

The Supreme Court recently held that an Indian defendant being prosecuted for a major crime is entitled to a jury instruction on a lesser included offense if evidence presented warrants such an instruction.[119] This increases the area of concurrent federal and tribal jurisdiction. A combination of more effective and conscientious federal prosecution and more capable tribal prosecution is needed if the reservation crime problem is to be addressed sufficiently. As discussed earlier, the Major Crimes Act was passed in response to the case of Ex Parte Crow Dog,[120] in which the tribe was held to have exclusive jurisdiction over a murder of an Indian by an Indian. Because Indians refuse to cooperate in federal prosecutions and U.S. Attorneys are reluctant to prosecute, the Act seems to have backfired. The opposite result from that intended by the Act is reached—reservation crimes go unpunished. A solution would be vigorous tribal prosecution in Indian courts.

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[118] Supra note 106.

[119] Keeble v. United States, supra note 117 at 214.

[120] Supra note 3.

Chapter 2

Indian Courts Today

During 1977 the NAICJA's Long Range Planning Project deployed teams of persons knowledgeable in court organization and administration and in Indian legal issues to twenty-three Indian reservations.[1] The reservations were selected because they represent a cross section of the various situations of the 134 Indian courts in the nation.[2] The teams sent to visit each court system were furnished with an outline of the inquiries and information relevant to the Long Range Planning Project. This outline guided the work of the teams both on the reservations and in preparing written reports of their visits. The findings of all the reports were compiled into a separate volume, which is Appendix I to this report. This chapter summarizes that compilation. Generalizations are based upon information in the reports which was common to most reservations surveyed. Where significant differences exist, they are indicated. Also, other recent studies are cited where they furnish information not available from the reservation visit reports and sometimes where they support or refute the findings of those reports.

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[1] For a list of the reservations visited, see the Introduction at page 5.

[2] Bureau of Indian Affairs data as of March 18, 1977.

Nature of Tribal Legal Systems

Most tribes now define their governments and powers in terms of the Indian Reorganization Act.[3] Of those tribes that have not actually incorporated under the IRA, most have constitutions that look essentially like IRA documents. Since most tribes had no legal advice at the time the tribes were "formed" under the IRA, they utilized Bureau of Indian Affairs assistance in the form of "model" constitutions and law and order codes.[4] Thus, most tribes' constitutions and law and order codes are virtually the same.

Authority for the formation of courts in tribal constitutions varies widely, from granting "power to the council to set up courts for the trial and punishment of offenders against such ordinances," to providing authorization to "safeguard rights and property of members and to enforce the obligations of the . . . treaty." Courts usually operate under the law and order code or the rules of court procedure of the tribe. Challenges to the authority of Indian courts generally come from two sources: non-Indians and tribal councils. Non-Indians challenge the existence of jurisdiction over them and the procedures of the court which affect them, such as jury composition. Tribal council interference occurs for two reasons: (1) councils perceive courts as alien institutions and do not consider them part of the tribal government structure, or (2) councils see themselves as above the tribal court and try to influence court decisions. Less than one-quarter of the reservations surveyed have experienced serious challenges in the recent past.

One of the basic problems concerning the tribal judiciary is the unavailability of tribal ordinances and codes. On many reservations copies of the code cannot be obtained by persons who wish a copy, or they are in such limited supply that for all practical purposes they are unavailable. On some reservations the cost of the

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[3] 25 U.S.C. §§461-479 (1970).

[4] See American Indian Lawyer Training Program, Inc., Indian Self-Determination and the Role of Tribal Courts, pt. II (1977) (hereinafter "AILTP Report").

code to purchasers is too high to interest many people in obtaining a copy. On others the only way to obtain a copy of the code is to make a photocopy.

Almost half the reservations surveyed have no procedure for incorporating changes into the code. On one reservation the tribal council does not inform the court when it has made an amendment to the code which was last printed in 1960, and there is apparently no way for the court to obtain copies; sometimes the first the court hears of a change in existing law is when a defendant calls it to the court's attention.

The most common method of changing or amending the tribal code is by majority vote of the council. Few tribes have any committee apparatus to consider and research proposed changes before adoption. Most amendments are not known outside tribal council sessions where they are proposed, discussed, and passed. In most tribes amendments require a majority vote of the council and are relatively easy to enact. Some tribes, however, are resistant to change and seldom consider amendments, or adopt amendments only by a consensus of the council.

As stated before, tribal law and order codes are similar if not identical to the Code of Indian Tribal Offenses (CFR code) which was published by the Bureau of Indian Affairs soon after passage and implementation of the Indian Reorganization Act. This code has been revised only once since then.[5] Of the twenty-three reservations surveyed, nineteen have law and order codes patterned to some degree after the CFR code. Some tribes have expanded on the code by adding additional chapters and provisions to meet their particular needs. The CFR code is very Anglo oriented, makes no provision for inclusion of tribal culture, and is outdated in that it includes many offenses which are no longer crimes in most jurisdictions or which are unenforceable. Only a few tribes have codes which are completely their own; few tribes are satisfied with their codes;[6] and many are in the process of revising them. However, recent revisions do not appear to be much of an improvement. Most often the crimes contained in the new codes are taken from the state code in which a particular

[5] 25 C.F.R. pt. 11 (1977).

[6] AILTP Report, supra note 4 at app. C-2.

reservation is situated. Tribal values are rarely reflected in new codes. Several reservation reports noted that tribal judges are not regularly consulted about problems of the court, nor do they have an active consulting role in the drafting of new codes.

Activities covered by tribal codes vary widely. Some tribal codes are reported as being comprehensive, others as piecemeal. Some tribes have attempted to add chapters to their codes to meet changing needs; others have never changed their codes, and so punishable offenses have little relation to the type of crimes that are considered to be a problem on the reservation. Any specialized areas that are added to tribal codes are usually borrowed from state codes. Model codes for tribes are rare. The Indian Civil Rights Act directed that the Secretary of the Interior develop a model code of Indian offenses.[7] Such a code was published in the Federal Register.[8] The American Indian Law Center has produced a model children's code[9] for tribes which awaits publication in the Federal Register. It is unusual for tribes to cooperate with one another in drafting new statutes, although their needs overlap considerably. Only two out of the twenty-three reservations surveyed use codes from other tribes to draft new laws.

As explained in Chapter I of this report, tribal courts were originally alien institutions imposed on tribes by the government. Even today they are seen by some as arms of a conquering nation. This history explains why Indian court systems are not often seen as separate and equal branches of tribal governments. No distinct branches of tribal government are required by federal law,[10] but tribal courts are often seen as subordinate arms of tribal councils, and this situation can lead to pressure being exerted by council members

[7] 25 U.S.C. §1311.

[8] 40 Fed.Reg. 16,689 (1975).

[9] American Indian Law Center, Model Children's Code (1976).

[10] Cf. Dodge v. Nakai, 298 F.Supp. 26 (D. Ariz. 1969).

on the court when a particular outcome or action is desired.[11]

Of the reservations surveyed, three have a separation of powers clause as part of the tribal constitution. Of the remainder of the tribes, approximately half claim that in practice there is separation and respect from other branches of the tribal government. In about one-quarter of the tribes courts are considered subordinate arms of tribal governments. No information was furnished for the other tribes.

A lack of independence of the judiciary seems to be a serious problem with many tribes. Strengthening of judicial independence has been identified by the BIA as an important goal.[12] Tribal courts sometimes are not respected by other jurisdictions because they are not independent of tribal council influence. Tribal council control over courts usually includes selection of judges, and there is little restriction upon a council's method of selection.[13] On virtually all reservations visited the tribal council selects judges. The AILTP found that 63 percent of all Indian judges are appointed.[14] Selection approval varies from a simple majority of the council to a consensus. The most common qualifications to become a judge are: tribal membership, at least thirty years of age, sufficient education to perform adequately in the courtroom, no felony convictions, and no misdemeanor convictions within the last year. Politics sometimes play a part in the selection of judges, and, in some tribes, full-blooded tribal members have the best chance of getting the job.

Terms of office for tribal judges vary widely,

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[11] See Bureau of Indian Affairs, Indian Reservation Criminal Justice Task Force Analysis 1974-1975, at 69 (1975) (hereinafter "BIA Task Force Analysis").

[12] Id. at 84.

[13] See Conroy v. Frizzell, 429 F.Supp. 918 (D. S.D. 1977), appeal pending.

[14] AILTP Report, supra note 4 at app. C-2.

the most common term being two to four years.[15] A fair percentage of the tribes surveyed have unlimited terms, where the judge may serve so long as competent. Almost all tribes provide a mechanism by which the tribal council may remove a judge for just cause. Some reservations provide for recall by a vote of the general tribal population. Reasons for removal include drunkenness, use of office for personal gain, failure to perform duties, incompetence, and moral turpitude. Some tribes provide a hearing for an accused judge before removal; most do not. Most tribes require a simple majority vote of the council before removal, but several tribes require as high as a seven-ninths vote. Removal takes place for many reasons other than "just cause." In some tribes the judge changes whenever a new political faction takes power. Where recall is effected by a simple majority vote, judges are particularly susceptible to removal after making unpopular decisions. Short terms of office, council removal power, and tribal politics combine to make a judge susceptible to pressures from those in power to dispose of cases in particular ways.

Surprisingly, most judges actually serve for long periods, except on a few reservations where politics cause frequent turnover. In the past judges sometimes were the older, respected members of the community who were being honored. There has been a relatively high turnover in the ten years since the Indian Civil Rights Act, partly because it is difficult for many tribal elders, who often lack formal education, to meet the high standards of the ICRA.

Included in the "boilerplate" constitution championed by the Bureau of Indian Affairs after passage of the Indian Reorganization Act is an interesting clause requiring approval of the Secretary of the Interior for new tribal codes, ordinances, or resolutions to be effective. There is no federal statutory requirement for inclusion of this clause, but once a tribe adopts it, it becomes legally binding. The Bureau has used this clause to exert policy control over tribes, particularly in the area of jurisdiction over non-Indians.

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[15] Id. at app. C-3. The report found 23 percent of courts have one year terms for their judges, with 61 percent having terms of two to four years.

Indian stick games, and even over action to rescind the Secretary's approval power. Approval by the Secretary seems to be exerted haphazardly at present. Some tribes are not required to submit ordinances to the Secretary, but do as a matter of courtesy. Other tribes are required by their own constitutions to submit laws to the Secretary but do not, and their failure has had no apparent consequences. Of the tribes surveyed that do submit their laws for approval, some tribes report automatic approval, others report interference and rejection, and still others report no consistent pattern for what is approved and what is rejected. Most judges expressed a desire that the Secretary's approval power be rescinded.

Most courts on Indian reservations now fit the definition of "tribal courts," as opposed to being traditional or CFR courts. Data from the BIA as of March, 1977 indicated that there are 16 traditional courts and 32 Courts of Indian Offenses (CFR courts), with the remainder (71) being tribal courts and conservation (hunting and fishing) courts (15). Tribal courts are established and operated by Indian tribes in the exercise of residual sovereign authority, while CFR courts are established where a tribe chooses not to exercise its authority or has decided to abide by the Code of Indian Tribal Offenses.[16] The distinction is important in terms of court authority and whether the court may be held subject to federal laws, specifically the U.S. Constitution.

Very few people on the reservations surveyed had any memory of what their courts were like as recently as twenty years ago. No one interviewed even remembered how or when a court first appeared on the reservation. The only general statement made by many people was that justice is better now than it was in the past, but none knew the reason why.

Except in some of the Pueblos, tradition plays a

[16] For a complete discussion of this area, see D. Etheridge, "CFR Courts," unpublished paper prepared for the Long Range Planning Project advisory committee (1977) (Appendix 2 to this report).

small part in modern-day Indian courts.[17] In other tribes the use of tradition in courts tends to be in the civil, domestic relations, and hunting and fishing cases. Remarkably, no tribe among those surveyed reported that it incorporates any traditional substantive law in criminal proceedings in the tribal court.[18] When tradition is used, it generally is not in formal court proceedings.[19] In some instances a judge will act as an arbitrator in informal meetings held with the parties, but, most often, the parties resolve disputes themselves or with the help of tribal elders or religious leaders. One Pueblo has two courts, a traditional court and a tribal court. A defendant may choose which court to go before. If the traditional court is chosen, rights under the Indian Civil Rights Act are waived, although the defendant still receives "aboriginal" due process. If the tribal court is chosen, tradition is still used but court proceedings are more formal and adhere to ICRA protections.

Tribal courts use a mix of tribal codes and federal, state, and traditional law in the courtroom. A common clause in most tribal codes states that when an area is not covered by provisions of the tribal code, state law can be applied. Tribal judges claim that they refer to state law as a last resort, but it appears that actual use of state ordinances is higher than answers indicate. Only one of the reservations surveyed has a clause mandating referral to laws of other tribes when the code does not cover a given subject. The importance of avoiding use of state law is shown by the case of Wippert v. Burlington Northern, Inc.[20] There

[17] See Oliver v. Udall, 306 F.2d 819 (D.C. Cir. 1962).

[18] See also raw data obtained from SRI International, Stanford, California, from responses to the Bureau of Indian Affairs' Planning for the Improvement of Indian Criminal Justice Services on Reservations—Guidebook I, at 11 (hereinafter "Guidebook I Responses").

[19] V. Santana, "The Role of Real Indian Law in the Survival of American Indian Tribes, or Will the Wheel of I.R.A. Ever Turn?", unpublished paper prepared for the Long Range Planning Project advisory committee (1977) (Appendix 2 to this report).

[20] 397 F.Supp. 73 (D. Mont. 1975).

the court decided that, since by course of conduct the Indians themselves had treated the law of Montana as governing law in a number of cases, the federal court would apply the substantive civil law of Montana in all cases involving reservation Indians and reservation transactions where there was no clearly ascertainable Indian law.

Most often the NAICJA or federal rules of procedure have been adopted or are applied when problems arise, but state rules are also used on an inconsistent basis. Almost all tribes do have written rules of procedure, but over half of the tribes surveyed consider their rules inadequate and in need of revision. There is a great concern that when rules are rewritten they ought to reflect the particular needs of the court and allow flexibility to the judges.

Indian courts appear and act much as their Anglo counterparts, and tribal tradition dominates nowhere that could be discerned. The largest remnant of tradition that still exists seems to rest in the discretion of the tribal judges. Many people said the informality and compassion that a judge exhibits to an individual defendant is a traditional way in which problems are resolved in the tribe. Judges as a whole felt that use of tradition is a thing of the past. Some responded that they have been taught in their NAICJA training that protections guaranteed under the ICRA supercede any traditions that might conflict with those protections. Several judges expressed interest in incorporating more tradition in their laws and procedures, but none had ideas about how to accomplish it. A tribe's ability to use tradition in the court is recognized in the case law.[21]

The question of the sovereign immunity of Indian tribes is considered a problematic issue by the tribes interviewed. They believe that only the tribe itself, in the exercise of its sovereign authority, may waive immunity in a proper case. But none of the tribes surveyed have ever voluntarily waived their sovereign immunity. No tribe felt that passage of the Indian Civil Rights Act has abrogated its historic sovereign

[21] See, e.g., O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140 (8th Cir. 1973); Tom v. Sutton, 533 F.2d 1101 (9th Cir. 1976).

immunity, although some people are confused about what the sovereign immunity cases mean. A congressional waiver of tribal immunities would reduce tribal sovereignty, and tribes are reluctant to waive their immunity voluntarily before the federal courts for fear of depletion of their assets.

Jurisdiction of the Tribal Court

Jurisdiction is probably the most confusing area with which Indian courts have to deal. The conflicts of state, tribal, and federal jurisdictions prevent effective law enforcement on the reservation. Federal laws slice Indian reservations into jurisdictional jigsaw puzzles and create problems for Indian police and courts.

General criminal jurisdiction of tribes exists over all offenses that occur on the reservation with the exceptions, on some reservations, of major crimes and offenses by non-Indians. Major crimes are a serious problem on the reservation because the federal authorities often refuse to prosecute (see discussion in Chapter 1). Since the Bureau of Indian Affairs has taken the position that federal jurisdiction is exclusive in this area, tribes are often left without means to prosecute serious offenders except under lesser included offenses, with, of course, the Indian Civil Rights Act limitations of six months imprisonment and $500.[22] Almost all tribes use this route to prosecute violations of the major crimes, but it is a common complaint that the limits on tribal sanctions under the ICRA make it impossible for tribal court enforcement to serve as a deterrent and to handle offenders effectively. Most tribes requested an increase in penalties available for their use, stating that their courts are competent to take jurisdiction over these crimes.

Caseload figures were difficult to obtain for reservations surveyed. The statistics for most reservations tended to be guesses by the judges. Caseloads seem to be increasing gradually for two major reasons: (1) courts are exerting broader jurisdiction (i.e., over juveniles and non-Indians) as they become more efficient, and (2) tribal members are getting more educated (mostly

[22] 25 U.S.C. §1302(7) (1970).

through Anglo influences) about their rights to have disputes resolved in the courts and to have a jury trial in criminal proceedings. Caseloads vary greatly depending on season and whether celebrations are occurring, and a large jump in offenses is usually reported when additional police officers are hired, pointing up the fact that most reservations are understaffed in law enforcement personnel.

Most crimes that occur on the reservation are misdemeanor offenses related to alcohol. A majority of the tribes responding to the BIA's 1977 law enforcement survey indicated the greatest single cause of crime is alcohol.[23] Virtually all of those giving a figure stated that over 90 percent of their court's cases are alcohol related. Similarly, a 1975 Department of Justice report concluded that criminal conduct on reservations is almost always alcohol related.[24] Crime rates (except for property crimes) on Indian reservations are considerably higher than in similar non-Indian areas.[25] These crime rates ignore the causative factor of alcohol and the fact that in most Anglo areas many such "crimes" never enter the criminal justice system. Serious crimes, as a general rule, are almost non-existent outside the alcohol context. This generalization is more applicable in isolated and/or close knit Indian communities than where there is a significant non-Indian population living among the Indians. Reservations tend to be very closed communities and so who has done what is usually common knowledge. Offenses are not prosecuted for several reasons. The large size of some reservations hampers investigation. Inadequate numbers of law enforcement personnel impede patrolling and prompt investigation. And, to some degree, politics and personal influence divert proper responses to crimes.

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[23] Guidebook I Responses, supra note 18 at 67.

[24] U.S. Department of Justice, Report of the Task Force on Indian Matters, at 24 (1975) (hereinafter "Justice Task Force Report").

[25] Id. at 23. See also American Indian Policy Review Comm'n, Report on Federal, State, and Tribal Jurisdiction, at 149 (1976) (hereinafter "AIPRC Jurisdiction Report"); S. Brakel, "American Indian Tribal Courts: The Price of Separateness," unpublished manuscript, at 36 (1977) (to be published by the American Bar Foundation, Spring 1978).

Another important Indian court activity is dealing with juveniles and family relations. (These matters, too, can be the result of alcohol abuse because alcoholism often intrudes upon and destroys stable family life.) Alcoholism is partly a result of the depressed economic situation on most reservations.

Civil jurisdiction of tribal courts in theory is general for most tribes, but the actual jurisdiction exercised tends to be more limited. Courts avoid handling cases that they feel may be too complicated for them. Civil caseloads of most tribes are very small. Most are under 10 percent of total caseload and the civil caseloads of only a few tribes exceed 20 percent.[26] But the Navajo Nation currently has a $3 million insurance claim and several other major civil actions pending before its court. Considering that civil law is a subject in which judges received almost no training until last year (because of former LEAA policies), it is surprising that such a large percentage of tribal courts reported that they take any civil case that comes before them. Civil jurisdiction should increase substantially as judges receive training in this area and start to feel more comfortable with it. Most civil cases at present are family related or minor contract actions. They involve two categories: Indian v. Indian and non-Indian v. Indian, the latter being mostly non-Indian creditors trying to collect on sales contracts.

Jurisdiction over non-Indians is an issue that is of vital concern to Indian tribes if they are to maintain their viability as sovereigns. In 1974 the Department of the Interior reversed an earlier position that tribes did not have jurisdiction over non-Indians on the reservation.[27] In recent years tribes have begun to assert authority in this area, especially in criminal matters. Of the twenty-three reservations surveyed, fourteen exert or are in the process of exerting general jurisdiction over non-Indians, while four more tribes exert jurisdiction over non-Indians in selected areas. A number of the remaining tribes have limitations in their own governing documents preventing them from taking such jurisdiction. Many tribes also retain

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[26] See Brakel, supra note 25 at 44.

[27] Op. Sol. Int. 77 I.D. 113 (1970), withdrawn Jan. 25, 1974.

clauses in their codes restricting the tribal court's jurisdiction over non-Indians in civil matters to cases where both parties consent. Some tribes have either removed or ignored this clause and now exert personal jurisdiction over all who enter the reservation. A few courts will entertain non-Indian v. non-Indian cases.

Most challenges to the assertion of jurisdiction over non-Indians have been in tribal courts. Once the Indian court has ruled that there is jurisdiction, most parties acquiesce to tribal jurisdiction. Challenges have been mounted more often to the procedures of the court, as in jury selection, than to the court's authority or jurisdiction. Some respondents believed that non-Indians will agree to the court's jurisdiction hoping that their punishment will be less severe. In some cases, state authorities do not challenge tribal jurisdiction over non-Indians in order to increase enforcement efficiency or because tribal penalties are harsher. A number of challenges to the authority of Indian courts has resulted from non-Indian resentment. In all reported cases the jurisdiction of Indian courts over persons on the reservation has been upheld. The issue, however, soon will be decided by the United States Supreme Court in the Oliphant case.[28] For those tribes that do not assert jurisdiction over non-Indians, a new ordinance is all that is usually needed, although some tribes must change language in their constitutions from "tribal members" to "persons." This change includes non-Indians as well as non-tribal member Indians.

A few tribes exert jurisdiction over tribal members when they are outside reservation boundaries. Some of these non-reservation lands are "Indian country,"[29] such as allotments. Others are sites where treaty fishing rights are exercised.[30] Some tribes also

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[28] Oliphant v. Schlie, 544 F.2d 1007 (9th Cir. 1976), cert. granted sub nom., Oliphant v. Suquamish Indian Tribe, 431 U.S. 964 (1977).

[29] 18 U.S.C. §1151 (1970).

[30] United States v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976); Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974).

hear civil suits that arise off-reservation where the defendant is an Indian, although this practice is not widespread. The power of Indian courts can be felt off the reservation in the few cases where Indian tribes and surrounding jurisdictions have agreements that local authorities will assist in citing offenders into tribal court. Finally, tribal courts often retain jurisdiction over children and others who are sent off-reservation for commitment and treatment. Control over these tribal members is an essential tribal function.[31] In most cases the state takes jurisdiction over Indians who leave the reservation.[32]

Tribes generally have not ceded any of their jurisdiction to states. Indeed, the rule in Kennerly v. District Court[33] prohibits such cession unless it is done strictly according to federal law.[34] Some tribes have made cooperative arrangements with the states where they are located for use of needed services or facilities, especially for treatment. These arrangements between states and tribes are not actually cessions of jurisdiction and therefore should not run afoul of Kennerly unless they vest in states power to commit Indians.[35] States in Public Law 280 jurisdictions share concurrent[36] jurisdiction with tribes over most criminal offenses and civil causes of action. Of course these cessions of tribal jurisdiction were not voluntary, but were imposed on tribes by the federal

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[31] Williams v. Lee, 358 U.S. 217, 219-220 (1959); Wakefield v. Little Light, 276 Md. 333, 347 A.2d 228 (1975). See also Wisconsin Potowatomies of the Hannahville Indian Community v. Houston, 393 F.Supp. 719 (W.D. Mich. 1973).

[32] Cf. Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

[33] 400 U.S. 423 (1971).

[34] 25 U.S.C. §§1321-1326 (1977 Supp.).

[35] Cf. White v. Califano, 437 F.Supp. 543 (D. S.D. 1977).

[36] See Confederated Bands and Tribes of the Yakima Indian Nation v. Washington, 550 F.2d 443 (9th Cir. 1977), on remand, 552 F.2d 1332 (9th Cir. 1977).

government.[37] Further assumptions of Public Law 280 jurisdiction require tribal consent, however.[38]

Tribes have jurisdiction over domestic relations matters, even where one spouse lives off-reservation and the marriage occurred off-reservation.[39] Most tribes do exert jurisdiction in this area, but one-quarter to one-third of the tribes surveyed do not. Reasons for not asserting jurisdiction were: that the state has jurisdiction under Public Law 280; that it is against tradition for the tribe to allow divorces; that the tribal court does not feel competent to supervise alimony, custody, and child support. Tribes generally felt that jurisdiction over family relations on the reservation is essential if the integrity of tribal culture and society is to be maintained.

Adoption and custody is another area in which tribal jurisdiction is of critical importance to tribes.[40] Most judges expressed an interest in maintaining jurisdiction over juveniles, but said needed facilities are not available. Many adoptions occur off-reservation with non-Indian parents because there are not enough available adoptive Indian parents on the reservation. Increased interest in this area is evidenced by the NAICJA's recent BIA-sponsored training program in family law and child welfare and the American Indian Law Center's publication of a model children's code.[41]

Many of the tribes surveyed have not exerted taxing power. As tribes begin to utilize this potential revenue source, tribal courts will be called on to resolve disputes. So far, courts have had little involvement in reviewing legislative and administrative decisions of the tribal government for sufficiency under the tribal constitution or the Indian Civil Rights Act. Since passage of the Act, federal courts have been

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[37] See Goldberg, "Public Law 280: The Limits of State Jurisdiction Over Reservation Indians," 22 UCLA L. Rev. 535, 538 (1975).

[38] 25 U.S.C. §1326 (1970).

[39] See Red Fox v. Red Fox, 542 P.2d 918 (Ore. App. 1975).

[40] See Wakefield v. Little Light, supra note 31.

[41] Supra note 9.

called upon in several cases to review tribal laws, decisions, and procedures.[42] Although some courts have recognized the importance of considering Indian values,[43] federal courts tend to apply Anglo constitutional precepts in Indian cases.

Most federal courts have been inclined to insist upon an exhaustion of tribal remedies before entertaining ICRA cases.[44] Thus, the door is open for expanding tribal court functions into this area. Although this exhaustion requirement has resulted in a greater workload for some courts, most judges have not noticed an increase in their caseloads because of it. Judges have become more cautious in their rulings to avoid ICRA challenges.

Probate is one of the few areas where tradition still plays an important role in Indian courts. Much distribution of a decedent's property occurs without involving the courts, but those courts that do handle probate are evenly divided between using custom or applying state probate laws. No reasons are given why state law is used or why probate cases are referred to state courts except that some cases are too complicated for the tribal court, and court personnel cannot handle the collection and distribution of property efficiently.

Operations of the Tribal Court

Every reservation surveyed has a courtroom located on the reservation. Construction of facilities by the Law Enforcement Assistance Administration (LEAA) and the BIA has resulted in some type of courtroom on

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[42] E.g., Martinez v. Santa Clara Pueblo, 540 F.2d 1039 (10th Cir. 1976), cert. granted, 431 U.S. 913 (1977); Daly v. United States, 483 F.2d 700 (8th Cir. 1973).

[43] E.g., O'Neal v. Cheyenne River Sioux Tribe, supra note 21.

[44] E.g., O'Neal v. Cheyenne River Sioux Tribe, supra note 21; Two Hawk v. Rosebud Sioux Tribe, 404 F.Supp. 1327 (D. S.D. 1975).

most reservations that have sought one. Before the passage of the ICRA and the creation of LEAA, construction was the tribes' responsibility. Many tribes had inadequate facilities or were forced to use facilities of other jurisdictions.

Courtrooms usually are located in the same area as tribal government and BIA agency facilities. Because these facilities are generally the center of the tribal community, most courts are convenient to litigants. Some large reservations have only one courthouse, requiring litigants to travel as far as seventy miles to get to court.

Courts almost always are combined with tribal police facilities. Defendants and litigants often must pass through police offices to get to the courtroom. This, plus court proximity to government and BIA facilities, gives many tribal members the impression that the court is merely an arm of the police department or the BIA, and not an independent decision making body. Many judges expressed concern over the image their courtroom presents to the community, and most expressed a desire that, where possible, separate facilities be constructed to house the courtroom and court staff.[45]

Court hours are usually normal business hours. However, there is great flexibility in the hours of individual courts, indicating that they are tailored to meet the needs of parties. Most judges surveyed are full-time, but smaller courts have part-time judges who may hold full-time jobs elsewhere. In these instances court is usually held one or two nights a week. Part-time judges usually expressed a desire to be full-time. One stated reason was to be able to attend training sessions, something they cannot do while holding down another job. In only one instance did respondents feel that the outside job of a part-time judge conflicted with his judicial duties. The judge was also director of the tribal alcohol rehabilitation center and had helped treat many of the defendants who came before him. However, the judge felt his knowledge of the defendants' backgrounds helped him.

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[45] See also Task Force Analysis, supra note 11.

Most judges could make no estimate of their caseload capacity. They often opined that they were very busy and were being paid little for their time. Complete information on court capacity was not available on any reservation to indicate the actual extent of any additional personnel needs. Some judges knew the number of cases or jury trials they could handle in a day, but no one could state the actual time involved in each type of case so that projections might be made of future needs of the court. Over half the judges interviewed felt they have a heavy caseload and that additional judges are needed. In other situations the judges work only so long as there are cases to hear and are not busy all the time. From the limited information that was available from reservation visits and the AILTP report,[46] some basic recommendations have been made correlating the number of judges with caseloads (see Chapter 5). It is also recommended that data collection be improved immediately to insure that adequate information is available for judicial planning in the future.

Most tribal court judges are Indians and tribal members. Reasons for using non-Indians as judges include: absence of qualified Indians; need for expertise in a special area (i.e., juvenile law); and close family relationships on the reservation. Almost all tribes now express a desire for Indian judges where possible.

Very few Indian judges have had any legal training outside of the NAICJA training program. Some have college experience, but their education is usually not related to their role as judge. Out of all the judges on the twenty-three reservations surveyed, five are attorneys and ten were police officers before they took a seat on the bench. Most did not feel that it is necessary to be an attorney to be an Indian court judge, although several chief judges thought that the ideal would be for judges, prosecution, and defense counsel all to be attorneys.

The NAICJA has conducted several annual regional and national training sessions for the past nine

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[46] AILTP Report, supra note 4.

years.[47] Almost all judges attend the NAICJA training regularly, although there are chief judges who refuse to permit anyone except themselves to attend sessions. It was the unanimous opinion of all judges that more training is needed. The NAICJA training is seen as adequate so far as it goes, but the judges stated that there is a wide range of subjects that they deal with in which they have no training, particularly in the civil area. Part of the reason more civil cases are not handled is that judges have no training in that area. A number of judges thought that the NAICJA training does not prepare them completely to deal with the ICRA, and that violations of the Act still occur in the courtroom regularly. Several judges said there is a need for more localized training in areas of special concern to them.

Low judges' salaries were blamed for the difficulty tribes have in attracting qualified candidates for judges.[48] Salaries range from $20,000 a year for one judge down to a budget of $450 a month which is shared by three judges. The average salary is between $9,000 and $12,000. Only a small percentage of judges interviewed felt their salaries are adequate, and most felt a raise of $2,000 to $4,000 a year is needed. The AILTP report indicates a greater level of satisfaction by judges with their salaries.[49]

Wages are also low for most other court personnel. Clerks' salaries are usually between $4,000 and $8,000.[50] Where they exist, probation officers receive between $6,000 and $10,000; prosecutors and defenders between $6,000 and $9,000; and bailiffs are paid between $2 and $3 an hour. Courts are staffed almost exclusively by clerks who must fill the roles of clerk, court reporter, secretary, and court administrator. Only four of the twenty-three reservations surveyed have a court administrator, and only three reservations surveyed have court

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[47] See R. Johnson, "Future Training Needs for Indian Court Judges," unpublished paper prepared for the Long Range Planning Project advisory committee (1977) (Appendix 2 to this report).

[48] BIA Task Force Analysis, supra note 11 at 95.

[49] AILTP Report, supra note 4 at app. C-4.

[50] See also Id. at app. C-6.

reporters with training in courtroom recording techniques. Respondents said that it is necessary to have a clerk present at all times to answer questions from people, even if the judge is not always immediately available. Some conflict arises because on one-quarter of the reservations surveyed clerks are shared with the tribal police department. Police often felt they have the first claim on the clerk's time, and the sharing also contributes to the image of the police department and court being one and the same.

In the past there has been almost no training for court personnel other than judges. Various Indian organizations are now beginning programs to rectify the situation. Five of the reservations surveyed have prosecutors or defenders who have completed the AILTP advocate training program. Those interviewed on reservations where the AILTP advocates are present felt the training has increased the advocates' expertise and efficiency in the courtroom. Training for court clerks is considered a critical need. The NAICJA court clerks training program will fill an important void.

With one exception, every reservation surveyed has an attorney under contract to represent tribal interests. Only the Navajo Tribe has an attorney who lives on the reservation and works full-time for the tribe. Most tribal attorneys work for firms elsewhere, and spend only a portion of their time representing a particular tribe. At only one of the reservations surveyed is the tribal attorney an Indian.

About half the tribal attorneys are used as legal advisors to tribal courts; in most cases they give advice infrequently. About 25 percent of reservations surveyed have an attorney available besides the tribal attorney to give advice on a fairly regular basis to the court. Indian court judges rarely seek advice from nearby non-Indian judges. When they need legal advice, they most often go to attorneys they are familiar with, usually other tribal court judges or NAICJA instructors.

The few tribal attorneys who involve themselves in the tribal judicial process are prosecutors. About one-third of the tribes' attorneys fill this role, generally when the defendant is represented by an attorney. Some tribal attorneys realize the conflict inherent in the prosecutor's role, and said they attempt to avoid it by having another attorney from their firm or a law clerk represent the tribe as prosecutor.

Most tribal courts are not satisfied with their tribal attorney. The main complaint is that the attorney is not available when needed, and that his time is too expensive. Almost all judges expressed a desire for easier access to legal advice. But because of a dearth of attorneys on or near reservations, any available attorney tends to be called upon to play several roles, causing ethical problems. On one reservation the tribal attorney/prosecutor also gives the judge legal advice and obtains a 90 percent conviction rate in court. The prosecutor claimed his high conviction rate is a result of his more extensive legal expertise, but others connected with the court said he intimidates the judge and takes advantage of his special relationship.

Almost no information is available about Indian court funding. Consequently, court planning is difficult. Court budgets are a mixture of tribal, BIA, LEAA, CETA, Public Law 93-638, and other funds. There is no logical explanation for the uneven distribution of federal funds to various Indian reservations; funding seems to be determined by history or by the political muscle of a tribe. Inequities in funding were criticized in a Bureau of Indian Affairs report which found no correlation between population or caseload and court budgets. It found that expenditures varied from $2.98 to $14.19 per capita and from $8.30 to $35.08 per case.[51] Further, the report said that, due to varying levels of tribal support for courts (and law enforcement), funding inequities are far more serious in reality. To get the same services, some tribes spend none of their own money, while others have to spend a great deal.[52] Those unable to contribute tribal funds depend on the BIA entirely, but the level of services varies. Since the report, the Bureau has encouraged area and agency offices to base their budgeting on a formula which would lead to some parity in funding. Judging from the reservations visited, it does not appear that the funding which reaches Indian courts is consistent with the formula.

Federal agencies other than the BIA also assist courts, but they apparently do not coordinate their activities with one another. It seems that they rarely

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[51] BIA Task Force Analysis, supra note 11 at 43.

[52] Id. at 81.

know what funds are being disbursed by the BIA or other agencies. One tribe surveyed was due for a large increase in funding because the funds for court operations supplied by one agency were inadequate. It was discovered that other agencies were contributing funds to court operations and that the tribe actually had one of the largest court budgets in the country.

Budgets for courts of the same size varied from $30,000 to over $200,000 a year. Much money earmarked for courts is lost on the way from Washington to the tribes, mostly at the BIA area office level. Although Public Law 93-638 was supposed to reduce the number of the BIA employees by contracting out positions to the tribes, the number of employees has increased since passage of the Act.

Only three out of the twenty-three reservations surveyed felt their court budgets are adequate. In most cases, funding for law enforcement and court operations is lumped together, sometimes causing funds to be diverted away from courts to the police. Fines usually go into the general tribal fund, but there are still instances of fines paying court salaries, a practice which is suspect because it can bias a judge. Management of fine money is very loose on most reservations, and it is accepted that some money will disappear between the time it is collected and the time it is turned over to the tribal treasurer. Salaries constitute the vast majority of every court's budget—between 60 to 90 percent of the total budget.

It was estimated by many judges that better administration of the courts would reduce waste and make more money available, but they thought that this would solve only part of the problem, and that large increases still would be needed. Twenty of the courts surveyed said additional personnel or increased salaries are their most critical needs. The remaining three tribes said new or additional facilities are needed immediately. Most tribes cited a need to replace or renovate presently inadequate facilities and equipment. Some tribes also cited a need for expansion of facilities in order to handle increased jurisdiction in the future. Money also is needed for training and public education. Most tribes felt at least a 25 percent budget increase is necessary to meet short term needs, and more is needed to attain long range goals for court improvement.

Over half the reservations surveyed said it would be difficult for the tribe to find funds to support increased court operations. Tribal taxes and increased Public Law 93-638 contracting are seen as the primary methods by which tribes could obtain more money to subsidize court operations. For other reservations, tribal council reluctance to make court operations a higher priority item in the tribal budget is seen as the main obstacle to obtaining increased funds. Most tribal governments are of the opinion that increased funding for tribal governments should come from the federal government, preferably in direct funding. They cited difficulties in complying with reporting requirements necessary to obtain federal grants and contracts. One tribe recently lost a $50,000 LEAA grant because no one in the tribal government would submit the required reports. The number of federal programs and the paperwork necessary has caused many tribes to avoid applying for federal funds. Some people expressed hope that the recent Joint Funding Simplification Act[53] will streamline procedures for tribes.

The most pressing need among all tribes surveyed for facilities is for treatment centers, especially for juveniles. Many tribes do not even have separate cells in their jails for juveniles, let alone a juvenile detention center, group home, or foster home program. Some tribes do have detoxification centers for alcoholics, but most do not, and a need was expressed for long term facilities for rehabilitation of alcoholics. Only one reservation surveyed has a comprehensive alcohol rehabilitation program on the reservation. Mental health facilities, family counseling facilities, and work employment programs are non-existent on reservations except where they are handled by the BIA or Indian Health Service. Judges said that all their attempts to maintain law and order on reservations and to rehabilitate criminals are frustrated so long as no treatment alternatives are available for referral of defendants and the federal government ignores treatment as a way to improve conditions on the reservation.

A need for better jails was also cited. Over one-third of the tribes surveyed felt their jails are inadequate. One tribe uses a jail which has been

[53] 42 U.S.C. §§4251-4261 (1974).

condemned for twenty years; another tribe has cells covered only by chicken wire. The AILTP study found that most detention facilities, whether on or off the reservation, owned by the tribe or used under contract, are inadequate.[54] But responses to a more recent BIA survey indicate that many tribes have relatively new facilities and that overcrowding or inhumane conditions are no longer terribly serious problems on most reservations.[55] Nevertheless, another BIA study concludes that proper care of inmates would require renovation and construction of detention facilities costing $51 million.[56] The need for new courtrooms is not as pervasive as the need for treatment facilities or jails, but most judges identified needs for courtroom improvements. Almost all judges said that increased legal materials are necessary if they are to do their jobs properly. Many legal reference materials sent to tribal courts, especially by the federal government and the NAICJA, never reach the judge.

Tribal social services personnel are almost as scarce as treatment facilities. Most available social services are provided by the BIA. However, several tribes now employ full-time social workers, mainly for juveniles. Judges would like to have more social services workers available. One or two of the tribes surveyed have complete court-referred social services programs, and these programs apparently have reduced the reservation crime rate. However, most existing tribally run programs are connected with alcohol rehabilitation. Alcohol programs vary from informal counseling to live-in homes, but treatment is generally perceived as inadequate due to a lack of facilities, personnel, and money. On several reservations alcohol rehabilitation programs refuse to take persons referred by the court. This happens because the programs are overcrowded with people who have come voluntarily, and the programs only want to deal with motivated alcoholics. Court referred defendants are not considered to be

[54] AILTP Report, supra note 4 at app. C-9.

[55] Guidebook I Responses, supra note 18 at 51.

[56] Bureau of Indian Affairs, Inventory of Law Enforcement Facilities on Indian Reservations and Cost Estimate for Renovation and Construction (1977).

motivated. On reservations supplying information, alcoholism rates are between 15 and 20 percent, and alcohol programs report between a 10 and 20 percent success rate.

Referral of defendants for treatment is a relatively new function for tribal court judges. Many are still uncomfortable with the concept, but as referrals show success, the practice is becoming more popular. Many social services personnel expressed frustration at their past working relationships with the courts and judges, but almost all said the situation has improved measurably in the last year or two. They favored combined training sessions for judges and social services personnel to promote better working relationships and to inform judges about available alternatives. At present, social services personnel are utilized part-time by some courts, but these workers feel that the potential exists for greater utilization.

Although few judges have had any training or expertise in court management, administration of the tribal courts is an area that has been left to the judges.[57] Administration of the court is time consuming and prevents judges from devoting their full efforts to judicial duties. The chief judge has authority over the court on all reservations surveyed, except one where the police commissioner has been given supervisory authority over court operations. Most judges are content with the fact that they have ultimate authority over the operations of the court, but would like to have someone available to handle the day-to-day administration and to supervise budget preparation and fundraising. Judges would welcome visits by an expert in court management who could help design a more efficient court system. Some thought a court planner and administrator would be valuable. Twenty-one of the reservations surveyed want either outside help or a full-time, on-reservation person to help with court management.

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[57] For more information in this area, see D. Hunter, "Determining and Planning for Court Needs," unpublished paper prepared for the Long Range Planning Project advisory committee (1977) (Appendix 2 to this report).

Most tribal courtrooms are occupied only several hours during a week, although the court itself may be busy almost all the time. Over half the courts surveyed said they have no space available for private conferences. Lack of privacy in talking to a judge and in approaching court clerks with questions about a dispute are among reasons people avoid using Indian courts. All judges usually share a single office, and all clerks and files are usually together in another room. No courts surveyed have a room in which witnesses can wait until called into the courtroom. On several reservations, whenever court is held, the courtroom must be completely rearranged from other uses. Most judges want more space for conferences, offices, and judges' chambers.

Court Proceedings

Court proceedings observed indicate that generally courtroom operations are smooth, efficient, and rapid. Comments that particular courts were either too formal or too casual were made in approximately equal numbers.

Indian courts have been compared by several people to non-Indian rural judicial systems. Common characteristics of these two systems are: (1) close acquaintance between the judge and the parties; (2) smaller volume of cases; (3) lack of resources because of low populations and tax base; and (4) space and separation.[58] The judge's personal knowledge of defendants and incidents in both systems leads to a high rate of guilty pleas. The high rate of guilty pleas in Indian courts has been attributed to tradition (if you are guilty, you say so), the fact that most offenses are minor drunk charges, and the lack of a prosecutor to screen cases. One study of Indian court systems concluded that justice is more individualized in rural, non-Indian courts than in Indian courts.[59] But personalized justice is an Indian tradition. Personalized attention to the needs of defendants was reported to be common in the reservation surveys.

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[58] See National Center for State Courts, Rural Courts: The Effect of Space and Distance on the Administration of Justice (1977).

[59] Brakel, supra note 25 passim.

Crime reports are usually handled by the BIA or tribal police, although some courts also administer this task. Recordkeeping systems on many of the reservations surveyed leave much to be desired, and crime reports are often lost or are in a form that cannot be used by the court. In criminal matters cases are usually docketed by the court clerk on the basis of incident reports. Docketing in many courts is haphazard and cases must often be continued because hearings are not scheduled, documents are not served, witnesses are not notified, etc. Most of the reservation courts surveyed have docket books in which case progress can be followed, but often these books are not used correctly. In several tribes the court docket consists merely of the pile of incident reports that have accumulated since the last court session.

In most courts surveyed, less than one day elapses from the time of arrest until arraignment, and in no court is it longer than three days. In civil cases from five to thirty days' notice is required of the commencement of an action before a hearing is set. The great majority of criminal cases are completed at the time of arraignment because most defendants plead guilty. Contested criminal cases are usually completed within a week. This time is longer if a jury is requested if there is a large backlog of cases. Civil cases usually last two to four weeks once pretrial proceedings end, but pretrial proceedings can take anywhere from one week to two years, depending on the degree of management the court staff exercises over a case. Hearings and motions are not commonly used in Indian courts. Only a few courts which have prosecutors and defenders who have gone through the AILTP advocate training program use motions regularly.

Actual time spent in trial depends on whether a guilty plea has been entered. Guilty pleas take less than a half hour; non-jury trials take from one-half to two hours; and jury trials may take from two hours to a day or more. On most reservations the longest trial has not exceeded three hours. Civil cases generally take longer, but many are settled in discussions with the judge, obviating a final decision. On almost all reservations decision and sentencing take place immediately. In some courts decisions in contested cases are put in writing, although usually without supporting reasons. Judges sometimes ask for a

pre-sentence report, although this is rare because they usually know the defendant or have reviewed the person's case history before the trial. Pre-sentence reports delay disposition of defendants about two weeks. Defendant-based case files, as opposed to incident-based case files, are common in many courts, posing potential due process problems.

The Indian Civil Rights Act of 1968 mandated that legal counsel be allowed to appear in criminal cases before tribal courts.[60] Few attorneys practiced in Indian courts before the Act. All reservations surveyed now authorize the appearance of attorneys in criminal cases where they have been hired by the defendant, although in several tribes this authorization was not given for several years after passage of the ICRA. On one reservation it is still made as difficult as possible for non-Indians to practice because the judges will speak only the tribal language when an attorney is present, forcing the attorney or defendant to hire an interpreter.

Use of attorneys varies widely. On a few reservations they appear in most cases, but in most courts attorneys appear less than ten times a year. Three of the courts surveyed never have had an attorney in the court. "Heavy" use of attorneys in Indian courts is considered twenty to thirty appearances a year. It seems clear that the court cannot deny the right of a criminal defendant to representation by counsel in tribal court.[61] And it has been held that it is not enough that representation by a fellow tribesman is available if the defendant wants a professional attorney.[62]

Some judges are intimidated and overwhelmed by the presence of attorneys; others welcome attorneys because it makes their courtroom role easier. If only one side is represented by an attorney, the represented side tends to dominate court proceedings. On many

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[60] 25 U.S.C. §1302(6) (1970).

[61] Claw v. Armstrong, Civ. No. C-2307 (D. Colo. Aug. 7, 1970).

[62] Towersap v. Ft. Hall Indian Tribal Court, Civ. No. 4-70-37 (D. Ida. Dec. 28, 1971).

reservations, if the defendant is represented by an attorney, trial is continued until the tribal attorney or some other lawyer can be found to present the tribe's case. Some attorneys avoid Indian courts because they do not understand the tribal legal system or Indian laws.

Attorneys represent all types of clients in the Indian court, but since the ICRA requires defendants to pay for their own counsel, the poor rarely are able to retain attorneys. As a rule, attorneys prefer civil cases where the fee possibilities are larger, but represent some indigent clients. Attorneys represent a high percentage of non-Indians in tribal courts; non-Indian counsel, rather than tribal advocates or Indian attorneys, usually are hired to represent non-Indians before Indian courts.

The ICRA does not require counsel to be provided free of charge to indigent defendants,[63] and on only five reservations does the court appoint defenders to assist those accused of criminal offenses. These defenders are most often tribal advocates or other members picked by the judge, and on only one reservation are they attorneys. One tribal court does not appoint defenders, but hires an attorney-defender to represent all tribal members free of charge when they come before state courts. Some judges said that they try to obtain counsel for defendants who are having trouble representing themselves before the court. Tribal responses to a recent BIA survey indicated that the greatest single problem relative to due process and individual rights is the unavailability of counsel for indigent defendants.[64]

Requirements for attorneys to practice before the tribal court vary widely. A few tribes now have a bar examination. Some said they require a working knowledge of tribal laws and customs, but did not explain how this knowledge was to be discerned. Most tribes require the applicant to be a member of a state bar and pay a fee ranging from $5 to $300. One tribe requires that the attorney be a tribal member. The judges surveyed thought that attorneys could be integrated into the tribal judicial system more easily if trained prosecutors

[63] Tom v. Sutton, supra note 21.

[64] Guidebook I Responses, supra note 18 at 67.

were available to the court so that criminal proceedings would be more balanced. Education in Indian culture was cited as a method of making attorneys more understanding of tribal values.

Legal services representation is available to approximately half of the reservations surveyed. A legal services program is located on six of the reservations. The nearest available legal services office is up to seventy-five miles from other reservations. Tribes that do not have access to legal services cited distance or acrimony between the tribe and the state (especially in Montana) as the primary reason such services are not available. When legal services attorneys are available for Indian court representation, respondents believed that they improve and work smoothly with the tribal judicial system.

"Lay" advocates are the most commonly used counsel in Indian courts. The tribe provides a lay advocate staff for use by defendants on about one-quarter of the reservations surveyed. All other reservations provide for representation by any person the defendant chooses. Permission to appear is usually granted by the judge. On half of these reservations there is a "professional" cadre of advocates who represent others before the court. On the other reservations advocates tend to be whomever the defendant picks, usually a friend or relative.

Requirements for advocates to practice before the court are flexible or non-existent. Those tribes that have bar examinations require advocates to take and pass them. Other courts usually require at a maximum that the advocate obtain the permission of the judge or council, be familiar with tribal customs and laws, and, in some cases, be a tribal member. A few tribes require payment of a fee, and one tribe requires that the advocate obtain training before practicing. Advocates on seven of the reservations surveyed have received the AILTP's advocate training. Besides the AILTP program, training of advocates consists of college or police experience. All respondents cited a need for more training, and those who had taken the AILTP training believed its seminars should be expanded to encompass more complicated subjects.

More than half of all defendants represent themselves. On only four of the reservations surveyed are

defendants represented in court most (80+ percent) of the time. Information on fees charged by advocates was not available. Advocates tend to represent a larger percentage of Indians than non-Indians and to take more criminal cases than civil cases. The ability of advocates varies widely. Those who have not received the AILTP training generally have inadequate knowledge of court procedures, and many felt they are most effective when they use obstructionist tactics, such as making as many objections as possible. Untrained advocates are seen as ineffective and often must be helped by the judge. On three of the reservations surveyed, advocates are not used much because the judge hands down harsher sentences to defendants who hire advocates and are found guilty. This is because these judges perceive the purpose of advocates as being to make trouble for them.

Although a recent federal court case dictates that some person other than the judge be retained to be a prosecutor in tribal courts,[65] at the time of the reservation surveys, ten out of the total of twenty-three tribes had not yet hired one. Four of those ten tribes said they are looking for a prosecutor; the others said one is not needed. On many reservations either the police act as prosecutors or there are no prosecutors except when the defendant has hired an attorney, in which case the tribe calls in an attorney to present the tribe's case.

Several tribal prosecutors have received AILTP training. Others who are attorneys felt no need for training. On the rest of the reservations, prosecutors had police training at most, and are at a serious disadvantage when they face a defense attorney. Prosecutors are split evenly between being full-time or part-time. Part-time prosecutors usually present a case in court only when a defendant is represented by an attorney or advocate. Where they exist, prosecutorial staffs are generally considered adequate and competent. Police prosecutors are generally seen as ineffective and often must be helped by the judge. Several respondents complained that prosecutors are not vigorous

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[65] Wounded Knee v. Andera, 416 F.Supp. 1236 (D. S.D. 1976).

enough in prosecuting cases and that cases often end up being dismissed because of time delays.

As a rule, judges participate heavily in court proceedings. Only in the most Anglicized courts do judges refrain from any involvement. In the courtroom judges often take the role of prosecutor or defender whenever needed. Judges call witnesses, question them, counsel defendants on how to plead, and generally do those tasks that are necessary to make court proceedings run smoothly. Outside the courtroom judges attempt to settle disputes informally. On the reservations that provided answers, these efforts have resulted in a 10 to 50 percent reduction in caseloads.

Judges participate in cases for two reasons: tradition and lack of other court personnel. A tribal attorney for one tribe portrayed the judge's active role as the traditional way of doing things, and thought it results in much better justice than the Anglo adversarial approach. The judge's role is perceived as helping out, making sure that everyone has his/her side of the case developed fully. Most judges stated that they prefer to take a smaller part in court proceedings, but that the lack of prosecutors and defenders forces them to step in and see that justice is done, particularly in criminal cases when a defendant is unrepresented. On two reservations surveyed judges thought their function dictates that they convict as many people as possible, and so they usually take the prosecutor's role in the court. Most judges felt no problems or conflicts are created by their involvement in court proceedings.

Only three of the reservations surveyed have rules of evidence incorporated into their codes, and most judges saw no need for formal rules. Most courts rely upon the NAICJA rules, federal rules, CFR rules, or the rules of the state in which the reservation is located. Evidence rules are followed loosely unless an attorney is in the courtroom, in which case judges tend to be more formal in their rulings. Hearsay is admitted in all Indian courts surveyed. Judges are of the opinion that most knowledge is disseminated through hearsay, and that "real-life" methods of testimony should not be barred from the courtroom. They stressed that attempts are made to obtain the first person as a witness if possible, and that attempts are made to verify testimony if introduced through hearsay. Judges usually admit anything that is relevant to the case. In

some court systems with more than one judge, police complained that problems are created because every judge has his/her own evidence rules, leading to confusion. Collection of evidence is done casually with little investigative groundwork. In many cases evidence is lost or the chain of custody is broken before it reaches the court.

Expert witnesses are rarely used; no special procedures exist for their appearance. Some judges prefer that expert testimony be taken in written form to avoid complex arguments in court, but this is done only if both parties so stipulate.

As with evidentiary rules, rules of procedure are not strictly followed in the courtroom (sometimes because there are no rules). Most judges felt that rules of procedure and evidence are needed, but wanted to retain the flexibility to apply them as they see fit.

The use of native language is not mandatory in any of the courts surveyed. Several tribes consider it customary that the native language be used, but most tribes said that native language is used in court only by older members who are not fluent in English and who wish to explain their thoughts more clearly. When non-Indians, such as attorneys, are present in the Indian courts, the use of native language requires interpretation which slows down proceedings. Several judges reported that their court reporters do not speak a native language and are, therefore, unable to record courtroom discussions when native language is being used. In these cases tape recordings of the proceedings can preserve a record for use in appeals, if necessary.

Only the larger courts surveyed saw a need for full-time interpreters. These courts reported that one to four cases per court-day require the services of an interpreter. All other courts said interpreters are not needed regularly. Either enough people in the courtroom speak the native language or interpreters can be found and brought in on a temporary basis when the need arises. Non-Indians often hire their own interpreters. [illegible] tribes have not yet faced the problem of a [illegible] interpreter [illegible] [illegible] Indian Civil Rights [illegible] proceedings [illegible]

[illegible]

taking shorthand to record court proceedings. A few tribes do not have tape recorders, or their tape recording systems are inadequate. Other courts use their tape recording systems only when there is a trial or contested case. The records of the courts which use shorthand vary widely in quality—some are poor, but most are adequate to produce verbatim transcripts. Minutes and recordings usually are not transcribed unless the court's record is needed for appeal.

In most instances the court clerk doubles as the court reporter. Only the few courts with long courtroom hours have a full-time court reporter. Combining the court reporter function with another position (clerk or secretary) is a cost-saving device that often can be used by Indian courts. Recordkeeping systems are generally inefficient and unreliable. Three of the tribes surveyed have used consultants to help set up efficient recordkeeping systems, and are satisfied with the results. Many tribes maintain their records on a name basis. Having a defendant's entire record before the court can bias the judge. In most courts the record kept of case progress is incomplete and results in scheduling and disposition delays.

Only two of the courts surveyed render written decisions. Two other judges said they prepare written decisions when a notice of appeal is filed, so there will be a record for appellate judges to use. One judge said he prepares written decisions in extremely complicated cases, but he had no examples of his decisions. Several courts prepare written decisions at the appellate level, but, except for the Navajo Tribe, there was no information as to the form of the decisions. The Bureau of Indian Affairs recently began an Indian Court Reporter and is soliciting opinions from Indian courts, but there has been only one issue in a year. The American Indian Lawyer Training Program is also considering issuing a tribal court supplement for publication of Indian court opinions.

Ex parte contacts and attempts to influence [illegible] reported as much more pervasive in [illegible]

[illegible]

surveys showed that the problem is considered by some to be very serious, but that most judges felt it is not a large factor in their courts. Only three reservations reported a high frequency of ex parte contacts. Contacts are made most frequently by litigants' families and litigants themselves who want to explain the circumstances of a case. Several judges mentioned that this is the traditional method of determining guilt, and that when tribal courts were established, offenders stopped going to the tribal council and started going to the judges. Some people come to the judge to ask that a sentence be lightened or a prosecution be deferred, while others vent their frustrations about an adverse ruling. All judges said they tell people who come to them that cases before the court cannot be discussed unless both parties are present, but added that it is hard in many cases to determine when a conversation is turning to the merits of a case. Judges said that the most frustrating influences come from the BIA or tribal police officers who, on some reservations, feel they have supervisory authority over the court, entitling them to tell the Judge what to do.[67] Most judges felt that they could ignore any potentially prejudicial statements.

Council interference was seen as a more serious problem, although it was reported only on a few reservations. The short terms of some judges, combined with the method of reappointment by the council, make some judges particularly vulnerable to pressure from tribal leaders. On two reservations surveyed the politics are very intense and judges are not selected unless they are willing to bow to the desires of council members. These practices can prevent the hiring of competent people. Some judges interviewed said that before they took office, council influence in the court was pervasive, but they accepted the job only on the condition that such influence cease. All seemed satisfied with the course of events since they assumed office. On some reservations council and family influences cannot be separated because tribal society is so close knit. On one reservation the chief Judge intervened personally to get his son's case dismissed.

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[67] See BIA Task Force Analysis, supra note 11 at 69.

Only one judge felt the present system of ex parte contacts must be changed. That judge is in a unique position in that every expenditure the court makes, down to pencils and expenses of a jury trial (often refused), must be approved by both the law and order committee and the full council, leaving the judge particularly susceptible to manipulation by council members.

Indian court proceedings usually include arraignments, trials, and sentencing. Formal pre-trial procedures, discovery, hearings, and motions, are rarely used, and when they are it is because of attorneys or other counsel. Only about one-quarter of the tribes surveyed use these devices. The most common motion is the motion to dismiss, which reportedly is misused by some advocates. Advocates who have received the AILTP training are adept at using varied court procedures. Many cases are settled before trial in conferences with judges, but the judges usually do not label these functions pre-trial procedures or hearings. Under the ICRA tribes have great flexibility in dispute resolution, and formal, written procedures are not necessary.[68]

Release of prisoners pending trial is almost universal among the courts surveyed. Reasons given were that the crimes prosecuted are not serious, jails are unlivable, defendants must work, and judges do not like to incarcerate people. Those who the judges think can be trusted to return to the court are released on their own recognizance. Those who cannot be trusted or who are not tribal members are required to post bond. On most reservations, before being released a non-member must obtain the personal guarantee of two tribal members that he/she will return to court. Tribal member guarantors are liable for the amount of bond if the defendant does not appear. When defendants post their bond and fail to appear, they are picked up by tribal police and jailed until trial. On other reservations the judge merely allows such defendants to forfeit their bail in minor cases and cancels the trial.

Defendants in Indian courts are warned of their rights at time of arraignment, as recommended in the

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[68] Cf. McCurdy v. Steele, 506 F.2d 653 (10th Cir. 1974).

NAICJA criminal benchbook.[69] It is hard to tell, in some cases, if the defendants really understand what is being told them, particularly when they do not understand English well or are drunk. Some judges attempt to explain rights to defendants who do not appear to comprehend them, others do not. On some reservations rights are read on an intermittent and inconsistent basis. In one court visited defendants were not read their rights when the judge was unaware of the visitor's presence. The next day, when the judge was aware, he read defendants their rights as a group, but did not check to see that all defendants were present. It was, however, the opinion of most of the survey teams that defendants receive better protection in Indian courts than in nearby state and municipal courts. In one instance observed in a nearby non-Indian court, the judge first asked those who thought they were guilty to step forward, sentenced them, and then read the remainder of the defendants their rights.

One deviation from the Miranda[70] warning was noticed. On five out of the twenty-three reservations surveyed, defendants are not told of their right to a jury trial for a criminal offense.[71] Reasons varied for not including this right. One judge stated that only troublemakers ask for jury trials. Another said jury trials are too expensive and that he does not want to encourage them. Two judges said jury trials are a waste of time and that better justice is received before a judge. Nevertheless, at least one federal court has ruled that an Indian court defendant is entitled to be informed of the right to a jury trial and that the right cannot be conditioned on payment of a fee.[72]

Theoretically, all tribes allow jury trials in criminal cases, but only a third of the courts surveyed allow juries in civil cases. Authorization for jury

[69] National American Indian Court Judges Ass'n, Criminal Court Procedure Benchbook (1976).

[70] Miranda v. Arizona, 384 U.S. 436 (1966).

[71] 25 U.S.C. §1302 (1970).

[72] Low Dog v. Cheyenne River Sioux Tribal Court, Civ. No. 69-21C (D. S.D. Mar. 14, 1969).

trials is not included in many tribal codes for such cases, although one judge allows them under the general powers of the court. One judge only allows jury trials if the requesting party is represented by an attorney. Another judge would allow a jury trial, but said he has talked everyone who has asked for one out of it.

Very few jury trials occur in Indian courts. Only two courts reported more than fifty per year; five reported more than ten per year; and most reservations reported only one or two, if any. Some people said few jury trials take place because defendants do not really understand their options. Others said they are not used because most defendants plead guilty or feel they will get better treatment from a judge, even though it appears that convictions by Indian juries are difficult. Prisoners interviewed on several reservations said that defendants who ask for juries are perceived as troublemakers, and if found guilty, are given harsher sentences.

Almost all courts surveyed require six jurors. One judge said he prefers twelve, but it is difficult to find twelve people without some interest in the case. On one reservation three jurors are allowed if both parties agree to it, but it is not known if it has ever occurred. Jurors are most often selected from a list of people on the tribal rolls supplied by the tribal council. Few courts have any procedure for challenging jurors. Most judges felt challenges should be allowed only for cause. Non-Indian and non-member defendants argue that they are denied their right to trial by one's peers when non-Indians and non-member Indians are excluded from juries. Challenges are currently pending in federal courts on this issue. One judge mooted the issue by changing the procedures to allow non-Indians on the jury panel. Most judges said they are willing to allow non-Indians on their juries so long as consideration of tribal values is not jeopardized.

Police testimony was generally described as leaving much to be desired. Judges usually have to help police officers in their presentation of testimony and evidence, and many times cases are dismissed because evidence is not properly presented. Some judges said that many complaints filed by police result in dismissals because they do not state enough facts to show commission of an offense. These judges felt more

training in court work is needed for police officers. Some suggested that joint training sessions should be held for judges and police.

Few of those convicted in Indian courts are jailed. On only four of the reservations surveyed that supplied answers are 20 percent or more of those convicted incarcerated. It is estimated by several judges that 75 to 90 percent of those in jail are repeat offenders. Indians comprise a significantly higher percentage of off-reservation jail populations than population size would signify.[73] Non-Indians rarely serve time in reservation jails. Many judges prefer to fine non-Indians instead of using tribal funds to pay the cost of their incarceration.

Fines are the most common punishment imposed by Indian courts. In many courts the percentage of cases in which fines are imposed runs well above 80 percent. One reason incarceration is not used is that many jails are not fit for habitation or are overcrowded. Some reservations still impose a "dollars or days" sentence. The practice of imprisoning a convict who cannot pay a fine has been held to be in violation of the equal protection clause of the U.S. Constitution.[74] A federal court challenge to one Indian court's use of this practice was successful in obtaining release of an imprisoned defendant.[75] Fines are usually larger for repeat offenders. Traditional methods of punishment are rarely used by Indian courts.[76] Some courts do use restitution, repossession, and doing work for the tribe as sentencing alternatives in applicable cases. Most tribes have no formal sentencing procedures and sentencing occurs immediately after conviction.

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[73]For a more complete discussion of Indians and jails, see R. Williams, "Corrections and Dispositions," unpublished paper prepared for the Long Range Planning Project advisory committee (1977) (Appendix 2 to this report).

[74]Tate v. Short, 401 U.S. 395 (1971).

[75]In re Pablo, Civ. No. 72-99 (D. Ariz. July 21, 1972).

[76]Guidebook I Responses, supra note 18 at 11.

All reservations surveyed have some appellate process. On several of the reservations surveyed the appellate process is not in fact functioning, in that the court has not met for a long time or funds never have been appropriated for the appellate court. Some tribes have appellate systems which do not operate according to the provisions of their code or constitution. Several tribes either cannot afford to staff a permanent appeals board or their leaders believe that the caseload does not justify it. Most reservations surveyed have full-time appellate courts available in some form. The most common variety is a panel of trial judges who were not involved in the lower court decision. Some tribes with small caseloads assemble an appeals court of off-reservation judges as needed. Several tribes, primarily the Pueblos, have the tribal council act as the appellate body. When done properly, use of the council as a judicial body presents no ICRA problems. Indeed, the practice is not unlike the British use of the House of Lords as the court of last resort. On one reservation, however, the tribal president appoints three council members to sit on the appeals court. They must make a decision within thirty days or the defendant is freed. Opportunity for influence exists in this system because a council member who is a relative of the defendant can ask to be on the appeals court, refuse to meet within thirty days, and thereby cause release of the defendant.

There are some courts with large caseloads and permanent appeals courts. Others provide for one permanent appellate judge joined by two lower court judges. More than ten appeals in a year were reported by only the Navajos (80-100) and the Oglala Sioux (100). Only seven other tribes surveyed reported more than one appeal in the last year; most reported no appeals. The primary reason given for the lack of appeals was that Indian defendants tend to accept their guilt, and they do not try to avoid conviction on technical grounds. However, it appears that many tribal members do not understand the appellate court as a remedy available to them. Most tribal appellate courts allow only for review on the trial court's record, although several allow oral argument and accept evidence discovered since the trial. Several appellate courts allow a choice between trial de novo or review on the record. Most judges prefer review limited to the record. Usually a trial transcript

is the record at the appellate level, and a tape recording is almost always made of appellate proceedings.

Most people on the reservations surveyed do not perceive recourse to federal courts as a means of reviewing Indian court judgments. Only five of the twenty-three tribes surveyed reported any appeals to federal courts, and only two tribes reported more than one case. Judges interviewed said the concept of federal review is too new and too complicated for most tribal members who are only starting to understand the avenues of relief available to them under the Indian Civil Rights Act. Most people expect the number of appeals to increase dramatically in the future.

Overall, appellate tribal courts have been ignored in court planning and budgeting. The paucity of appeals masks the problem, yet is itself the result of inadequate appellate procedures. As more people become aware of their rights, viable appellate processes will become a necessity.[77] If they are not available, aggrieved litigants are more likely to resort to federal courts. Lack of a working appellate system invites federal courts to look beyond provisions for appeal in the code or constitution in determining whether such a process effectively exists, as they are checking for exhaustion of tribal remedies in Indian Civil Rights Act cases.[78] Moreover, one federal court has termed appeal a "right" for criminal defendants, of which they must be informed under the ICRA.[79] To avert ICRA problems, the Jurisdiction Task Force of the American Indian Policy Review Commission strongly recommended that Congress provide funding for tribes to develop appellate court systems.[80]

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[77] See M. Gonzalez, "Problems Which Prevent Tribal Appellate Court Viability," unpublished paper prepared for the Long Range Planning Project advisory committee (1977) (Appendix 2 to this report).

[78] See, e.g., Wounded Knee v. Andera, supra note 44; Two Hawk v. Rosebud Sioux Tribe, supra note 44.

[79] Low Dog v. Cheyenne River Sioux Tribal Court, supra note 72.

[80] AIPRC Jurisdiction Report, supra note 25 at 149.

Treatment has been discussed above in terms of facilities and support personnel. Only in the past few years have Indian courts begun to use the treatment services available to them, and to refer defendants for treatment in lieu of fine or incarceration. This is still regarded as a novel process by most Indian court judges. Tribes vary tremendously in their capacity to handle treatment cases, and judges vary in their willingness and ability to use treatment services. Referral procedures are not formalized in any of the courts. Commonly, prisoners are referred for treatment on the condition that if they leave before treatment is successfully completed, they will have to serve a jail term. All judges interviewed thought expanded treatment services should be a high priority budget item and that use of treatment should be expanded as an alternative. Some judges thought that being put in jail is the best medicine for some people, especially alcohol offenders.

Juvenile rehabilitation shows the most serious deficiency. None of the reservations surveyed offer complete services to juveniles. Juvenile services in the form of detention centers, foster homes, group homes, community centers, and diversion programs are lacking on most reservations studied.[81] On over half the reservations surveyed, juveniles are incarcerated with adult prisoners. This occurs either because there are no juvenile detention facilities, or because facilities are overcrowded. The most common "juvenile detention facility" consists of a separate cell in the adult detention facility.

Many juveniles must be sent off-reservation to obtain needed treatment because no supervision or facilities exist on-reservation. Tribes interviewed said this practice is very distressing for them because the juveniles lose cultural identify and community support in their rehabilitation efforts. Many times juveniles sent to non-Indian reform schools come back to the reservation more hardened than when they were committed. People interviewed stated that the youth is the tribe's most valuable resource and that it needs better protection than off-reservation Anglo treatment affords.

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[81] See American Indian Law Center, New Approaches to Juvenile Justice (1977).

On some reservations under Public Law 280, the state has jurisdiction over juveniles, but the affected tribes favor retrocession of jurisdiction. Juveniles, knowing the tribe has no authority over them, lose respect for tribal law enforcement.

Inadequate courtroom facilities often make closed sessions for juveniles impossible. When closed sessions are held, they occur most often in the judge's office. Dispositions of juvenile cases are limited by a lack of juvenile probation officers. The AILTP reported that in 1976 only 16 percent of the tribes surveyed had juvenile officers and only 38 percent operated separate juvenile courts.[82] On many reservations there is no juvenile code and juveniles are treated as adults when they enter the criminal justice system.[83]

All reservations reported that adult and juvenile alcoholism is the major cause of crime and cases before Indian courts. As reported earlier in this chapter, alcohol accounts for perhaps 90 percent of all cases in Indian courts,[84] and several courts visited maintained that alcohol is a factor in every case. Indeed, most people thought that high reservation crime rates would be more in line with off-reservation rates if the alcohol problem could be abated. However, the judges interviewed reacted strongly to decriminalizing alcohol as an alternative because, at present, they felt the court is the only method available for "rehabilitating" offenders. If adequate facilities and personnel were provided by the federal government, judges would feel easier about diverting alcohol cases from the criminal justice system. There are few cases at present in the Indian court system that do not deserve referral to some treatment program, alcohol or otherwise.

The Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS) provide most services available in

[82] AILTP Report, supra note 4 at app. C-7 - C-8.

[83] See T. Stiffarm, "Juvenile Law and Indian Court Training Needs," unpublished paper prepared for the Long Range Planning Project advisory committee (1977) (Appendix 2 to this report).

[84] See ch. 2, supra at 46.

the treatment area. The BIA usually has social workers stationed on each reservation, and the IHS provides mental health and alcoholism counselling. Evaluations of program adequacy vary with each reservation. On several reservations no federal services are available. Persons interviewed expressed the view that treatment services should be under tribal or court control, but did not want to see federal services discontinued.

The overwhelming opinion on reservations surveyed was that non-Indians receive fair treatment in Indian courts while Indians receive biased treatment in non-Indian courts. The treatment of Indians in non-Indian courts varies to a large degree, but fair treatment seems to depend more upon the personality of the judge involved rather than upon any legal foundation. Although Indians were the majority of those interviewed during the reservation surveys, attempts were also made to ascertain opinions of non-Indians living on the reservation or in nearby communities. The only serious bias against non-Indians discovered in Indian courts was that several Indian judges consider non-Indians as the biggest source of revenue for the courts, and so fine them heavily rather than sentencing them to jail. Informants were evenly split on whether or not they thought non-Indians try to avoid coming before the tribal court if possible.

Many tribes reported that the Indian Civil Rights Act has had little effect on their court procedures. The major change in some courts is that proceedings have become more formal and sophisticated or, in the words of some respondents, Anglicized. Judges believed that tradition has played a smaller role in court proceedings since passage of the Act. The requirement of hiring a prosecutor has had the greatest impact on court operations resulting from the ICRA. Some tribal codes and rules of court procedure have been modified to reflect the requirements of the Act, but most judges said they were already complying when it was passed. Judges felt that more training in the ICRA is the most effective way of insuring court compliance with the terms of the Act. The main ICRA issue of concern to judges is possible abrogation of tribal sovereign immunity by implication.[85] Many judges thought it

[85] See Loncassion v. Leekity, 334 F.Supp. 370, 373 (D. N.M. 1971).

erroneous to interpret the Act as waiving their immunity from suit.

Relationships with Other Jurisdictions

Tribal court relationships with surrounding jurisdictions are of serious concern to most Indian tribes[86] (see Chapter 1, Current Issues). Only two states give full faith and credit to tribal judgments.[87] Several tribes reported agreements with surrounding jurisdictions for recognition of judgments, but documents were unavailable for inspection and it was difficult to tell whether such agreements were actually written and signed.

Slightly more than half the reservations surveyed stated that surrounding jurisdictions do not recognize tribal court judgments. Where tribal judgments are recognized, it is on the basis of comity, is limited to specific counties, is not granted by the state, and is limited to family matters, such as adoption, child custody, and divorce. States which recognize tribal judgments usually do so informally and inconsistently. Agreements for recognition of judgments are reportedly one-sided in effect. Tribal courts enforce many more non-Indian court judgments than vice versa, and tribes tend to enforce a wider range of judgments, extending well beyond the domestic relations tribal decrees which the non-Indian courts are most comfortable enforcing.

Relationships with surrounding counties depend on the individuals involved. In white backlash country, non-Indian judges, especially those who are elected, tend to refuse to recognize Indian court judgments. Many non-Indian judges thought that non-lawyer Indians are not qualified to act as judges. Those judges who do enforce Indian court judgments usually are in regular contact with Indians. The most common excuses given for

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[86] See American Indian Lawyer Training Program, Inc., Issues in Mutuality (1976). See also M. West, "Reciprocity Issues for Tribal Courts," unpublished paper prepared for the Long Range Planning Project advisory committee (1977) (Appendix 2 to this report).

[87] See Jim v. CIT Financial Services Corp., 87 N.M. 362, 533 P.2d 751 (1975); In re Lynch's Estate, 92 Ariz. 354, 377 P.2d 199 (1962).

refusing full faith and credit for Indian court judgments were that the Indian courts are not courts of record and that Indian tribes do not merit the extension of full faith and credit. Some non-Indian judges do not recognize tribal judgments because Indian court jurisdiction is so limited.

There are few tribal ordinances authorizing reciprocity in recognition of judgments. Most Indian courts enforce judgments even though the arrangement is one-sided, and few question the judgments they are asked to enforce. Some tribes refuse to enforce non-Indian judgments unless there is a reciprocal agreement with the jurisdiction requesting enforcement. Other courts hold hearings to determine whether a non-Indian judgment conflicts with tribal values, and whether the Indian defendant had an adequate chance to defend him/herself before they will recognize the judgment. Most judgments sought to be enforced on reservations are creditor claim judgments.

There is not much recent information available on recognition of tribal court judgments by federal courts. The recent trend under the Indian Civil Rights Act is for federal courts to defer to Indian courts, at least to the extent of insisting upon an exhaustion of tribal remedies.[88]

There is much more interaction between Indian and non-Indian law enforcement agencies than between courts. Almost all reservations have some form of agreement with surrounding jurisdictions regarding cross-deputization of officers, service of process, delivery of instruments and investigation of offenses. These arrangements are considered necessary for effective law enforcement on and around Indian reservations. Almost all cross-deputization agreements are informal, but a few reservations have formal agreements. They are usually reciprocal.

Agreements can be limited to specific functions. Some provide merely that Indian police will escort non-Indian offenders to the border of the reservation and turn them over to non-Indian police, and that non-Indian police will reciprocate with off-reservation Indian offenders. Other agreements permit state and county

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[88] See, e.g., O'Neal v. Cheyenne River Sioux Tribe, supra note 21.

police to patrol the reservation and cite Indian offenders to tribal court and non-Indian offenders to state court. On one reservation the state cites all offenders found on the reservation into tribal court. As with other reciprocal arrangements, agreements can be frustrated by non-Indian animosities. The non-Indian backlash movement in Montana has resulted in one cross-deputization agreement being withdrawn.[89]

Relations with other jurisdictions vary immensely. On one reservation the county has refused to accept the fact that jurisdiction was retroceded to the tribe and federal government, and it continues to patrol the reservation against tribal wishes and without involving the tribal court. On another reservation a state police officer lives on the reservation by tribal request, uses tribal police facilities, and assists the tribe as much as possible. He believes that justice is better in the tribal court than in nearby state and county courts. Those jurisdictions that have cooperated have found that law enforcement is easier and crime is reduced. Those that do not have agreements said crime prevention is more difficult and a feeling of lawlessness is more pervasive.

Tribes cooperate with states and counties to a fair degree for treatment and incarceration if facilities are not adequate on the reservation. There is some cooperation in investigation with other jurisdictions. But some states and counties will have nothing to do with tribes and their courts. There is generally good cooperation between the BIA police and special officers and the tribal police.

About half the tribes surveyed have extradition agreements with other jurisdictions; only two have formal agreements. All tribes surveyed said their agreements are reciprocal, but there was not one instance cited in which an Indian or non-Indian have been extradited to the reservation. A few tribes said agreements have the same effect as state jurisdiction over the reservation: Indians are arrested and tried by state authorities. Few tribes hold a hearing on an extradition request; most requests are approved

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[89] See AIPRC Jurisdiction Report, supra note 25 at 128.

automatically. One tribe has a comprehensive hearing process under which the judge determines that the extradition request is for the proper person, and that the judgment sought is fair and in agreement with tribal policy. Denials of extradition requests may be appealed to the appeals court, and then to the tribal council which can deny the request on political grounds. Extradition is granted only if the other jurisdiction reciprocally agrees to extradite to the tribe when requested.

The number of extraditions is few. Only a handful of tribes reported more than five requests a year, and only one reported more than ten (25). Most judges thought that extradition is an important function, even though extradition agreements have so far been one-sided. Judges felt that power of extradition helps protect the tribes' sovereignty. The judges also believed Indian prisoners should serve their time on the reservation in order to preserve cultural identity. A few reservations already have informal agreements with surrounding jurisdictions for exchange of prisoners.

Prosecution and investigation of crimes on reservations where states (Public Law 280 jurisdictions) and the federal government (all reservations for major crimes) have a mandatory duty to provide such services is a sore point among Indian tribes. Performance of these duties is almost universally considered inadequate.[90] The only tribe visited which said that federal enforcement is adequate is so isolated and close knit that serious crimes are almost non-existent. FBI investigations of serious crimes are exceedingly slow, sometimes a matter of several days. Evidence often is destroyed or lost before investigators arrive. The confusing morass of overlapping tribal, state, and federal jurisdictions causes inefficiency and competition among law enforcement agencies and prevents effective investigation, leading to lack of prosecution by responsible authorities.

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[90] For a more complete discussion of this issue, see J. Myers, "Law Enforcement on Indian Reservations," unpublished paper prepared for the Long Range Planning Project advisory committee (1977) (Appendix 2 to this report).

Many people believe that the U.S. Attorney attempts to avoid prosecutions involving Indians or Indian reservations. Cases are frequently declined, and on most reservations many persons known to have committed major crimes are at large in the community. Because tribal members know persons can commit serious crimes with impunity, they fear for their own safety. And respect for tribal courts is diminished because tribal members hold the courts responsible for not taking action.

At a recent NTCA-NAICJA conference on the Indian judiciary in Albuquerque, New Mexico, an assistant U.S. Attorney stated that crimes such as burglary and larceny are being left to tribal courts as part of the federal policy of self-determination. But tribes including the crimes of burglary and larceny in their codes have not received approval for the codes from the Secretary of the Interior, apparently because of a policy that the federal government should have exclusive jurisdiction over major crimes. Several U.S. Attorneys cited distance as the reason more crimes are not investigated and prosecuted. Other reasons are discussed in Chapter 1.[91]

There is little coordination of investigations between the FBI and tribal police. It is the prevailing opinion among many tribal leaders that whether or not the investigation of a crime will be diligent depends upon the political visibility of a case and the race of the victim. One respondent stated that it takes more than one bullet hole before the FBI will say an Indian died of other than natural causes. Estimates of the percentage of major crimes which are not investigated by the FBI or prosecuted by the U.S. Attorney's office range from 50 to 90 percent. While cautioning about the accuracy of the data, the Department of Justice reports that the declination rate is about 75 percent for both Indian and non-Indian cases.[92] Some tribes said they hesitate to prosecute major crimes or lesser included offenses because it may prevent possible federal prosecution. Major crime enforcement by tribes usually means assisting the federal government rather than applying federal law in the tribal court.

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[91] Ch. 1, supra at 33.

[92] Justice Task Force Report, supra note 24 at 46.

Many tribal codes give the tribal judge discretion to apply laws from other jurisdictions. State law is used frequently. Most tribes apply state traffic laws. Some have incorporated state traffic laws into their tribal codes. Since much traffic on reservations is by non-Indians, and since most tribes require a state driver's license and state license plates, it is convenient to apply state traffic laws. The next most popular state laws applied on reservations are probate laws. In at least one case a tribe's use of some state laws has led a federal court to assume that state laws are the laws of the tribe.[93]

Very few state courts apply relevant tribal law in Indian cases, even in Public Law 280 states where the practice is specifically authorized by federal law.[94] Some states will enforce tribal judgments, but will not apply tribal laws. Contrary to some reports, Indians on most reservations seem to have little or no problem obtaining credit from nearby merchants caused by jurisdictional problems which might prevent collection of debts or enforcement of judgments. Most merchants said they have no hesitation about enforcing judgments in tribal courts.[95] Some said their profits are high enough to take chances on payments. Young people take advantage of credit arrangements more than older Indians. Many older Indians continue payments on contracts they have been advised are illegal, as in cases where usurious interest is charged.

General Evaluation of Indian Courts

Visitors to Indian courts had the general impression that they perform well and are comparable to nearby municipal and rural state courts. The primary constraints in achieving a high standard of judicial excellence are reportedly lack of training and inadequate personnel and facilities. Five of the twenty-three tribes surveyed complained that their courts were confused and

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[93] Wippert v. Burlington Norther, Inc., supra note 20.

[94] 28 U.S.C. §1360 (1970).

[95] Accord, AIPRC Jurisdiction Report, supra note 25 at 126.

inefficient. These problems were blamed on intra-tribal politics or newness of the courts.

Success of Indian courts today is attributed primarily to the judges. Visitors to the courts were impressed by the judges' dedication, notwithstanding negative factors—law pay, tribal politics, and inadequate personnel, facilities, and training. Most judges said they are doing as good a job as conditions permit, and thought they easily could improve their courts if conditions were improved. Some judges felt that a more coherent body of law for Indians needs to be developed; that tribal codes should incorporate Indian values while maintaining some national uniformity; and that a body of "Indian common law" should be developed, so that non-Indian law will not have to be applied in cases where there is no relevant tribal law.

Tribal councils need better education in the role of Indian courts. On about half the reservations surveyed, the courts are still considered subordinate arms of the tribal government. However, support for courts is increasing, and many judges stated that tribal government officials have begun to realize that the tribal court ultimately defends the tribe's sovereignty. Some tribal councils have raised the priority of their courts in tribal budgets. All council members interviewed supported the idea of more judicial training. Establishment of Indian courts is still a recent phenomenon for many tribes; thus, they have only begun to assimilate the court into the workings of tribal government. Joint training sessions between council members and judges and increased community education are seen as methods to rectify the lack of knowledge about the court's functions. Information concerning the court's place in tribal government is also needed by the general tribal population.

Non-Indian judges generally had a good opinion of nearby Indian courts and judges. Some said they have an excellent working relationship with Indian judges and have the highest respect for them and the job they do; others felt that Indian judges are not as good as Anglo judges and are not entitled to full faith and credit. Most prisoners interviewed thought they were dealt with fairly, although some believed that influence plays a part in the court or that at times the judge harasses defendants unnecessarily.

Tribal members' opinions of their courts varied widely, usually depending on whether they see courts as part of the tribal society or as alien institutions. Most attorneys thought the courts do an adequate job with the resources available, but that jurisdiction needs to be clarified and facilities need to be improved. All cited the need for increased training. Most respondents felt that the NAICJA training has provided a good start for judges, but must be expanded and changed in order to meet the changing needs of the judges.

Generally, judges are well respected in the tribal community. There are no allegations of major corruption of judges, and only a few tribes reported any incidence of significant improper influence. Physical needs such as facilities, equipment, and personnel were identified in the reservation surveys. The use of attorneys is considered unnecessary. Jurisdiction should be increased if possible. The position of the court in tribal society needs to be improved. Administration of the courts should be better. Most court visitors saw the court striving to take a more important role in the community in the future, and expected improvements to follow availability of more funds and training. Most concluded that, so long as continued efforts are made for improvement, the future of the courts will be bright.

Chapter 3

Strengths and Weaknesses of Indian Courts

So far, this report has reviewed the legal status of Indian courts and assessed their present operational capabilities. This information leads to certain conclusions about the strengths and weaknesses of the Indian court system. The areas of strengths and weaknesses identified here have guided the Long Range Planning Project in developing its program for Indian courts which is discussed in Chapter 5.

Major Strengths

Deference by Federal Courts

The authority and importance of Indian courts have increased tremendously in recent years. This is partly because federal courts are beginning to recognize the authority of Indian courts over most matters arising in Indian country. This trend began in 1959 with the Supreme Court's insistence that actions by state governments not interfere with the authority of tribal courts.[1] In recent cases brought by tribal members against tribal governments, the federal courts have deferred to the judgment of Indian courts, thus requiring an exhaustion of tribal remedies before redress may be sought in the federal system.[2] The Supreme Court has ruled that, even in Public Law 280 states, Indian tribes have basic regulatory authority over activities on the reservation,

[1] Williams v. Lee, 358 U.S. 217 (1959).

[2] O'Neal v. Cheyenne River Sioux Tribe, 582 F.2d 1140 (8th Cir. 1973).

precluding action by the state.[3] The Ninth Circuit Court of Appeals has held that, where Indian tribes have off-reservation treaty rights, the authority of their law enforcement and tribal courts extends outside the reservation to those areas where the rights exist.[4] And the Supreme Court has recently upheld the authority of tribal governments to enforce laws as delegated by Congress, basing its decision in part upon the inherent authority of the tribes over their members and territory.[5]

Federal judicial deference means that Indian courts must respond to demands for interpretations of tribal law, review of administrative decisions, and determinations of the legitimacy of specific tribal actions. Consequently, more judicial business is indicated; fair and efficient procedures are required. And the impact of Indian decisions is greater.

Quick Access to a Fair Forum

Most Indian reservations are located in rural areas, far from federal and state courts. When county courts and justice courts are nearby, they are usually in border towns where hostility toward Indians may run high and sympathy for Indian values may be lacking. Thus, Indian courts located on reservations have the advantages of being convenient to the persons who will use them and the most likely forums to do justice in specific situations. Dispute resolution and redress of anti-social acts can be quickly accomplished. Most important, Indian values are best understood and translated into legal principles and remedies by Indian courts and judges. Although Indian justice as we know it today is generally not based on Indian tradition, a great potential exists for reinstilling Indian values into the administration and substance of Indian court functions.

[3] Bryan v. Itasca County, 426 U.S. 373 (1976).

[4] Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974); United States v. Washington, 520 F.2d 676 (9th Cir. 1975), cert. denied, 419 U.S. 1032 (1976).

[5] United States v. Mazurie, 419 U.S. 544 (1975).

Fairness in Indian courts is assured by the Indian Civil Rights Act.[6] Habeas corpus review of Indian court decisions in federal court provides a check on decisions which may conflict with rights secured under the Act.[7]

Growing Support by Federal Agencies, Tribal Leaders and Organizations

Indian courts draw strength from the fact that in recent years support for them has grown. Indian tribal leaders are showing an increased awareness and understanding of the importance of Indian courts in a tribal structure—that the courts are the means by which tribal legislation and decisions are applied. The National Tribal Chairmen's Association has begun to recognize the need for cooperation and a better working relationship between tribal leaders and the Indian judiciary, as demonstrated by its conference on the Indian judiciary held November 15-17, 1977 in Albuquerque, New Mexico. That conference resulted in the adoption of a position paper forcefully supporting the independence of Indian courts and acknowledging that the Indian judiciary has a status which is co-equal with other branches of tribal government.[8] The NTCA conference also urged provision of the resources needed to realize the fullest potential of the tribal judiciary.

Indian organizations are making a new and strengthened commitment to growth and improvement of Indian courts. Most notably, the NAICJA operates a training program which has reached most Indian judges in the country. The NAICJA also has undertaken this Long Range Planning Project with the financial and moral support of the BIA. And it has instituted a new court clerk training program, funded by the Department of Labor. These and other activities have been essential to the growth of competency, effectiveness, and efficiency in Indian courts, as well as the ability to exchange information among court judges throughout the nation. The AILTP has designed and begun a training

[6] 25 U.S.C. §1302.

[7] 25 U.S.C. §1303.

[8] National Tribal Chairmen's Association, Position Paper adopted at Judiciary conference (Nov. 17, 1977).

program of developing paralegal defenders and prosecutors for Indian courts. It has also compiled a useful report of its survey of tribal courts entitled Indian Self-Determination and the Role of Tribal Courts under a contract with the BIA. That report has been cited repeatedly and relied upon heavily in the preparation of this report. The NTCA, as indicated above, has begun to address the need for cooperation and communication between Indian judges and tribal leaders. The American Indian Law Center has assisted Indian courts through cooperation in a project with the NAICJA for improving on-reservation juvenile justice and the preparation of a handbook for tribal clerks and administrators.

Federal support for Indian courts, especially by the Bureau of Indian Affairs and the Law Enforcement Assistance Administration, is shown by dramatically increased financial support for Indian courts and court related projects. The following tables summarize the extent and growth of the BIA and the LEAA assistance to Indian courts in recent years.

Bureau of Indian Affairs Budget for Indian Law Enforcement and Courts[9]

1968	$ 3,000,000
1969	4,100,000
1970	5,100,000
1971	5,900,000
1972	7,300,000
1973	8,300,000
1974	11,800,000
1975	9,871,000
1976	27,500,000
1977	28,681,000

[9] Prior to 1976 the BIA support program for tribal courts was located in the Law Enforcement Division. In 1976 this responsibility was given higher priority and as a result the BIA established a separate Judicial Services Division. In 1976 and 1977 $3 million out of the total budgets for each year was earmarked for Indian courts.

Law Enforcement Assistance Administration Support of Indian Courts

1973	$ 344,783
1974	403,843
1975	505,560
1976	626,676
1977	497,004 (incomplete)

The agencies' motivation to request funds and the congressional response both should be guided by the government's trustee obligation to the tribes to maintain law and order on the reservations. Further, Indian courts have greater needs largely as a consequence of congressionally imposed requirements, principally those in the Indian Civil Rights Act. These reasons support the tribes' claims on the government for programs and funding sufficient to meet current needs.

The Bureau of Indian Affairs' policy permits tribes to allocate federal funds available to them according to budget priorities determined by the tribes themselves. A awakening tribal awareness of the importance of Indian courts has been reflected in recent tribal budgets submitted to the Bureau of Indian Affairs. As a result, the fiscal 1979 BIA budget includes an increase of 36 percent for courts over the fiscal 1978 budget—the greatest increase in any item in the budget.

The dedication of federal officials and agencies to the betterment of Indian courts is an important asset. Administrators of federal programs for Indian courts within the BIA and the LEAA have demonstrated interest in and devotion to the ideal that those courts should be strengthened and assisted. This is evidenced by their willingness to press for increased assistance and funding within their own agencies, their attendance at meetings and other gatherings concerned with the Indian judiciary, and by their good working relationships with the NAICJA and other organizations working for improvement of Indian court systems. This report calls upon the federal officials and agencies which have expressed interest in Indian courts to coordinate their efforts and to take swift and definitive action to an unprecedented degree. Thus, the extent of the federal commitment will soon be revealed.

Ability to Bridge the Gap Between Law and Indian Culture

Indian courts can become effective bastions of Indian cultural maintenance under the guidance of tribal judges and leaders who understand the promise of the Indian judicial system. As the agents of another system and culture, non-Indian courts are destined to be viewed as alien. But decisions of Indian courts have the potential of being respected as the true law of Indians. That potential has not been realized, but its very existence is a strength of Indian judicial systems.

Dedicated Judiciary

The dedication of Indian judges is one of the most obvious strengths of Indian courts. Judges in the non-Indian system are rewarded in terms of prestige, respect, and, although some disagree, fair compensation, benefits, and retirement provisions. Many judges also are assured tenure and freedom from political meddling. But the Indian judge enjoys no such luxuries. Because some judges are still seen as agents of the federal government, they are often treated disrespectfully by tribal leaders who may not appreciate the importance of the judge's role in tribal government. Indian judges rarely get adequate pay, and the surveys revealed no retirement or other appreciable benefits for them. Indian judges' tenure is uncertain and frequently their official orders and judgments are not enforced or obeyed. Nevertheless, they have shown a willingness to do their thankless jobs fairly and diligently.

There are few known instances of dishonesty or malfeasance by Indian judges. Virtually all judges in office are zealous in their desire to improve their competency and abilities. This is shown by their attendance at training sessions conducted by the NAICJA, by their seeking help from the NAICJA instructors and others, and by their reading of extensive literature which the NAICJA makes available. Judges often work at a financial sacrifice, usually accompanied by risk, such as vandalism to personal property and threat of physical injury.

In the final analysis, the greatest potential of Indian courts lies with the judiciary. What it lacks in formal education, it makes up in a dedicated and serious approach to its work.

Weaknesses

The Long Range Planning Project intentionally has emphasized finding the weaknesses and needs of Indian courts. The primary objective has been to find and recommend ways of satisfying Indian court needs and dealing with their problems.

Susceptibility to Political Influence

An important precept of Anglo justice is independence of the judiciary. Indian judges are often appointed by tribal governments and serve at the pleasure of elected leaders. Because terms are usually short, a judge rarely is secure in his/her position. Nevertheless, most judges interviewed for the Long Range Planning Project favored appointment as the best method of judicial selection. On reservations where judges are selected in a contested election, the process can become a popularity contest.

Complaints of political interference abound. There have been repeated instances of tribal leaders putting pressure upon an Indian court judge to rule a certain way, under an implied threat that the judge must comply or lose his/her job. Impeachments and recalls of judges are frequent. Such extreme actions are rare in non-Indian systems. There, individuals are elevated beyond their personal status to a position of respect; even when they make highly unpopular decisions, they are seldom targets for removal from office on that basis alone. The different treatment Indian judges receive is perhaps a by-product of Indians' seeing them as part of a political system, rather than as independent officers charged with application and interpretation of the law.

The political susceptibility of judges in Indian courts can be checked in several ways. Revised procedures for judicial selection, tenure, and removal are found in the Model Standards for Indian Judicial Systems, parts V-A, C, and D, Chapter 4. A commitment to high standards of independence for the judiciary must be made by both judges and tribal leaders, and a code of ethics adopted. See Model Standards for Indian Judicial Systems, parts V-F and G, Chapter 4. Programs of community education can improve attitudes of people in the Indian community and promote a better understanding

of the role of the Indian judiciary. See recommendation concerning community relations and education in Chapter 5. If the Indian judiciary incorporates more concepts of Indian traditional justice and locally held values, rather than automatically replicating non-Indian systems, it should increase overall respect for the Indian judiciary. A discussion of the absence of custom and tradition appears later in this chapter.

Summary Justice

Arrests on Indian reservations result in an astoundingly high rate of guilty pleas. Perhaps this stems in part from Indians' traditional hesitation to contest charges made by law officers in an adversary proceeding; or it may indicate a feeling that it is impossible to prevail against "the system."

A more likely reason for the disposition of virtually all cases in Indian courts by guilty pleas is the fact that they are not well equipped to conduct adversary proceedings. There are few defenders available to defendants in Indian courts. Even the defendant who has the means to hire an attorney or other counsel may have difficulty finding one who is adequately trained and willing to practice in tribal court. The problem is much more severe for indigents. The Indian Civil Rights Act guarantees a right to counsel only at the defendant's expense.[10] Only a handful of tribes voluntarily provide defense counsel free of charge to indigents.

An absence of prosecutors also impacts a defendant's ability to have a full and fair review of the charges made in many Indian courts. One federal court has ruled that it is improper for a judge to play the role of prosecutor.[11] Not only is it improper under modern standards of due process to have a judge act as both decision maker and prosecutor, but it deprives a defendant of some of the subtler benefits of a prosecutor. In other courts typically a prosecutor has

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[10] 25 U.S.C. §1302(6). Tom v. Sutton, 533 F.2d 1101 (9th Cir. 1976).

[11] Wounded Knee v. Andera, 416 F.2d 1236 (D. S.D. 1976).

determined whether the case has merit and whether there appears to be sufficient evidence to prove criminal charges. Further, the presence of a prosecutor offers the possibility that multiple charges will be pared down to a particular charge suited to the situation and that lesser included offenses will be charged where they are more appropriate. The ability to plea bargain has become an "essential" and "highly desirable part" of criminal justice administration.[12] When that element is removed, a defendant must rely upon the charging police officer or the judge to prevent or correct overcharging.

A 90 percent rate of guilty pleas in Indian courts is not greatly different from the rate prevailing for misdemeanants in large urban areas, but by the time a plea is made in an urban court, the defendant has had benefit of prosecutorial review and possibly plea bargaining. In any event it is unusual for rural courts to dispose of such a high number of cases without trial or some adversary contest. The advantage of courts in small communities is that they are not too busy to preclude the necessary attention to individual cases. Individualized treatment is especially important for Indian courts. An obstacle has been the unavailability of the resources and trained personnel needed to conduct proceedings as advocates and judges.

Little recourse remains for one convicted by an Indian court. While most tribes have structures providing for appeals, they often are inoperative. Sometimes this is because funds are lacking. Or the small number of appeals may relegate appellate courts to a low priority. The lack of judges trained in handling appeals also is a problem. With no tribal remedy for a party aggrieved by an Indian court's judgment, many persons seek review in federal courts by a writ of habeas corpus or independent suit under the Indian Civil Rights Act. The present system provides an inadequate opportunity for appeals from Indian court decisions and invites federal court oversight. Fairness to parties and respect for the independence of tribal government dictate that appellate review be more available.

The presence of trained prosecutors, defenders, and judges in Indian courts can help assure that

[12] Santa Bella v. New York, 404 U.S. 257 (1971).

Individual rights are protected and that courts realize their potential for meting out justice on a more deliberate and personal level. See parts V and VI of the Model Standards for Indian Judicial Systems, Chapter 4, and the recommendations in Chapter 5 dealing with personnel and training. Tribal appellate mechanisms are prescribed in part IV of the Model Standards for Indian Judicial Systems, Chapter 4, and funding sufficient to hire judges to hear appeals is urged in the personnel recommendation in Chapter 5.

Inadequate Tribal Laws

The constitutions and codes of many tribes are deficient in a number of respects. The limits of tribal jurisdiction, over persons, territory, and subject matter, are not sufficiently defined. A number of important subjects are not covered by tribal law. A notable deficiency is the lack of juvenile codes for many tribes. A model children's code has been prepared by the American Indian Law Center and should be considered. The Code of Indian Tribal Offenses in part II of the Code of Federal Regulations is still used entirely or in part by most tribes, notwithstanding widespread agreement that it is antiquated and inadequate. As tribes consider code revisions and promulgation of new laws, they often fail to incorporate values and concepts which are important to Indian people.

Many tribal laws are simply not codified and some do not find their way into the tribal code or are not known by many of the people who are subject to them, including the judges who must administer them. Code publication and periodic updating are essential, but, with a few exceptions, they are not regularly done. Similarly, written court decisions are not generally accessible to the tribe whose courts have rendered them, let alone to other tribes.

Very few tribes have developed a common law governing decision making in civil cases and, necessarily, gaps are filled by state and federal statutory and common law. Few tribes have explored the idea of gap filling with the laws of other tribes. This is partly due to the unavailability of tribal codes and of major tribal court decisions.

The problems identified here are addressed in the Model Standards for Indian Judicial Systems, part I,

Chapter 4, and in the recommendations in Chapter 5 concerning tribal legislation.

Dearth of Civil Cases

Very few civil matters are brought before Indian courts. This is not owing to a lack of non-criminal disputes requiring resolution on Indian reservations. There are plenty of problems needing attention, but few of them find their way into Indian courts. Those that do are mostly domestic relations cases and collection matters initiated against Indians.

One reason for non-use of Indian courts in civil cases is that the courts do not lend themselves easily to solving the specific problems of Indians. From the standpoint of the judiciary, a lack of training results in their being ill-equipped to conduct civil proceedings, including motions, trials, and appeals. From the standpoint of prospective litigants, the procedures are foreign and either because of expense or distance advocates on their behalf are unavailable. Exploration of new methods seems warranted. Perhaps it would be appropriate in reservation dispute resolution to involve families in family related disputes, to forsake rigorous procedures and rules of evidence, and to employ the judge in the role of mediator. Whatever the best format, Indian court systems should be adapted to enable them to handle Indian problems. To the extent that they are still viable, underlying traditions and values ought to be explored to determine if there are processes and roles for a judicial officer in dispute resolution which would have wide acceptance among people on the reservations. Fuller use of Indian courts in civil disputes would probably enhance the overall role of the Indian courts in the tribal government system.

An obvious aid to better use of the courts for civil cases would be increased and improved training of judges. Virtually all past training efforts have been in the criminal area, with the exception of a few sessions on family law and child welfare. Training in civil proceedings is essential.

Parts I-B and G and V-E of the Model Standards for Indian Judicial Systems, Chapter 4, and recommendations in Chapter 5 pertaining to training are relevant to expanding the use of Indian courts in civil cases.

Need for Qualified Personnel

Although Indian judges' dedication cannot be questioned, they often lack training and other basic qualifications for office. Many tribes have no fixed qualifications, and choose judges based simply upon political contacts or popularity. Others attempt to find candidates with high qualifications, but salaries and other benefits are inadequate to attract persons with the requisites for the job. Many candidates are deterred by the insecurity of a short term of office or vulnerability to removal for political reasons.

The quality of judicial performance has surged since the institution of the NAICJA's judicial training program. However, an unfortunately high turnover of judges has slowed progress. The reasons for judicial turnover are the same as the reasons it is difficult to find qualified candidates for judge.

As with judges, better trained and more qualified personnel are needed at other levels of tribal court function. These include court clerks, court reporters, defenders, prosecutors, and other advocates before the court. Tribal budgets rarely make adequate provision for proper staffing; funds simply are not available at present. Training programs for clerks and advocates have been instituted by the NAICJA and the AILTP respectively. These incipient programs promise to make a significant difference in Indian court practice and procedure.

Solutions to the problems discussed here are addressed by the Model Standards for Indian Judicial Systems, parts V and VI, Chapter 4, and in the recommendations concerning training and personnel in Chapter 5.

Lack of Dispositional Alternatives

Most courts have available some type of jail or other lock-up facilities, but there are few alternatives for inmates whose situations may not require incarceration. This is not to say that detention facilities generally are adequate, but that other serious needs eclipse the need for better jails. A huge number of juvenile matters and alcohol related offenses coming before Indian courts demand special treatment programs and facilities.

Juveniles appearing before an Indian court may be there because of some action of their own which constitutes a criminal or anti-social offense or because of their status (e.g., parental neglect). In either case, it is well established that diversion away from the adult penal system is imperative to avoid more harm than benefit to the child. It appears that a majority of Indian courts, lacking facilities or a coherent program, refer children back to family members without offering the child or the family any assistance. Many tribes have begun to provide some counselling services for children. It is beyond the scope of this study to determine the ideal response of Indian courts generally, or of any particular court, although it can be said reliably that the present system falls short of the desired approach.

Alcoholism is unquestionably the greatest single problem for Indian courts (as well as Indian law enforcement, Indian health, and virtually every other aspect of Indian social welfare and relations). The revolving door syndrome for repeating alcohol offenders is not unique to Indian courts, but the percentage of alcohol related offenses is greater in Indian courts than in others. This signals a problem to which all levels of tribal government must respond, as must government agencies whose duty and mission it is to assist tribes and their governments. Regardless of laudable intentions and efforts, the response so far has been a failure.

The additional available judicial resources which could be dedicated to other tribal problems (such as civil matters) would be tremendous if there were an expedient way of dealing with alcoholics and alcohol related offenses.

The problems discussed here are addressed in the Model Standards for Indian Judicial Systems, parts II-G and VIII-C and D, Chapter 4, and in the recommendations relating to court related services, Chapter 5.

Lack of Planning

For the most part, Indian courts have just "happened." The government and the tribes have responded to needs only after they have become apparent. In only a few instances have there been any planning efforts concentrated specifically on Indian courts.

The Fort Mohave, Cocopah, and Salt River Tribes are examples of tribes which have formulated court plans.

Tribes have failed to take a systematic approach to court planning, and year-to-year budget planning has not suited their needs. The findings of the Long Range Planning Project indicate that there are few court judges who have a significant role in determining their budgets. Although they are quite aware of the needs in their court systems, many of them have no idea what their budgets are. Overall, funding is inequitable among tribes: some sacrifice extensive tribal resources, yet are still unable to meet their needs, while others receive virtually all they need from government agencies.

A problem related to planning is the lack of adequate data. Data collection and records are essential to an efficient and fair court system. They are also the prime ingredients of planning. Almost no tribe has an adequate system for data collection and recordkeeping. This lack has impaired court operations, and has crippled the planning efforts of individual tribes and government agencies.

The problems discussed in this section are addressed in the Model Standards for Indian Judicial Systems, parts IX and X, Chapter 4, and in the recommendations relating to data collection and planning, Chapter 5.

Unnecessarily Narrow Jurisdiction

The effectiveness of Indian courts often has been curtailed by their inability to deal with significant problems arising on the reservation. This is partly due to tribal constitutions and laws which do not define sufficiently the extent of personal, territorial, and subject matter jurisdiction, creating opportunities for persons to challenge court decisions. While the Ninth Circuit Court of Appeals has held that there is tribal jurisdiction over non-Indians,[13] tribal enforcement against non-Indians has been prohibited where the tribe's

[13] Oliphant v. Schlie, 544 F.2d 1007 (9th Cir. 1976), cert. granted sub nom., Oliphant v. Suquamish Indian Tribe, 431 U.S. 964 (1977).

own constitution does not extend its jurisdiction over non-Indians.[14]

Enforcement of laws relating to major crimes is another problem. The Major Crimes Act[15] gives federal courts jurisdiction over many felonies committed on reservations by Indians, but many Indians complain that federal enforcement of these laws and investigation of reported major crimes are inadequate. Whether through a lack of diligence by federal officials or a refusal of Indian witnesses and complainants to become involved in federal proceedings, one possible solution is the use of Indian law enforcement officials and courts to deal with these matters. This does not suggest divesting the federal courts of their present jurisdiction. Rather it suggests that the exercise of tribal enforcement concurrently with the federal government ought to be made more realistic by removing present low limits on the penalties which tribes can impose. The Indian Civil Rights Act prohibits the imposition of penalties greater than six months in jail or a fine of $500 or both by Indian courts.[16]

The problems discussed are addressed in the Model Standards for Indian Judicial Systems, part I, Chapter 4, and recommendations concerned with tribal legislation and congressional legislation, Chapter 5.

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[14]Quechan Tribe of Indians v. Rowe, 531 F.2d 408 (9th Cir. 1976).

[15]18 U.S.C. §1153.

[16]25 U.S.C. §1302(7).

Chapter 4

Model Standards for Indian Judicial Systems

Introduction

The development of model standards for use by all Indian courts was one of the most important tasks of the NAICJA's Long Range Planning Project. Most Indian courts are in the process of growth and change. Virtually all want to improve their ability to dispense justice fairly and efficiently. New courts are being established on a number of reservations where none have existed, because of retrocessions of Public Law 280 jurisdiction or other recent developments. But there has been no set of objective standards for tribes and their court personnel to use as a measuring stick for their own courts. And planning efforts at both the national and tribal levels are hampered by a lack of identifiable goals. The Model Standards for Indian Judicial Systems found in this chapter are intended as guidelines for self-evaluation and as a blueprint for Indian court planning.

A difficult aspect of drafting a "model" for Indian courts is the great diversity among tribes. The impracticality of prescribing standards for urban law enforcement planning is well recognized, and the inherent problems are even greater for Indian tribes which are even more diverse than cities.[1] Differing tribal traditions, values, and methods of dispute resolution must be reflected in court systems unless Indian courts are to resemble Anglo-Saxon models indigenous to no tribe.

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[1]Bureau of Indian Affairs, Indian Criminal Justice Task Force Analysis 1974-1975, at 91-92 (1975).

Thus, where tribal differences exist, the model standards in this report are general. In any event, the standards are not meant to be imposed wholesale on tribes without any modifications to meet particular tribal needs and requirements. Rather, the set of model standards is to serve as an advisory document which tribes can use to determine priorities for improvement of their courts and evaluate what is needed to achieve a high quality Indian justice system. Pursuit of these goals will require a concerted effort and adequate dedication of resources by tribal governments, tribal judges, federal agencies, and Indian people.

It is nearly impossible to prescribe standards without some reliance upon a basic philosophy. The NAICJA Long Range Planning Project staff and advisory committee, with the advice and approval of the NAICJA board of directors, have been guided by these principles:

1. The use of tradition and custom should govern whenever it is applicable in the Indian judicial system in tribal member controversies.

2. Tribes and their courts should exert as much of their lawful authority and jurisdiction as they determine appropriate.

3. The operation of an Indian court should be under the authority of the tribe and its members to insure independence and curtail federal control.

4. The provisions of the Indian Civil Rights Act and other federal legislation must be followed to protect the rights of individuals and to insure the integrity of the judicial system against outside attack.

The success of the recommendations in the model standards depends upon tribal understanding and acceptance, adaptation and modification of the standards to fit individual situations, and adequate planning and funding to permit their implementation. The standards must be explained and presented to tribal leaders, court personnel, and members of the reservation community (Indian and non-Indian) in meetings called for that purpose. The NAICJA will attempt to aid in this task to the extent resources are made available. Ideally, experts who are capable of understanding Indian court needs should be provided. The establishment of a National Indian Judiciary Research Institute (NIJRI) which could assist in explaining the purposes and needs

for the model standards is recommended in Chapter 5. The NIJRI also could help tribes to adapt the standards to their own values and needs and to plan programs to effect the standards.

Four Model Courts

The model standards are the result of extensive research and investigation concerning Indian courts, including both the theory and practice of their present operations. Further, similar standards have been used successfully by non-Indian courts. But it is highly desirable to test the efficacy of the model standards in use in Indian courts. As a part of the Long Range Planning Project, the Bureau of Indian Affairs requested the NAICJA to designate four Indian courts to serve as models to implement the model standards. The experience of the four model courts in their implementation of the model standards will serve as an example to encourage other judges and tribes to make the effort necessary to upgrade their own court systems to meet as many of the model standards as they feel ought to apply to them.

Every attempt was made to choose a sample of different types of courts in order to provide a valid test of the standards. Therefore, the tribes chosen vary in the sizes of their reservations, populations and caseloads, geographic locations and in the different kinds of problems they deal with (fishing and hunting, large non-Indian population, water rights, white backlash, etc.). Also, the NAICJA endeavored to choose from among courts employing different structures, such as Courts of Indian Offenses, tribal courts, traditional courts, and courts serving coalitions of several tribes.

The strength of commitment to improving the court system by the judges, court personnel and tribal council was a primary consideration in choosing among particular tribes. Much effort and time will have to be expended by the tribes whose courts are chosen. Tribal budgets may have to be reordered to place a higher priority on courts. A tribe's past commitment of resources and the existence of some basic facilities and personnel for courts is some measure of its attitude. Furthermore, if model courts with no facilities were chosen, a valid test of the standards in a limited time would be impossible.

Another criterion for the model courts was the capacity to dispense justice fairly (by modern Anglo standards) without sacrificing desirable cultural attributes. Federal court decisions, federal funding, and tribal planning will determine whether tribal courts will retain and revive many of the values that make them uniquely Indian. They necessarily must emulate non-Indian courts in some areas in order to satisfy requirements of the Indian Civil Rights Act and to gain the confidence of non-Indian judges whose comity is desirable. But much of the justification for continuing to maintain separate court systems for Indians will be lost if they become virtually indistinguishable from non-Indian courts.

Other factors considered in choosing the model courts were:

- respect for the court in the tribal community
- availability of qualified personnel to fill court positions
- stability of the judicial system
- good relationship with surrounding jurisdictions
- orderly and efficient existing court system

After a thorough consideration of all the criteria, the Long Range Planning Project advisory committee recommended, and the executive committee of the NAICJA board of directors approved, selection of the following courts:

Northern Cheyenne Tribal Court
San Juan Pueblo Court
Gila River Tribal Court
Point-No Point Treaty Tribes Court (Skokomish, Lower Elwha, and Port Gamble Clallam Tribes)

A summary of the considerations in choosing each of the tribes follows.

The Northern Cheyenne Tribal Court has a large caseload, including a number of civil matters. The tribe now spends over $25,000 of its own funds for its court and has an interest in improving the judicial system. There is a separate juvenile code and court, and provision exists for appeals. Jurisdiction is exerted over non-Indians. The tribe is located in the plains states and there is a strong non-Indian backlash in Montana. Northern Cheyenne tribal members are showing a renewed interest in their customs and traditions. Some court and jail facilities now exist on the reservation.

The San Juan Pueblo in northern New Mexico maintains a traditional court and a tribal court. The judge of the tribal court is educated in law. Caseload and territory are small. Recently the Pueblo prepared a plan for the betterment of its court system and requested funds to assist in this effort from the BIA. The court runs efficiently and enjoys the support and respect of the Pueblo's governor and other leaders. There is a courtroom and basic equipment.

The court of the Gila River Pima-Maricopa Tribe in Arizona operates in an orderly, efficient manner. It has an implied consent ordinance under which it asserts jurisdiction over many non-Indians, especially in traffic matters. The court has a strong chief judge and the council has responded well to his ideas for court improvement. Caseload is of moderate size and jury trials and appeals occur with increasing frequency. The court has a prosecutor and plea bargaining is utilized in over 40 percent of the cases. There is a larger civil caseload than in most Indian courts. The tribe has agreements with contiguous counties, the State of Arizona, and several tribes for recognition of its court's judgments. Effective cross-deputization arrangements also exist.

The Point-No Point Treaty Tribes in the State of Washington, Skokomish, Lower Elwha, and Port Gamble Clallam, have come together for many treaty related matters because of their common treaty and location in the same general geographic area. Recently, they began planning for a coalition court system. Initial plans called for a coalition court for treaty fishing matters only, but the tribes are now discussing broadening the coalition to cover all purposes, and perhaps to expand the number of tribes covered. Two of the three small tribes have operated courts in the past, while the third, Lower Elwha, has used the court of the neighboring Makah Tribe. None has had a large enough caseload to justify full-time personnel and facilities. Washington is a Public Law 280 state, although a trend toward retrocessions and a recent Ninth Circuit Court of Appeals decision rejecting the Public Law 280 scheme on many Washington reservations make it likely that jurisdiction of Indian tribes and their courts in that state will increase.

The National American Indian Court Judges Association has requested funds from the Bureau of

Indian Affairs to enable it to embark on a program of assisting the four model courts to implement the model standards. The NAICJA intends to hire a full-time Indian court planner with the requested funds. The planner will coordinate planning teams for each of the four model courts to map programs for implementation of the model standards.

Some immediate action is needed if the four Indian courts selected are to be able to attain the standards which apply to and are desired by them because the costs beyond their existing court budgets must come from government agencies whose budgets are determined some two to three years before a program year. The planning team approach for model courts resembles the approach recommended for individual tribal needs assessments in Chapter 5. By starting the process now, an earlier implementation of the standards for the model courts will be possible and the approach recommended for all courts can be tested.

The model courts planning team is to consist of an Indian court judge from the region in which a model court sits, the Indian criminal justice planner from that region, and the BIA area judicial officer, if any, from the area in question. In addition the court planner will include other persons on the team because of their special expertise relevant to a tribe's particular needs. For instance, a specialist in data collection or record-keeping might be included on a team going to a court which has identified that area as a problem.

The planning team will also include the chief tribal judge of the model court, a representative of the tribal council or the tribal chairperson, a reservation planner, and such other persons as the chief judge and tribal chairperson see fit to include on the team. The planning team will spend two to four days on site to assess the situation and to become familiar with local problems and tribal personnel. The team will develop plans necessary to implement the model standards and an adequate budget to carry out the plans.

Following the reservation visit, the NAICJA court planner will summarize the results in an overall court needs assessment and program plan which would then be submitted to the tribe for its approval. Once approval is obtained, it is anticipated that the plan and supporting budget will be made a part of the tribe's program and included as a high priority in the tribal budget.

A second function of the NAICJA court planner will be to assist each of the tribes represented by the model courts in obtaining funding to carry out their plans to adhere to the Model Standards for Indian Judicial Systems. This would involve discussions with government agencies such as the Bureau of Indian Affairs, the Law Enforcement Assistance Administration, the Department of Labor (CETA), the Department of Health, Education, and Welfare, and others. Also, the planner may approach private sources, such as corporations and foundations. The purpose of this fundraising effort is to supplement the model court budgets as necessary pending inclusion of an adequate budget in the next possible federal budget cycle.

A third function of the NAICJA court planner will be to help each model court obtain the technical assistance it needs. This entails retaining consultants, deploying NAICJA instructors and experienced judges and directing the model courts to other sources of assistance including area judicial officers, LEAA Indian criminal justice planners, experts in operation and administration of non-Indian courts, such as the Institute for Court Management, the National Center for State Courts, and others.

The planner's fourth function will be evaluation and review of the model courts. Plans will be modified to respond to experience. Valuable information for other courts desiring to pursue the model standards also can be gained. Thus, this function would serve as a means of testing the efficacy and utility of the standards. Further, it will give the four courts involved valuable feedback on their progress in meeting the standards and carrying out the plans developed by them for that purpose.

The Model Standards

The Model Standards for Indian Judicial Systems are printed below in a topical outline, with brief explanatory narratives following each subject.

I. Tribal law.

A. Codification.

1. All tribal laws and customs applicable in the courtroom shall be codified, so far as practicable, in order to give notice to all persons subject to them.

a. Separate chapters or codes should be created for special areas of law or custom, such as juvenile or hunting and fishing. These chapters should include substantive laws and rules of procedure to apply when that type of law is before the court.

b. The code should be published and available to all persons at a low cost, and free if possible.

c. Where codified law does not exist, the tribal code should incorporate by reference the tribal customs or laws of other tribal jurisdictions. State law should be used only where tribal law is not applicable.

d. Adequate notice should be posted at reservation boundaries to acquaint non-Indians with customs of which they would not normally be aware.

2. Revision of the code should be easy to accomplish.

a. A committee should conduct periodic reviews to update the tribal code and recommend revisions.

b. The revision committee should include the chief judge, members of the Indian community, and a cross-section of tribal government personnel.

c. Where the tribal constitution or code is being revised, proposed revisions should be made generally available to the public for discussion.

d. Procedures for accomplishing changes in codes should be available to all tribal members.

e. A procedure for codification of revisions and distribution of those revisions to persons who have copies of the code should be initiated.

Explanation

It is essential to update and make available current tribal laws. Tribes should be encouraged to look beyond state and federal laws. Tribal codes need to be more comprehensive and concise. Inclusion in codes of all applicable laws will help insure that the laws important to the tribe, both modern and traditional, can be considered by the court. Separate chapters for special areas of law are necessary in the code to promote efficiency in use of the laws, and because different kinds of procedures may apply in the courtroom, such as when juveniles are before the judge. A compilation of the codes of all tribes should be available for use by tribal judges for reference when the current code of a particular tribe does not cover the situation.

B. Customary law (Indian common law).

1. Customs shall be recognized in tribal codes and court procedures to the full extent possible. The use of custom by the court shall be encouraged.

2. Customs of the tribe should be collected or codified for use in the tribal court, and by non-Indian courts which apply them in proper cases.

3. Indian advisors with a knowledge of tribal customs and tradition should be available to the court to interpret both written and unwritten tribal customs. Use of such advisors should be authorized in the code.

4. Procedures reflecting tribal tradition, authority and respect should be incorporated into court rules. Methods of encouraging and simplifying the use of tradition should be developed.

5. Traditional methods of resolving disputes should be used whenever applicable. The use of the traditional extended family network is to be encouraged in the disposition of family related disputes.

6. Interpreters shall be available to assist parties and the court whenever there is a situation where native language is used in the court (see part VI-K below).

Explanation

It is "Indianness" which makes tribal courts different from Anglo courts. The use of customs which are important to the tribe in the courtroom should be encouraged in tribal member disputes. Procedures should be designed to make the use of custom in the courtroom as simple as possible for all parties. Respect, understanding and greater effectiveness of Indian courts can follow application of traditional law and law ways. An example of using Indian traditional procedures would be to use traditional seating arrangements (e.g., circle) in the courtroom, or to have tribal power symbols placed in the courtroom. Steps should be taken to insure that custom is not used as an excuse to circumvent tribal laws or individual rights or to grant special favors, nor should custom be avoided to gain special favors. Notice of the fact that certain customs will be applied to non-members should be posted and available in prominent places to avoid disputes by non-members claiming they had no knowledge of the applicable law.

C. Jurisdiction.

1. Jurisdiction of the courts and the tribe should be clearly and simply defined.

a. Territorial limits of jurisdiction, both on and off the reservation, should be published and available to those enforcing or subject to tribal law.

b. The tribal jurisdiction statute should not exclude any subject area in which the tribe could and might wish to assert jurisdiction. This will guarantee the jurisdictional authority necessary to meet the need for expanded jurisdiction.

(1) The tribe should remove any impediments which may exist in its constitution or laws to exertion of jurisdiction over non-members.

(2) The tribe should state and clearly express its jurisdiction so that it may be exerted over any crime as the need arises (see part I-A-1 above).

(3) The tribe should state its jurisdiction so that it may be exerted over any civil cause of action, administrative or regulatory problem as the need arises.

2. Those tribes whose constitutions require BIA approval before an ordinance becomes effective should consider amending the constitutions to remove the approval requirement.

Explanation

The confusing overlap of tribal, state, and federal jurisdiction is one of the most serious problems besetting tribal courts. Crimes going unpunished because no one knows who has jurisdiction or because the tribe lacks authority to exert jurisdiction contributes to a lack of respect by those under the tribal court's authority. These standards do not advocate taking jurisdiction over non-Indians, only that tribes should not preclude the exercise of such powers.

D. Juvenile law.

1. A separate juvenile code or a separate chapter in the tribal code should be enacted to deal with juvenile problems, including truancy and status offenses.

2. Tribal customs and traditions regarding juveniles should be codified in the juvenile code, since this is an area where traditional ways are of critical importance. Use of the traditional extended family network should be emphasized in the resolution of cases involving juveniles.

3. Adequate jurisdiction shall be undertaken by the tribe to insure that all aspects of tribal juvenile problems can be dealt with by the tribal court.

4. Separate procedural rules should be used when dealing with juvenile problems.

5. Adequate facilities and trained personnel should exist so that all treatment and incarceration ordered by the court for Indian youths may be carried out on the reservation.

Explanation

Juvenile law is a very complex and relatively unknown area of Indian tribal law, but is probably the most serious problem tribal courts face after adult alcohol problems. Juveniles can be described as the tribe's most important resource, for they are literally the future of the tribe. Therefore it is important that juvenile problems be dealt with by the tribe in a comprehensive manner which reflects tribal traditions. Wherever possible, Indian juvenile problems should be dealt with and treated on the reservation by tribal personnel or, if appropriate, within the family unit. Preventive intervention before incarceration should be encouraged. Closed conferences should be used when juveniles are involved, and counselling of the entire family should be emphasized. Status offenses for juveniles should be reviewed. Tribes should consider adoption of the American Indian Law Center's model children's code.

E. Enforcement.

1. The tribal court and judges should not have supervisory or administrative authority or control over tribal law enforcement personnel.

2. Tribal law enforcement personnel should be under the supervision and control of the tribal government.

a. The court should have the authority to order police to serve warrants, take people into custody, and appear as witnesses.

b. Reservation law enforcement facilities should be separate from court facilities.

Explanation

The tribal court can only be as effective in maintaining law and order and dispensing justice on the reservation as the law enforcement personnel covering the reservation are in enforcing laws and prosecuting violations. Except for a shared interest in law enforcement the tribal law enforcement agency and the judiciary

should exist as separate and independent. Therefore, the police must have their own standards of operation and conduct. However, where juvenile or domestic relations problems occur, the police and courts should cooperate to avoid incarceration whenever possible, and traditional methods of conflict resolution should be used.

F. Place of court in the tribal government structure.

1. The judicial branch should be independent of other parts of the tribal government whenever consistent with tribal custom and tradition.

a. Independence of the tribal court as a decision making body in the tribal government should be expressed in the tribal constitution.

b. If separation is not possible because of tradition, a judiciary subordinate to, for instance, the tribal council should be assured of independence in decision making in individual cases.

c. Tradition should not be used as a means to hide the expression of influence in individual cases.

2. Judges of the tribe should have status and respect equal to other tribal officials.

Explanation

The role of the tribal court in the tribal government system is an often confusing combination of traditional justice concepts and the demands of the non-Indian world. Because most traditional Indian justice systems were a function or arm of the tribal council or chief, it is often difficult for tribal councils and tribal members to recognize the current need for independent status of the Indian judiciary to avert possible ICRA and tribal political problems.

G. Review of tribal legislative and administrative actions.

1. The tribal court should have the authority to review tribal legislative and/or administrative decisions for ICRA due process or tribal constitutional violations to the

extent this authority does not conflict with tribal customs.

2. Before a tribal court undertakes a review of a tribal administrative or legislative decision, all other methods of tribal review including review by the tribal council should have been exhausted.

3. Any decision or order handed down by a tribal court on a tribal legislative and/or administrative decision should be written and should include reasons for upholding or overturning the tribal council's decision.

Explanation

This standard recognizes demands being placed on tribal governments under the Indian Civil Rights Act. A tribal council may not like the idea of giving the tribal court and judge authority over its decisions, but if the tribal court does not review these legislative or administrative decisions, the federal district court will. There must be a channel in the tribal system to test the validity of these decisions under tribal law and custom as well as the requirements of the ICRA, rather than letting a non-Indian judge with no knowledge of tribal customs decide the validity of the law or order according to his/her own values and precepts. The tribal council still would retain the authority to rewrite or relegislate a law to meet the court's objections, or the tribal administrative body can reevaluate the facts. But the court should have final authority over interpretation of laws and customs and whether they have been followed in a given case.

II. Court procedures.

A. Meeting requirements of the Indian Civil Rights Act (ICRA), and preserving Indian governmental autonomy.

1. Tribal courts should have written rules of court procedure that provide for all rights enumerated in the ICRA. However, the terms "due process" and "equal protection" should be construed with regard for historical, governmental and cultural values of the tribe.

2. A primary purpose of court procedural rules shall be to protect individuals from arbitrary tribal action.

B. Courtroom procedures should include:

1. Traditional ways that reflect the Indianness of the court.

2. Arraignment procedures and pretrial conferences.

3. Requirements for practice before the court.

4. Rules of evidence.

5. Motions.

6. Courtroom procedure.

7. Verdicts.

8. Procedures for sentencing or other dispositions.

9. Provisions for written decisions or case summaries.

C. Rules of procedure should be followed that insure that fairness and justice is done to all persons before the court.

Explanation

Procedures are important to insure the effective operation of the court and to help make tribal courts courts of record. Clear and concise rules of procedure are needed to prevent reviews under the ICRA in federal courts, and to promote orderly and efficient proceedings. Rules may be interpreted liberally and applied with flexibility consistent with requirements of due process. The goal of protection of individual rights in the court should be achieved by maintaining unique Indian traditions and heritage in harmony with the establishment of such individual rights. Model rules of courtroom procedure should be developed which can be incorporated into tribal codes.

D. Pretrial proceedings.

1. Defendants should be made to understand their rights fully before they are allowed to plead guilty or refuse counsel in the tribal court.

2. Once arraignment has occurred, trial should occur as soon as possible while insuring that defendants have sufficient time to prepare their defense.

3. If a judge has had a role in plea bargaining or informal pretrial conferences between the prosecution and defense, he/she should offer to disqualify him/herself.

E. Bond.

1. Both bail money and release on own recognizance shall be used as alternatives to pretrial incarceration of a defendant whenever appropriate.

   a. The amount of bail required shall be appropriate to the crime allegedly committed and sufficient to guarantee the defendant's return to the court.

   b. Release on own recognizance should be utilized in instances where the return of the defendant to the courtroom can be reasonably expected.

2. The use of personal guarantees of friends, employers or relatives to assure the return of defendants to the courtroom should be considered.

3. Where possible, the defendant should be released into the custody of a person respected in the Indian community.

F. Juries.

1. The number of jurors required for a case shall be clearly expressed in the tribal code, with at least six in criminal cases involving possible imprisonment.

2. Whether and under what conditions juries may be demanded shall be clearly expressed in the tribal code.

3. Jury selection shall be designed to insure a fair and impartial jury composed of a cross-section of the community.

   a. Challenges to jurors should be limited to cause and possibly a specific number of preemptory challenges.

   b. A sufficient roll of prospective jurors should be kept so that there will always be enough to make up a jury.

   c. Non-Indians and non-tribal members residing on the reservation should be on the jury roll in cases where non-Indians or non-tribal members are parties to avoid possible due process claims under the Indian Civil Rights Act.

4. Sufficient facilities should exist so that the jury may deliberate in private.

G. Sentencing.

1. Tribal traditional sanctions such as requiring restitution should be codified and within the sentencing judge's discretion.

2. When an offender is convicted, the preferred disposition by the court should be the provision of proper treatment to correct the defendant's conduct. Where no treatment facilities are available, or the defendant does not appear likely to be aided by treatment, incarceration should be considered. Incarceration should be combined with treatment whenever possible.

3. The background and current situation of the defendant, such as prior convictions, probation reports, and psychological evaluations, should be considered when imposing sentence on him/her.

4. Sanctions should be imposed in the form of either a fine or a jail term or both; but giving a defendant the choice of a jail term or a fine probably violates the ICRA.

5. Probation as an alternative to or in conjunction with a fine or incarceration should be considered.

H. Motions and stipulations.

1. The use of motions and stipulations should be encouraged to expedite proceedings and avoid litigation of unnecessary points of law or procedure.

2. A separate time should be set for hearing motions.

3. Motions to dismiss or for summary judgment should be allowed at any time during the progress of a case.

1. Presence or absence of prosecutors and defenders.

1. The tribal government should provide prosecutors in the court, except where it would conflict with traditional practices.

2. If prosecutors are hired to present cases in the tribal court, defenders should be available free of cost to all indigent defendants who request them.

3. Tribal members with a knowledge of tribal laws and customs should be preferred for the positions of prosecutor and defender.

Explanation

Procedures are necessary to insure that due process and justice exist in the courtroom. Procedures should be flexible, but basic guidelines should be followed so that a defendant has a full chance to be cleared and has the benefit of all individual rights afforded by the Indian Civil Rights Act. Model standards for juries and sentencing should be set nationally and a model book of forms and other motions that could be used in the courtroom should be developed.

III. Relations with other jurisdictions.

A. Extradition, reciprocity agreements, and comity.

1. Tribal governments should initiate extradition and reciprocity agreements with other jurisdictions to insure that tribal judgments are enforced and respected beyond reservation boundaries.

a. Tribes should initiate arrangements for reciprocal enforcement of state and county judgments and orders and other tribal judgments. Judgments from other jurisdictions need be enforced only if a reciprocal agreement exists with that jurisdiction.

b. Where reciprocity is not desired, the tribal decision should be clearly expressed to surrounding jurisdictions.

2. The extent of tribal jurisdiction in relation to federal and/or state jurisdiction should be clearly defined so problems do not arise in enforcement, investigation or prosecution of crimes.

3. Methods by which reciprocity can be achieved include:

a. Mutual legislation at the state and tribal level.

b. Intergovernmental agreements, either formal or informal, which should be written.

c. Recognition through a court case that the tribe is entitled to full faith and credit.

d. Comity.

4. Procedures should be instituted in the tribal code for the enforcement of state and county orders and judgments, as well as those of other tribes.

a. The identity of the party charged should be confirmed.

b. Proceedings should be checked to confirm that there was due process.

c. Proceedings and verdict should be reviewed to determine if they conflict with tribal policy (e.g., confession of judgment may be contrary to policy of tribe). If so, the tribal court should make its own determination on the merits of the case.

5. Orders and judgments to be enforced should be clearly defined. They might include:

a. Extradition orders.

b. Support orders.

c. Creditor claim judgments.

d. Prisoner exchange requests.

6. The tribal government should insure that any agreement made with a surrounding jurisdiction is reciprocal both in theory and practice.

Explanation

Circumstances and tribal policy should dictate whether a tribe enters into reciprocal agreements with surrounding federal, state and tribal jurisdictions. Once done, court proceedings should be more than automatic approvals of judgments and orders to insure that due process has been accomplished. For instance, in the creditor claim area, many Indian people have entered into credit agreements under duress or fraud, and enforcement of judgments arising out of these arrangements would offend tribal policy as well as fundamental fairness. Intergovernmental agreements should be clearly expressed and preferably written.

B. Cross-deputization agreements should be clearly expressed to prevent any misunderstanding about shared responsibilities. A written agreement is preferred.

Explanation

Cross-deputization agreements need to be as clear as possible to avoid misunderstandings or the use of such agreements to the detriment of tribal members. Cross-deputized non-Indian police officers potentially might enter the reservation and create a greater danger or problem than that which they were originally trying to quell. Cross-deputization agreements should give the tribe authority over a deputized person while on the reservation so that his/her actions can be controlled.

IV. Appeals.

A. An appellate process shall be available to defendants within a reasonable time after a trial court decision has been entered.

1. Notice of appeal should be required within thirty (30) days of the trial court decision.

2. The decision of the appeal shall occur within a reasonable period; reasons for the decision should be written.

B. Appeals should be based on the record of the trial court below and no new evidence should be introduced.

1. Arguments should be written and submitted to the appeals court.

2. Brief oral argument should be permitted before the appeals court.

C. Appeals judges should have no knowledge of or personal interest in a case before them, and should not have been involved in the lower court trial.

D. Appeals should be heard within a short time after the trial decision has been rendered, preferably within ninety (90) days after the appeal has been requested.

E. Inter-tribal appellate systems should be established to insure a body of appeals judges who have no conflict of interest. A minimum of three judges should make up the appeals court. The appeals court could be set up in one of the three following ways, or in the traditional way of the tribe.

1. An appeals panel could be made up of judges from one cultural unit, such as all Apache reservations, and judges from reservations other than the one where the trial was held would hear appeals. This approach insures cultural integrity.

2. Judges from a different reservation could hear an appeal. The judges should be aware of tribal traditions. This method avoids conflicts of interest.

3. A permanent appeals court made up of present or past Indian judges or tribal elders who are familiar with tribal traditions could be established.

F. On large reservations appellate judges could be selected on a rotating basis from the ranks of trial judges.

1. Appeals judges shall have not heard the case at the trial level, or have an interest in the case.

2. Permanent appeals judges may be hired to fill some of the positions on the appellate court, depending on the demands of the tribe's caseload and financial constraints.

Explanation

The actual selection of judges for a tribal appellate court is covered by the same standards set forth for trial judges (see part V). The appellate court should consist of no less than three judges. For most reservations the maintenance of a permanent court of appeals is an unbearable expense and is not justified by the caseload. Appellate courts serving more than one reservation will promote an efficient use of resources and personnel.

When inter-tribal appellate agreements are enacted, each participating tribe should incorporate the appellate court into its own government and code. The appellate court will then act under the law of the particular tribe when considering an appeal, and challenges to the authority of the court can be avoided.

Large (in area or population) or isolated tribes may want to keep their appellate systems within the tribe. Even in this situation unnecessary expense can be avoided by having only one or two of the seats on the appellate court filled by permanent appellate judges. The remaining seats can be filled by trial judges not having an interest in the case, preferably on a rotating basis.

Appellate cases should be heard on the record only. Trials de novo are one of the reasons that state courts refuse to recognize tribal judgments. Appellate procedure should be simple enough so that all persons will be able to appeal easily. Thus, for example, required briefs should be simple in form so that persons with little education will still have the ability to appeal.

V. Judges.

A. Selection.

1. Minimum qualifications shall be set by the tribe for the office of tribal judge, and he/she should be selected by a subdivision of the tribal government or elected by the tribe at large.

   a. Qualifications should reflect a preference for legal knowledge, an understanding of the tribal code, experience in practice before the tribal court, an understanding of tribal traditions and customs, sufficient education to function effectively in the courtroom, and good moral character.

   b. Other considerations which may be included in the selection of judges could include a minimum age, being a tribal member, ability to speak the tribal language, and residence on the reservation.

   c. Qualifications should be designed to minimize the influence of popularity or improper preferences in the selection of judicial officers.

2. Except when it is inconsistent with tribal tradition, Indian judges should be hired.

3. The selection process must be designed to prevent personal gain or improper influence by any person on the selecting board.

4. Salaries for judges must be adequate to attract the most qualified individuals.

5. A salary scale and hourly wage scale shall be developed to serve as guidelines to tribal councils.

Explanation

The image that the tribal judicial officer presents is almost as important as the way he/she performs. A person selected or elected only on the basis of popularity often will have no qualifications to perform the job of judge, and is likely to engender little respect for the authority of that position. Thus enforcement of the law is made even more difficult. A person selected for the job of judicial officer on the

basis of some preference or bias is likely to raise the suspicion of those who come before the court that they may not always receive a fair and impartial decision. This may encourage them to seek resolution of their problems in some other manner or to disregard any decision handed down by the court. A screening board should be developed to evaluate qualifications of candidates for tribal judgeship, perhaps by means of an examination or oral review. Maximum effort should be made to insure that only the best qualified persons attain the office of judge. A strong preference for Indians to be judges should exist. A national entity should develop guidelines for judicial salaries.

B. Numbers.

1. An adequate number of judges shall be retained by the tribe to insure that the tribal caseload is handled efficiently and with enough time to allow complete and fair resolutions of controversies.

2. An adequate number of judges should be retained to insure that a judge will be available at all times in case of disqualification.

   a. If alternate judges are used for disqualification situations, they must have no employment which will cause a conflict of interest with judicial duties.

   b. Training should be mandatory for alternate judges.

3. The number of judges retained by the tribe should be designed to insure that all judges will have adequate work to perform.

4. Guidelines should be developed to correlate numbers of judges with caseload, time spent in the courtroom, and other pertinent factors.

Explanation

On many reservations the number of judges has no correlation to the caseload or amount of work that the judge must do. Once a determination is made of what

an adequate judge-to-caseload ratio is, tribes should move to align their number of judges with this ratio. Another problem, particularly on reservations with small numbers and close family ties, is disqualification of judges because of knowledge of or relationship to parties in a case. Sometimes this leads to a situation where there are no available judges within the reservation and a judge must be called in from outside, often at great cost and delay. Sufficient alternate judges will help alleviate this problem. Also, the use of coalition courts serving several reservations will work to insure a qualified judge in all cases. Standards for disqualification should be developed by a national entity, as should guidelines for correlating the number of judges needed with court caseload and other factors. Guidelines also should be developed for needs for other court personnel.

C. Tenure.

1. Judges should be subject to a probationary period when they first enter office, during which time their performance should be reviewed periodically by a supervisory body of the tribal government according to objective standards set by a national entity.

2. Removal of Judges during the probationary period should be subject to a hearing process incorporating ICRA due process rights and tribal customs.

3. Once a judge has been in office for a specified period, he/she should be removed from office only for justifiable cause as set forth in subsection D below.

4. The term of office for a judge should be long enough to acquire expertise in his/her job and to apply that expertise to serve the tribal population. In no event is a term of less than three years adequate, and a longer term is recommended.

5. The process for reelection or reselection of judges who have served a period in office and performed adequately should be structured to give those persons an advantage in retaining their office.

Explanation

The problem of judges being removed from office after short periods of time for any number of reasons is well known. This removal problem results in a waste of training time and money invested by the NAICJA and its funding sources and in a waste of the valuable experience a judge has gained during his/her term in office. Removal of judges after short periods lessens the competency and respectability of the office and militates against a fair, impartial and efficient tribal judicial system. An example of structuring the reelection procedure to give preference to experienced judges would be to have the judge run only against his/her record, and not against challengers. A national entity should set standards by which all judges' performance should be measured during the probationary period.

D. Process for removal.

1. A procedure to provide for the removal of judges must be set forth in the tribal code, in the tribal constitution, or by resolution.

2. The procedure for removal of a sitting judge shall be fair, time consuming, and difficult to accomplish so that judges may not be removed arbitrarily or for political reasons.

   a. A vote of tribal members or members of the tribal council should be required before a judge is removed from office. The required vote should be a proportion over a majority of those voting, such as two-thirds or three-quarters.

   b. A fair hearing process as assured by due process provisions of the ICRA and tribal custom shall be provided to allow the accused judicial officer to hear the charges and to provide a chance to respond and present witnesses and evidence.

   c. People involved in the removal process with interest or bias shall be disqualified from any aspect of the removal process.

3. A list of causes for removal should be developed and included in the tribal code. Causes that would justify removal of a sitting judge could include:

   a. Conviction of a felony.

   b. Professional incompetence.

   c. Chronic alcoholism.

   d. Conviction of a misdemeanor involving dishonesty or acts offensive to the morals of of the community.

   e. Flagrant violations of ethical standards or tribal customs (see subsection G below).

   f. Repeated failure to perform duties.

   g. Failure to complete required training (see subsection E below).

4. Suspension with treatment should be considered as an alternative to removal when appropriate. Suspension while corrective training is obtained also should be considered as an alternative to removal.

Explanation

The vulnerability of a sitting judge due to an unpopular decision or change in governing political power must be checked. Judges are supposed to be fair and impartial. The possibility of quick and easy removal can influence a judge's decisions. On the other hand the removal process must be effective enough so those judges who should be removed are removed. The image of the judge in the community is important in engendering respect for the court's authority. Thus, for example, a sitting judge who is habitually drunk should be removed even if his/her drinking does not interfere with judicial duties. This is because a defendant who is sentenced for being drunk can have no respect for the court if the person sentencing him/her is also known to drink excessively, but suffers no consequences for it.

E. Training.

1. Training should be mandatory for all persons holding a tribal judicial office.

a. Training is desirable for all judges before they assume office.

b. Completion of a training course each year shall be required.

c. Training should be received in all specialized subjects over which that person exercises authority, such as juvenile law.

d. The training received should be under a program approved by a national entity composed of representatives of Indian organizations involved in training.

Explanation

Training is a crucial and vital element of the qualifications of any judge, and steps need to be taken on a continuing basis to insure that such officer has an understanding and working knowledge of all areas of court procedure, laws, and customs. Having a list of training programs approved by a national entity will help insure that judges receive adequate training and that tribal councils will have guidelines as to appropriate training for judicial personnel. Available training courses should be utilized where such courses are applicable to a tribe's legal problems. A national entity should set standards for what constitutes good training, i.e., length of course and what subjects should be covered.

F. Independence.

1. Separation of powers should exist between the judicial branch and other branches of tribal government, and should be expressed in the tribal constitution.

a. If tribal council members are used either as the trial court or as the appellate court, court procedure and selection of judges should be designed to avoid any conflict of interest.

b. Governments in which the combination of legislative, executive and judicial functions are based on tradition should insure that fairness and due process to protect individual members exist in judicial proceedings.

2. The tribal judges shall avoid informal contacts with the law enforcement branch of the tribal government regarding judicial business.

3. The tribal judges shall avoid informal contacts with officials and offices of the Bureau of Indian Affairs, and other state and federal agencies regarding judicial business.

4. Judges shall avoid ex parte contacts; discussions with the judge shall be held only when all parties are present or represented.

5. Judges should disqualify themselves for reasons of bias, relationships, or interest in a case.

6. Solicitation of legal advice by tribal judges from lawyers, judges or other persons should be limited to points of law and hypotheticals, and there should be no discussion of the merits of a particular case.

Explanation

The presence of the tribal court as an independent and impartial fact finding and law deciding body is important for its use and respect by those under its jurisdiction. Recognition of independence and the removal of political pressures from the Indian judiciary will be a major step toward the acceptance of tribal courts by state and federal courts. A tribal court should be perceived as a distinct part of tribal government by the Indian community. Independence includes financial independence from the other branches of government, independence in decision making, freedom from corrupting influences, and preferably a physical separation of court facilities from the facilities for law enforcement or other branches of government. Judges should be encouraged to seek legal advice from other professionals, but caution should be exercised by the judges to avoid improper contacts (see parts I-G and VI-B-1). Standards for disqualification of tribal judges should be developed by a national entity.

G. Ethics.

1. The tribe should adopt a code of ethics to insure that judges will be subject to certain standards of conduct that will engender respect for the position and authority of the judge and insure fair, impartial and unbiased decisions and conduct by the judge.

2. The code of ethics should be designed to:

   a. Minimize or prohibit the following:

      (1) Ex parte contacts that result in outside knowledge of the incident (see subsection F-4 above).

      (2) Participation in proceedings where parties are related to the judge.

      (3) Participation by judges in legislative or administrative decision making, except where such role is traditional.

      (4) Undue influence on the court by tribal officials, BIA officials, parties, relatives, etc.

      (5) Obtaining outside opinions on the merits of a specific case (see subsection F-6 above).

      (6) Interference in the proceedings except where necessary to protect the rights of the defendant.

      (7) Using procedures not covered by tribal law or custom.

   b. Maximize the following:

      (1) The use of traditions of the tribe.

      (2) The objective use of court procedures.

      (3) The rights of the defendant to a fair trial.

      (4) The orderly and fair nature of trial proceedings.

      (5) The impartiality of the judge.

      (6) The overall justice of the final outcome.

Explanation

A code of ethics is necessary for the Indian judiciary, not only to engender a spirit of rendering fair treatment to persons under the tribe's jurisdiction, but to give notice to other jurisdictions that fundamental fairness and due process exist in tribal court proceedings. Creation of a national code of ethics for the Indian judiciary by a national entity would operate to fulfill this purpose best. One method of monitoring compliance with such a code would be the establishment of an ethics board by the NAICJA to rule on alleged violations of the code. Ethical standards should be incorporated in rules of court procedure. The ethical code that is created should reflect the traditions of the tribe.

VI. Court personnel.

   A. Ethics.

      1. An ethical code should be enacted by the tribe to cover the actions and relationships of all personnel connected with tribal court operations.

      2. Conflicts of interest and preference for any party should be eliminated.

      3. Confidentiality of the court's business should be stressed, especially in the juvenile area.

      4. Court personnel should be educated about the role of the court in the Indian community, and a public relations effort should be conducted to improve the image of the court in the community.

   B. Training.

      1. All court personnel shall receive available training in courtroom procedures and operations and other duties relevant to their position.

      2. All court personnel should receive training in tribal customs and law.

      3. Training should be made a mandatory requirement for holding a court support office.

C. Legal advisors.

1. The duty of the legal advisor is to advise the judges on points of law and to discuss hypothetical situations.

2. The legal advisor shall not advise the tribal judge on the merits of a specific case.

3. The tribal court's legal advisor should be available to judges at least by telephone for day-to-day consultation.

4. The legal advisor should have knowledge of tribal law and custom and should have a working knowledge of the tribal language if it is regularly used in court proceedings.

5. The tribal legal advisor shall not be the tribal attorney because of conflict of interest problems.

6. The tribal judge's independence as a decision maker shall not be influenced by the legal advisor.

D. Court clerks.

1. The clerk shall respect the confidentiality of the business conducted by the court, and shall perform the duties of his/her office in a professional manner.

2. If there is a sufficient caseload, there should be separate clerks for the tribal juvenile court and appellate courts.

3. The clerk is responsible for maintaining the records of the court and supervising the court calendar.

4. The clerk should be qualified to perform the duties of his/her office. The clerk should have the business skills of filing, shorthand, typing and the organizational ability to administer the office efficiently. The clerk's salary should be adequate to attract qualified personnel.

E. Court reporter.

1. The reporter's function is to record all

court proceedings, and to transcribe those proceedings when required for an appeal or enforcement of a tribal judgment outside the tribe's jurisdiction.

2. The court reporter should be in the courtroom whenever court is in session.

F. Probation officer.

1. Probation officers (male and female) shall be hired to supervise those persons placed on probation by the tribal court, or who are released from incarceration subject to some condition, such as enrolling in an alcohol rehabilitation program.

2. A separate probation officer should be hired to deal with juveniles if the caseload is sufficient.

3. Probation officers should have social work training. An understanding of police operations and tribal customs also is necessary for proper performance of probation duties.

4. Probation officers should be subject to the control of the tribal court.

   a. They should be required to report violations of probation to the tribal judge.

   b. They should be required to report monthly on the progress of their cases.

G. Court administrator.

1. When the size of a court warrants, a court administrator should be hired to coordinate and administer the tribal court. Otherwise, the functions of the court administrator can be combined with the court planner or, if necessary, the chief judge or clerk.

2. The tribal court administrator should have the following responsibilities:

   a. Hiring and firing of all court personnel except for the tribal judges, under authority delegated by the chief judge.

   b. Planning and administration of the court budget.

c. Oversight of all recordkeeping and reporting.

3. The tribal court administrator should be required to have training in the areas of office and court management.

H. Court planner.

1. The tribal court should have access to a court planner to organize court operations and plan for the needs of the court.

2. The planner should conduct periodic reviews of court operations, suggest alterations in structure where necessary, and apply for funding for the court.

3. The tribal court planner should have responsibility for:

a. Planning for the court.

b. Writing federal grant applications.

4. The tribal court planner should be required to have training in court management and planning.

I. Prosecutor.

1. The tribe shall hire one or more tribal prosecutors to present cases before the tribal court.

2. The tribal prosecutor should not be under the supervision or control of the tribal judge, and should be able to act independently. Hiring and removal for cause should be under the ultimate authority of the tribal council.

3. The judge shall not act as a prosecutor.

4. The tribal prosecutor's offices should be separate from the offices of the tribal judges and from the tribal defenders.

5. Tribal prosecutors should be required to receive training in advocacy during their term of office.

6. Tribal prosecutors should be required to have an understanding of tribal law and of tribal customs and traditions.

J. Defenders and advocates.

1. Tribal defenders shall be available in sufficient numbers to represent all persons in criminal prosecutions who request their assistance and whose financial status prevents them from retaining counsel at their own expense.

2. Tribal defenders should be required to receive training in advocacy if they are hired by the tribe.

3. Tribal defenders should be required to have a knowledge of tribal law and tribal custom and traditions.

K. Tribal interpreter.

1. In criminal cases a tribal interpreter should be furnished free of cost to persons who require one.

2. Tribal interpreters must have a good knowledge of both English and the tribal language.

Explanation

Adequate court personnel are necessary to insure the proper and efficient working of the tribal court. A sufficient number of trained court personnel would help eliminate many of the problems which now exist in Indian courts. For instance, a tribal prosecutor and defender would insulate judges from attempts by persons to influence a case. Individual tribal policy and customs will determine which of the personnel recommended above should be hired. Costs can be saved by combining some job functions when possible. An example would be combination of court clerk and court reporter functions in one person. A position like court planner could be merged with the job of court administrator, performed part-time by a judge or clerk, or shared in a circuit riding arrangement with several tribes. A national entity should draw up model ethical standards for court personnel.

VII. Practice requirements.

A. Professional attorneys shall have the privilege to practice in an Indian court when they have

qualified for admission to the court, and they shall be expected to show respect for tribal laws, customs and traditions.

1. Professional attorneys shall be allowed to practice in the tribal court in criminal cases when they have qualified for admission and are paid by the defendant.

2. Professional attorneys may be allowed to practice before the tribal court in non-criminal cases.

B. Standards and conditions of admission to the tribal bar (attorneys and other advocates) shall be set by the tribal court or tribal council. These standards might include:

1. Passage of a bar examination on tribal law.

2. Residence on the reservation if a strong showing of tribal interest is presented.

3. Maximum fee schedule.

4. Knowledge of the tribal language if it is regularly used in court proceedings (or the attorney should be required to hire an interpreter at his/her own expense).

5. Minimum training in Indian court practice.

C. Standards for removal of advocates (attorneys and others) from the courtroom or from admission to the tribal bar for unprofessional conduct should be adopted by the court or tribal council.

Explanation

Standards for allowing advocates to represent defendants, such as entrance requirements, will tend to eliminate incompetent or unethical advocates from appearing, and standards for removal will guide the conduct of those who do appear before the court. Practice requirements also may be used by a tribe to restrict representation by attorneys, particularly non-Indians, as narrowly as the tribe desires consistent with the Indian Civil Rights Act. A national entity should develop a model bar exam and set model standards for removal of advocates from admission to the tribal bar.

VIII. Facilities.

A. Judicial control over facilities and personnel.

1. The tribal court shall have full control and authority over its facilities and personnel, without interference by other arms of the tribal government.

2. The tribal court should have authority over all funds allocated for court purposes.

3. Control over all operations of the tribal court should be in the hands of the chief judge or a court administrator under authority delegated by the chief judge.

B. Courtrooms.

1. Courtrooms shall be located where they are convenient to most of the tribal population.

a. If the caseload merits, court branches should exist full-time in different areas of the reservation.

b. If the caseload is small but distances are great, court branches that can be visited on a regular basis should be set up.

2. A full-time court shall include the following, although several facilities may be combined depending on court needs:

a. A courtroom.

b. A special area for the jury.

c. A special area for witnesses.

d. Judge's chambers for each judge.

e. Jury deliberation room.

f. Offices for court clerks.

g. Offices for support personnel.

h. A recording system.

i. Law library research room.

j. Filing system.

k. Typewriters and other necessary equipment.

C. Detention.

1. Separate detention facilities (wings) should exist for men, women, and juveniles so that they are not incarcerated together.

2. An Indian woman should be hired to be matron in the women's facilities.

3. Juvenile detention facilities should be staffed with trained counsellors.

4. Cooks should be hired to prepare food and plan nutrition in detention facilities.

5. For small tribes or for those tribes with small detention needs, contractual arrangements should be made with surrounding jurisdictions (state, county, city or tribal) for joint use of adequate facilities to house and care for convicted offenders. Indian facilities are preferred, however.

D. Court support facilities.

1. Court support facilities should be available to treat persons who are referred by the tribal court and other agencies on the reservation.

2. A treatment center should include the following programs, depending on the needs of the particular tribe:

a. Alcohol rehabilitation.

b. Detoxification.

c. Vocational rehabilitation.

d. Family counselling.

e. Juvenile treatment:

(1) Juvenile center.

(2) Group homes.

(3) Residence facilities.

(4) Foster homes.

(5) Shelter home for abused and neglected children.

f. Mental health center.

3. So far as possible, all court support facilities should be designed and located so that all treatment may take place on the reservation to prevent cultural isolation of persons being treated. Facilities may be combined for several reservations which are close geographically, according to the needs of each of the tribes.

4. Whenever possible, a court's sentence should be deferred subject to satisfactory completion of a relevant treatment program.

5. Treatment facilities should include both live-in and walk-in type facilities.

a. Live-in facilities should exist for mental health treatment, juveniles and alcohol rehabilitation.

b. Walk-in and home visits should exist for vocational rehabilitation, family counselling, mental health counselling and alcohol rehabilitation.

6. There should be a sufficient number of trained counsellors to handle treatment problems arising on the reservation.

a. The counsellors should have some knowledge of Indian laws and customs so that they may assist the court in determining the best sentence for a convicted person.

b. Counsellors should live on or near the reservation so that they are familiar with the tribal lifestyle.

E. Library.

1. The tribal court should have a library of legal reference materials available.

a. These materials should be available to all tribal members and prisoners and should remain the property of the tribal court.

b. Materials should include:

(1) All tribal codes and laws.

(2) NAICJA materials.

(3) Cohen's Handbook of Federal Indian Law.

(4) AILTP Manual of Indian Law, Manual of Indian Criminal Jurisdiction.

(5) An Indian law casebook.

(6) Indian Law Reporter, Tribal Court Supplement.

(7) National Indian Law Library Catalogue.

(8) Titles 18 and 25, United States Code.

(9) Title 25, Code of Federal Regulations.

(10) State codes.

(11) Law dictionary.

(12) Treatises and reference works on criminal law, evidence, and other relevant subjects.

2. More extensive library materials may be included in the library. Such a library could be shared by several reservations if the court's caseload does not justify a full library for each individual court. However, the judge should have the basic materials listed above available on a daily basis.

Explanation

The tribal court often is handicapped in its efficiency by a lack of facilities. Many of the persons who come before the court are recidivists and without adequate treatment facilities there is little hope of their pattern of appearance before the court being changed. Because of the prevalence of alcohol related offenses, effective alcohol treatment facilities are especially important to Indian courts. Inadequate courtroom and legal facilities impede provision of a fair trial of defendants. Finally, tribal control over treatment is essential to the maintenance of tribal authority and the retention of tribal culture.

IX. Budgeting.

A. Judge's role in budgeting.

1. The job of budgeting for the needs of the tribal court shall be in the hands of the court administrator, working in coordination with the tribal judges.

2. The chief judge of the tribal court should have authority to set priorities in budgeting for the tribal court.

3. In situations where members of the tribal council or tribal governing body act as judges, court operations should be at least a separate line item in the tribal budget.

B. Sources of funding.

1. A court's sources of funding should be identified well in advance of the budgeting process.

2. Funding for the tribal court shall be separated from the law enforcement budget and from the general budget for the tribal government.

3. Funding for the tribal court should be of a long term nature so as to insure job security, attract qualified personnel, and give the court assurance that it will be able to carry out all of its jurisdictional responsibilities.

4. Adequate tribal court funding should be assured by the tribal council to prevent cutoff of funds to the court for political reasons.

5. Fines collected by the court should be used for tribal court operations, but potential conflict of interest problems should be avoided in their allocation. The amount paid to any court employee should not be contingent on the amount of fines collected.

Explanation

The budget for the tribal court must be separate from law enforcement needs. This will avoid the inequity of large allocations being made for "law and order" with little actual benefit accruing to the

courts. A greater balance needs to be achieved between the police and the courts on reservations, for each is less effective in the long run without the other arm of government being adequate. Fines are a good source of money for the court, but if judicial compensation is directly related to the amount of fines collected, unfairness is invited.

X. Data collection and records.

A. Court of record requirements should be met by all tribal courts by maintaining a complete record of all court proceedings and by being able to furnish transcripts of proceedings when needed.

B. The tribal court should make a tape recording of all court proceedings as well as a shorthand or recording backup system to insure that there are complete records.

C. Proceedings of the court should be kept on file permanently.

D. Transcripts of court proceedings should be prepared when cases are contested or appealed.

E. Arrest records should be designed so that all data needed by courts and police are collected on one form.

F. Files should be kept on a case-by-case basis, not by a given defendant, to avoid "rap sheet" problems.

Explanation

Some states refuse to recognize tribal court judgments and orders because the courts are not courts of record. Often the problem is inadequate record-keeping. Records should be kept in case files to avoid biasing the judge's decision by disclosing a defendant's complete past history every time a defendant appears in court.

XI. Court-police cooperation.

A. There should be sufficient tribal law enforcement personnel to deal with all criminal problems on the reservation.

1. Tribal law enforcement personnel should receive mandatory training as soon as possible after assuming their positions.

2. Tribal law enforcement personnel should be specially trained to help them deal with juvenile and domestic relations problems.

3. There should be a special training program dealing with family and juvenile problems in which court and police personnel participate together, so they may learn to cooperate in preventive legal measures and alternatives to detention in this area.

4. Special training should be given to tribal law enforcement personnel so they may function effectively in courtroom proceedings by presenting facts in an orderly fashion that will help the judge reach a decision. This training should include subjects such as presentation of evidence, establishing elements of proof and techniques of giving testimony, and should be developed and presented in cooperation with Indian judges.

B. Tribal law enforcement personnel should have authority to investigate all crimes on the reservation.

1. Agreements should be made so that tribal investigative reports will be accepted by whatever authority has final jurisdiction over a case.

2. Tribal law enforcement personnel should investigate all crimes that occur on the reservation.

Explanation

Although law enforcement is an area of reservation government which is not part of the tribal judicial system (see part I-E), it has a direct effect on the efficiency of the court system in dispensing justice. The tribal courts cannot work well if the police do not function effectively in areas that affect the operations of the court, and this section contains recommendations to improve the relationship between the courts and the police.

Chapter 5

A Five Year Plan for Support of Indian Courts

The National American Indian Court Judges Association has prepared a five year plan of program support in the hope that what has been learned during the Long Range Planning Project can provide the backdrop for constructive action. The plan incorporates the findings of the NAICJA's year long study which are discussed in Chapters 1 and 2 of this report. The elements of the plan attempt to rectify problems identified as weaknesses of Indian courts in Chapter 3. And the plan provides the means for realizing the objectives of the Model Standards for Indian Judicial Systems in Chapter 4.

The plan is directed principally at federal agencies whose action is required to provide funds to make it work. Many tribes can provide funds for operation of their own courts, but uneven tribal funding has been identified as a serious problem that should be rectified by federal provision of all the basic elements of Indian law enforcement and judicial systems.[1] Consistent with the policy of Indian self-determination, this is best done by federal contracts and grants to tribes in response to their requests. Tribal funds should be spared for other needed projects. If they are to be used for courts, it should be for programs or facilities which go beyond the "basics."

It follows from the historical development of Indian legal systems and the special relationship between tribes and the United States that the federal government should be seen as the primary source of Indian court funding. In many treaties, and as an element of its trusteeship, the federal government has assumed an obligation for the maintenance of law and order within Indian reservations. Since the mid-nineteenth century, Indian courts have been the chosen mode of administering justice on reservations. These courts and the federal courts share responsibility for adjudicating most matters arising in Indian country. Congress has imposed standards which must be met by Indian tribunals, notably through the Indian Civil Rights Act.[2] And in interpreting this legislation federal courts have required expansive changes in Indian court systems, such as the presence of prosecutors[3] and the development of appellate processes.[4] Given the pervasive federal role, the trust relationship, and the limited financial means of Indian tribes, it seems clear that the federal government must be prepared to shoulder the burden of paying for Indian courts.

Although this project was commissioned by the Bureau of Indian Affairs, its recommendations are not meant exclusively for the BIA. Many other federal agencies provide support and funding for Indian courts and the NAICJA does not presume that any one agency should or should not be responsible for particular programs or expenditures. This must be worked out among the agencies themselves as discussed in the recommendation concerning interagency coordination. Thus, recommendations are addressed generally to "federal agencies."

It is not enough for federal agencies to act alone. Most of the recommendations in the five year plan require actions by tribes and Indian organizations. Most components of the five year plan will not be launched without initiation of action at the tribal level. Even when federal monies are budgeted by the agencies and appropriated by Congress, the tribes must request and utilize them under their own plans.

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[1] Bureau of Indian Affairs, Indian Reservation Criminal Justice Task Force Analysis 1974-1975, at 81, 8[illegible] (1975) (hereinafter "BIA Task Force Analysis").

[2] 25 U.S.C. §1302.

[3] Wounded Knee v. Andera, 416 F.Supp. 1236 (D. S.D. 1976).

[4] Cf. Low Dog v. Cheyenne River Sioux Tribal Court, Civ. No. 69-21C (D. S.D. 1969).

The needs of Indian courts and the best methods of satisfying those needs are best defined in terms of individual tribes. It is obvious to any observer of Indian court systems that each tribe has unique characteristics which render unreliable most generalizations. But the recommendations that follow apply to most Indian courts. Of course, the degree to which each recommendation fits a particular tribe only will be determined as the needs of that tribe are examined.

Wherever possible, this study has assumed that programs should be run at the tribal level, but some recommendations simply are more economically and practically obtainable if addressed nationally or by groups of tribes. Accordingly, several national-scale programs are included.

A brief explanation of the reasons for recommendations precedes them. The actions required, the time involved, and some estimated costs follow each set of recommendations. The cost projections are based on the best information now available, but should be considered only "ball park" figures. They do not take account of probable inflation and do not consider growth either in the number of courts[5] or in the business of individual courts. Obviously, the cost projections should be revised as newer and better information is available.

Individual Court Needs Assessment

The Long Range Planning Project has attempted to identify needs which are common to virtually all court systems, but it has not produced a definition of any individual tribe's needs. A close look at the court system of every tribe must be undertaken. This should not be in the nature of an outside "study," but rather should be initiated by tribes themselves.

A needs assessment is required to determine what must be done to make each court more capable and

[5] A total of 110 courts is used in making projections, although 134 tribes now have court systems. The reason is that about 25 small tribes combine all or some aspects of their court operations with other tribes. This is being considered by several others.

efficient, to enhance its image, and to respond to changing demands.[6] Specifically, an assessment of needs is necessary to determine the requisite financial and technical assistance and the needed internal changes in order for the tribe to satisfy the Model Standards for Indian Judicial Systems in Chapter 4. This is the first step in realizing the goals of the model standards.

The model standards in the hands of a planning team must be tailored to the objectives identified for a particular tribe. The Long Range Planning Project has recommended that four model courts immediately undergo a thorough needs assessment and subsequent implementation of applicable model standards (Chapter 4). Every other tribe in the country that so desires ought to have sufficient funds available to undertake a similar assessment of needs.

The needs assessment process, like that recommended for the model courts, involves a planning team. The team would be coordinated by a national Indian court planner associated with the National Indian Judiciary Research Institute (NIJRI), the creation of which is recommended below. The planner would organize teams and would facilitate their work on particular reservations. As a member of reservation teams, the NIJRI planner would bring an understanding of the meaning and rationale of the model standards and knowledge of their implementation by other tribes. The experiences of the four model courts should be especially valuable to tribes.

At each reservation, one person should be charged with the responsibility of obtaining information, getting people together, and generally facilitating the needs assessment/planning process. This person would be the primary reservation contact for the NIJRI court planner. It is anticipated that the reservation court planner's function would consume less than full-time, but because of the importance of the function, duties ought to be separately defined and provision made in

[6] Accord, American Indian Lawyer Training Program, Inc., Indian Self-Determination and the Role of Tribal Courts, at 111-112 (1977) (hereinafter "AILTP Report").

the court budget so that adequate time can be devoted to planning and to training for planning duties. A court clerk, judge, or other person attached to the court would be a likely candidate for the duties of court planner. On the larger reservations, it may be determined that the job of court planner should be full-time.

In addition to the reservation court planner, other members of a tribe's planning team should include:

- chief tribal judge
- tribal leaders
- tribal planner
- members of relevant tribal committees (such as judicial, law and order, and legislative committees)
- BIA area judicial officer
- other personnel considered appropriate by the tribe (e.g., court clerk, attorney)

The following persons should be available to the planning team in an advisory or consultative capacity:

- LEAA Indian criminal justice planner for the region
- Indian court judge from another tribe in the region
- specialists capable of assisting the tribe with particular problems

The BIA, through its Division of Judicial Services and its area judicial officers, should encourage tribes to initiate planning for their courts by tribal budget requests. The NIJRI, and particularly its personnel working on court planning, should also seek to interest tribes in the development of training programs for court planners.

Once a tribe is funded for the recommended needs assessment, the reservation court planner would establish contact with the NIJRI planning staff. The NIJRI would then dispatch a person to the reservation. He/she would explain the purposes and methods to the tribal council and court personnel and, together with the reservation court planner, would help organize the planning team. The model standards would be introduced for consideration by the particular tribe. Obviously, the procedure to be followed on each reservation would differ according to the relative development and

sophistication of individual courts. The first visit will enable the planner to tailor the needs assessment process appropriately. After this he/she would arrange for the outside members of the planning team. The NIJRI planner would return later to the reservation for several days with the team. During this visit the team would identify specific programs needed to give the court the ability to satisfy the model standards (insofar as the tribe wishes to do so) and to make other changes to address any special problems. As follow-up to the visit, the NIJRI planner and the reservation planner together would compile a report and budget supporting these programs. If technical assistance were needed, the planner would attempt to direct the tribe to the appropriate people. Of course, other visits by the planner or the whole team could be arranged if the tribe desires.

The needs assessment is only the first step in court planning,[7] and must be followed by implementation of needed programs. A portion of tribal budgets should be devoted to ongoing planning by maintaining the job of a part-time reservation court planner. This will help assure proper implementation, enable evaluation of results of programs, and allow an assessment and respond to new and changing needs. The NIJRI planner and the planning team concept would continue to be used to assist in these purposes.

Certainly the greatest need for Indian court planning will occur during the next five years, as this five year plan is implemented and the model standards are introduced into practice. But the need for planning resources is constant and ought to become a regular part of tribal and federal budgets. Indian courts must anticipate responses to changing demands. For instance, as Public Law 280 jurisdiction is retroceded by states, as tribes assume jurisdiction over non-Indians and felonies, and as the limits of Indian country are redefined as a result of federal court decisions, there can be major changes in the size and nature of court business. Less remarkable developments also shape the

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[7] See National Center for State Courts, Planning in State Courts: A Survey of the State of the Art (1976).

needs of Indian courts. The fact that needs assessments undertaken in the near future will be based on data and statistics now available makes them inherently imprecise. As discussed elsewhere in this report, present data is woefully inadequate. As more is known about the work of Indian courts—how many cases and consultations are handled, how long it takes for certain types of matters and for general court administration, what equipment and facilities are used, and what the capacities of courts are—judicial needs can be more readily determined relative to type and volume of business. As more accurate information becomes available, needs and plans for satisfying them will have to be re-examined. It is likely that as courts improve they will attract more activity, thereby increasing their needs. A planning capability is needed to adapt court programs to these changes. It is not enough to develop plans after the fact, because the time lag in federal budgeting will cause a delay of two to three years.

The process of constant modification of court plans involves an assessment of pending and recent changes in tribal and federal law, analysis of court decisions, and projections of potential court business. The NIJRI court planner could aid individual courts in this process.

The NIJRI planner also should attempt to assist federal agencies in anticipating changes which may make new or expanded Indian courts necessary. For instance, a tribe in a Public Law 280 state may not have any court or court planner because of its limited jurisdiction. But if retrocession by the state where the tribe is located appears likely, the NIJRI planner can assist in the development of contingency plans for establishment of new courts. Similarly, contingency plans should be made where major cases or administrative issues are which may change Indian court needs (e.g., fishing rights cases). Recently the Interior Solicitor ruled that the Cheyenne-Arapahoe Tribes and the Absentee Shawnee Tribe of Oklahoma have jurisdiction over civil and criminal matters on extensive allotted lands.[8] The determination makes the tribes eligible

[8]Memorandum from Assistant Solicitor, Division of Indian Affairs, U.S. Department of the Interior, to Chief, Division of Law Enforcement Services, dated

for federal assistance and it is appropriate for them to establish court systems. But there was neither contingency pre-planning nor is there any avenue for planning in response to the decisions. A role for a national level Indian court planner to aid the tribes and the federal agencies is apparent.

Recommendations

1. Every tribe should develop a comprehensive needs assessment for meeting the Model Standards for Indian Judicial Systmes (Chapter 4).

2. Funds should be made available to every tribe requesting them to begin and continue a planning process, either as a special item in the tribal budget or by means of a Public Law 93-638 contract.

3. The National Indian Judiciary Research Institute should receive sufficient funding to operate a court planning unit.

Action Required

Federal agencies—must budget for planning in each year and respond to tribal requests pursuant to their plans. Importantly, the agencies must encourage tribes to embark on the needs assessment process. The budget requirements found elsehwere in this plan are subject to revision as tribal plans are developed.

Tribes—must initiate requests for funds to begin and continue the planning process by requesting and budgeting sufficient amounts of money. They must work diligently on plans and then take action (including internal changes, budget requests, and seeking technical assistance) to realize those plans.

NIJRI—should establish and maintain a court planning and evaluation program, develop lists of resource persons, and encourage tribes to build their planning capabilities.

(footnote 8 continued)
Nov. 16, 1977; letter from Acting Associate Solicitor, Division of Indian Affairs, U.S. Department of the Interior, to F. Browning Pipestem, dated Nov. 16, 1977.

Time Required

Each tribal needs assessment should not take over one year to complete. All tribes should be able to finish their initial plans within five years, with about one-fifth of all tribes undertaking a needs assessment each year. Planning should be an ongoing program for individual tribes. The NIJRI would be a continuing source of assistance and guidance with court planning.

Cost

Tribal Needs Assessments

Small Courts[9] (up to 1,000 cases/yr.)

Reservation court planner (1/4 time x $10,000)	$ 2,500
Consultants (3 x 4 days x $100)	1,200
Travel and per diem (4 trips x $400)	1,600
Total	$ 5,300

Medium Courts[9] (1,000-3,000 cases/yr.)

Reservation court planner (1/4 time x $10,000)	$ 2,500
Consultants (4 x 4 days x $100)	1,600
Travel and per diem (5 trips x $400)	2,000
Total	$ 6,100

Large Courts[9] (3,000+ cases/yr.)

Reservation court planner (1/2 time x $10,000)	$ 5,000
Consultants (5 x 4 days x $100)	2,000
Travel and per diem (6 trips x $400)	2,400
Total	$ 9,400

Totals

Small courts ($5,300 x 75 courts)	$397,500
Medium courts ($6,100 x 26 courts)	158,600
Large courts ($9,400 x 9 courts)	84,600
Total	$640,700

$640,700 divided by 5 years = $128,140/yr.

[9]Classification of courts as small, medium or large and the numbers of such courts are based on figures

Subsequent Years' Court Planning

Small Courts

Reservation court planner (1/4 time x $10,000)	$ 2,500
Consultants (2 x 3 days x $100)	600
Travel and per diem (3 trips x $400)	1,200
Total	$ 4,300

Medium Courts

Reservation court planner (1/4 time x $10,000)	$ 2,500
Consultants (2 x 3 days x $100)	600
Travel and per diem (3 trips x $400)	1,200
Total	$ 4,300

Large Courts

Reservation court planner (1/2 time x $10,000)	$ 5,000
Consultants (2 x 3 days x $100)	600
Travel and per diem (3 trips x $400)	1,200
Total	$ 6,800

Totals

Small courts ($4,300 x 75 courts)	$322,500
Medium courts ($4,300 x 26 courts)	111,800
Large courts ($6,800 x 9 courts)	61,200
Total	$495,500

$495,500 divided by 5 years = $99,100/yr.

Costs of the NIJRI court planning component are included under the National Indian Judiciary Research Institute recommendation in this chapter.

(footnote 9 continued)
in the AILTP Report, supra note 6, modified by data obtained in the reservation visits by the NAICJA Long Range Planning Project, and by other available information and estimates.

Summary of Costs

Year 1	
Tribal needs assessments (one-fifth of all courts each year)	$128,140
Subsequent years' court planning (phased in after needs assessments complete)	0
Total	$128,140
Year 2	
Tribal needs assessments	$128,140
Subsequent years' court planning	99,100
Total	$227,240
Year 3	
Tribal needs assessments	$128,140
Subsequent years' court planning	198,200
Total	$326,340
Year 4	
Tribal needs assessments	$128,140
Subsequent years' court planning	297,300
Total	$425,440
Year 5	
Tribal needs assessments	$128,140
Subsequent years' court planning	396,400
Total	$524,540

After the fifth year, all initial court needs assessments should be complete and every tribe should be budgeting planning annually at a total cost for all tribes of $495,500 per year.

Tribal Legislation

Revisions in tribal law would be a tremendous aid in the administration of Indian justice. In some cases this requires amendment of tribal constitutions. In others it demands rewriting codes, codification of now unwritten tribal laws, or promulgation of new codes for subjects not now covered.

As discussed in Chapters 2 and 3, the jurisdiction of some tribes is limited by their own organic law. Some constitutions or codes restrict tribes from exercising jurisdiction over certain persons (e.g., nonmembers, non-Indians), leaving a gap in the courts' ability to apply tribal law to all persons within their jurisdiction. Many tribes have no provision allowing them to assert jurisdiction over certain subject matter (e.g., major crimes, probate of personal property). And very often the limits of tribal territorial jurisdiction are not stated in any single place; law enforcement officers and courts have the unenviable task of piecing it together from treaties, executive orders, federal statutes, agreements, court decisions, and maps.

A majority of tribal codes are simply reiterations of the Code of Indian Tribal Offenses in the Code of Federal Regulations, part 11. Many subjects not now covered by codes should be included in tribal statutory law by adding new sections and separate codes. Further, the Code of Indian Tribal Offenses is largely a reflection of non-Indian legal concepts carried over from the time of external rule by the federal government. As such, it has little relation to the values and traditions of the tribes to which it applies.

Tribal codes are notoriously laden with outmoded laws. Crimes such as illicit cohabitation, fornication,[10] malicious gossip, crime against nature, and indecent exposure are found in many codes. Some are simply antiquated; others probably would be unenforceable in most circumstances because of their vagueness. Many of these purported crimes are not considered criminal conduct under the tribes' values, but are holdovers from the missionary era in which an alien morality was imposed on Indians by using Indian justice systems. Removal of laws which do not reflect current tribal values and those which result in overcriminalization of conduct is an important part of code revision.

All tribal laws, whether or not based on the Code of Indian Tribal Offenses, should be examined to determine to what extent they can be changed to reflect better the customs and traditions of the tribe and community. The Long Range Planning Project found that

[10] E.g., 25 C.F.R. §§11.60C, 11.61.

on many reservations there is little respect for Indian courts. Integration of tribal values as expressed in customs and traditions should increase respect for courts and law. The uniqueness of the situation, laws and values of reservation Indians is one of the most forceful justifications for maintaining separate Indian courts. Resort to state and federal law and codes based on non-tribal values erodes this important rationale for Indian judicial systems.

Tribal legislation providing for reciprocal arrangements with other jurisdictions should be considered. This will help further the impact and reach of tribal law and Indian court judgments, and prevent reservations from becoming havens for lawbreakers from elsewhere. Appropriate legislation includes acts enabling reciprocal recognition and enforcement of judgments, extradition arrangements, and cross-deputization of law enforcement officers with neighboring tribes, states and counties.

Tribal legislation covering a range of matters not now included in tribal law would make dispute resolution and the regulation of antisocial conduct fairer, more efficient, and more effective. Some areas in which tribes might consider legislating include:

- domestic relations
- procedures for dealing with juveniles
- adoption and termination of parental rights
- regulation of water and other natural resources
- hunting and fishing regulation
- traffic
- probate procedures
- definitions of traditional crimes

In the past, tribal law codification and revision has been dominated by non-Indian attorneys. The process should involve the Indian court judges who must apply the law, officials of the tribe who enact and enforce it, and elders of the tribe who know tribal customs and traditions. Technical assistance from anthropologists, experts in tribal customs, attorneys and persons knowledgeable in law revision is also helpful. To assure adequate responsiveness to reservation needs and tribal values, codification and revision of tribal laws should be closely controlled by the tribal council or a special committee, but not by outsiders.

The proposed National Indian Judiciary Research Institute should assist in the task of law revision. Its staff would consult with tribes and draft model laws and codes. In addition, the NIJRI would be able to refer tribes to persons with the skills necessary to furnish technical assistance especially needed by them. As tribes require subsequent law revision and updating, they would be able to call on the NIJRI staff for assistance and referral to experts.

In addition to a need for codification and law revision, access to tribal laws must be improved. Many codes are not published and available to tribal members and others who are affected by or interested in them. Under these circumstances, persons subject to tribal laws do not have adequate notice of them. All laws should be published in an easy to read format with sufficient copies available to tribal members, other tribes, the BIA, the NIJRI, and others concerned with tribal law. An advantage of published tribal codes is that other tribes can use them to fill gaps in their organic law.

Tribal laws should be printed in volumes which can be supplemented, such as the loose leaf format used by the Navajo Nation. Most tribes do not now regularly supplement their codes so that persons can determine the laws which are currently in effect. In fact, judges on many reservations complained that they have been embarrassed by learning of a change in the law as they were called upon to apply it from the bench.

As with statutory law, there is a substantial advantage in having tribal decisional law published and available. This can be facilitated by training Indian court judges in decision writing and publishing an Indian court reporter containing written decisions.

Recommendations

1. A Public Law 93-638 contract for study and revision of tribal constitutions and codes should be available to every tribe.

2. Access to technical assistance in law revision should be available through the NIJRI proposed in this five year plan.

3. Tribal laws should be published, regularly supplemented, and available to interested persons.

Action Required

Federal agencies—for the next five years must budget funds to be available to tribes for law revision, and should urge tribes to utilize such funds.

Tribes—must request funds to carry out the purposes of this recommendation and must undertake the task of law revision.

NIJRI—must include a person on its staff to assist tribes by directing them to appropriate consultants and advisors, and to aid directly with reforms needed in tribal law by developing model codes and advising individual tribes. It should be a function of the NIJRI to let tribes and their leaders know the importance of tribal law revision.

Time Required

It is anticipated that it will take some time for all tribes to become interested in revision of their laws. It need not take longer than five years for all tribes to undertake the task if they so desire. For planning purposes it is reasonable to assume that approximately one-fifth of all tribes will undertake the task each year for five years.

Cost

Law Revision (typical contract)

Consultants (attorneys, elders, law revision specialists, anthropologists, etc.) (4 x 20 days x $90/day (average))	$ 7,200
Travel and per diem (8 trips x $400)	3,200
Printing and binding (500 copies x $10)	5,000
Total	$ 15,400

$15,400 x 110 tribes = $1,694,000

$1,694,000 divided by 5 years = $358,800/yr.

Supplementation

500 copies/tribe x $2/yr. = $1,000/tribe/yr.

$1,000 x 110 tribes = $110,000/yr.

Costs of the NIJRI law revision assistance are included in the NIJRI budget at page 184.

Cost Summary

Year 1

Law revision (one-fifth of all courts each year)	$358,800
Supplementation (phased in as laws are revised)	0
Total	$358,800

Year 2

Law revision	$358,800
Supplementation	22,000
Total	$380,800

Year 3

Law revision	$358,800
Supplementation	44,000
Total	$402,800

Year 4

Law revision	$358,800
Supplementation	66,000
Total	$424,800

Year 5

Law revision	$358,800
Supplementation	88,000
Total	$446,800

After the fifth year all codes should have been revised; supplementation costs then should remain level at $110,000 per year.

Facilities and Equipment

Minimum court facilities vary according to the amount and type of court business and the tribal desires. Economics dictate that courts handling less than 500 cases annually consider consolidating operations with other tribes. But factors such as cultural differences and great distances between tribes may militate in favor of a separate court. Thus, no categorical formula can be prescribed.

It is important that courts be located conveniently for most people. To the extent possible, a tribe ought to choose sites for courts which are accessible by most of its population. This may mean small court facilities at several locations, served part-time by a circuit riding judge. The courtroom facilities and equipment optimally needed by a court with at least one full-time judge are described in the Model Standards for Indian Judicial Systems, part VIII, Chapter 4.[11]

Detention facilities should meet standards of space, health and safety, exercise and recreation, food preparation, sanitation facilities, and security. Separate facilities, or at least separate wings, should be provided for women and juveniles. A thorough survey recently concluded by the BIA identifies current needs and related costs.[12] As with court facilities, detention facilities may be used most economically by more than one tribe or other (city, county, etc.) government through a cooperative arrangement for shared use. Indian tribes have a severe need for special treatment facilities and programs for juveniles and alcoholics which is discussed in the next section.

Recommendation

The needs assessment recommended in this five year plan should address individual tribal needs for court facilities and equipment. Sufficient budgets for such needs should be programmed into the next possible funding cycle for each tribe.

Action Required

Federal agencies—must respond to tribal needs with appropriate funding and other assistance.

Tribes—must identify needs for facilities and equipment, consider ways to use them economically, and press for acquisition of those they need the most.

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[11] See also AILTP Report, supra note 6 at 114.

[12] Bureau of Indian Affairs, Inventory of Law Enforcement Facilities on Indian Reservations and Cost Estimate for Renovation and Construction (1977).

Time Required

Needs can be identified within the scope of the individual needs assessments (one year per tribe; five years for all tribes). Satisfaction of those needs can follow as rapidly as resources are provided and utilized.

Cost

The cost of recommended tribal needs assessments is estimated above on page 154. After specific needs are known, costs of facilities and equipment can be determined. Current agency budgets (for the next two or three years) should set aside a lump sum at least equal to budgets for the last year or so. Subsequent budgets, and use of the funds set aside, can be based on the results of the needs assessments.

Court Related Services

The greatest need of Indian court systems nationally and on most reservations is for facilities and programs for persons whose detention in jail may be inappropriate, such as juveniles and alcoholics.

A recent federal district court decision states that it is the responsibility of the federal government to provide adequate care for an insane reservation Indian.[13] The duty could logically extend to chronic alcoholics and to children in need of care or supervision. The government's response should not await a challenge, such as a writ of habeas corpus to the federal court under the Indian Civil Rights Act.

Alcoholics

Public drunkenness or variations of that offense, such as disorderly conduct and driving while intoxicated, are the most common offenses handled by tribal courts. As discussed in Chapter 2, virtually all crimes handled by Indian courts are alcohol related. An early purpose of Indian courts was liquor control. Now the courts exercise general jurisdiction but still

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[13] White v. Califano, 437 F.Supp. 543 (D. S.D. 1977).

deal constantly with alcohol problems. The modern response of Indian courts to these problems should be analyzed. It behooves tribes and interested government agencies to question whether the usual response of criminal justice systems is appropriate with offenses which have as their principal victim the perpetrator.

Alcoholic treatment methods and facilities must be reexamined, and their effectiveness, success, abuse, and practicality must be evaluated. It is clear that the approach of law enforcement and courts (both Indian and non-Indian) to alcohol related offenses has been ineffective. The federal government and the tribes should place a high priority upon developing new methods for responding to alcoholic offenders. As alternatives to "revolving door" processing of alcoholics through the law enforcement-court-jail system are proposed, they should be tested in practice and implemented where they show promise. The considerable expense of new services and the necessary facilities and programs to support them can be justified if the present burdens on the Indian justice system will be relieved significantly.

Juveniles

Most people on reservations today are under age 18. Nevertheless, little special attention has been given to the resulting impact on Indian justice systems. Courts lack procedures for dealing both with children who have violated the law and with those who are in need of protective services. There is an absence of facilities, programs and personnel to assist the courts in the disposition of juveniles. This study proposes, as did a 1975 BIA report,[14] that every court have available the services of a probation officer. Budgets included in the personnel recommendations include provision for an appropriate number of officers for various size courts.

It is well established that housing juveniles who come into the custody of the court with adult criminals can be highly destructive. Further, it may be offensive to Indian Civil Rights Act guarantees of due process and freedom from cruel and unusual punishment.

[14] BIA Task Force Analysis, supra note 1 at 84.

It is desirable that juvenile facilities be in reasonable proximity to the reservation where social and cultural alienation is less likely, if their use is to be in the best interests of the children held there.

Preventive programs, which intercept youths before they enter the criminal justice system, are the most promising.[15] Provision of jobs, educational and recreational opportunities, counselling for children and parents, and other attempts to divert children away from the courts by eliminating root causes of antisocial behavior hold out the greatest hope for success.

The development of programs for juveniles is a very high priority. Federal agencies should support an overall study of the problem, with the objective of recommending new solutions and programs.

Recommendations

1. An alcoholic offender planning project, directed at finding better and more effective ways for the Indian criminal justice system to handle alcoholic offenders should be funded and begin at once. The project should include a search for new methods to deal with causes and results of alcohol abuse and plans for implementing new programs at the tribal level.

2. A juvenile justice survey and planning project addressing Indian court procedures, facilities and personnel for handling and disposition of children, and methods for preventing encounters between the courts and juveniles should be funded and begin at once.

3. As programs are proposed and tribal needs identified by the projects proposed above, there should be rapid implementation to provide the needed programs and facilities.

Action Required

Federal agencies—must provide funds for the recommended projects, preferably from existing

[15] See American Indian Law Center, New Approaches to Juvenile Justice (1977).

appropriations to avoid delay. Agencies must respond later with funds adequate to provide needed programs and facilities.

Tribes—must cooperate in the recommended planning processes and place high priority upon obtaining needed facilities and programs.

Time Required

The alcoholic offender planning project and juvenile justice survey and planning project can begin at once if funds can be found within existing agency budgets. They should be concluded in two years. Once programs are proposed and tribal needs assessed, implementation can be as fast as available funds and tribal action permit.

Cost

The alcoholic offender planning project and the juvenile justice survey and planning project each should be funded at a level of at least $100,000 a year for two years. The programs they recommend undoubtedly will be costly and their inclusion in future federal budgets should be anticipated.

Personnel

The most important ingredient of a good court system is its staff. The need for qualified, trained judges and other court personnel is discussed in parts V and VI of the Model Standards for Indian Judicial Systems, Chapter 4. Some guidelines follow for basic court staffing.

Small courts (under 1,000 cases/year)

judge
associate judges (part-time)
clerk
prosecutor
defender (part-time)
probation/parole officer (one-half time)

Medium courts (1,000-3,000 cases/year)

chief judge
associate judges (full and/or part-time)
chief clerk

deputy clerk
prosecutor
defender (part-time)
probation/parole officer

Large courts (3,000+ cases/year)

chief judge
associate judge for each 2,000 cases over 1,000 cases/year
court administrator
chief clerk
deputy clerk for each branch court or each 3,000 cases/year over 2,000/year
secretary for each 3 full-time judges
2 prosecutors plus 1 additional prosecutor for each 3,000 criminal cases/year in excess of 5,000
defender plus 1 additional defender for each 3,000 criminal cases/year in excess of 5,000
2 probation/parole officers plus 1 additional officer for each 3,000 criminal cases/year in excess of 3,000

The recommended positions and numbers should provide an adequate staff for court operations. However, as individual tribes identify their actual court needs, they may call for different or additional personnel. Thus, staff estimates included in this recommendation are only a foundation upon which federal budgets can be based, subject to revision to adjust for actual tribal needs.

The basic staffing patterns used here are predicated solely on the number of cases handled annually. They assume an even distribution of cases throughout the year and a high number of guilty plea dispositions. The sizes of court staffs needed in practice will vary based upon:

- caseload
- nature of cases handled
- number of cases resolved short of a full trial (such as by guilty plea, mediation, etc.)
- number of jury trials
- number of appeals
- land area
- distance
- physical limitations of facilities

The basic formula also may need revision as its premises are tested. As more coalition courts are established, overall court personnel needs of the affected tribes may drop. But these staff reductions probably will be more than offset by plans of other courts which identify needs beyond the basic formula. Departures from the formula will be necessary with growth of caseloads, more accurate data collection methods, and expansion of tribal jurisdiction.

Indian courts have a pressing need for appellate judges.[16] Because appellate systems may vary from a full-time panel for some large tribes to use of a part-time coalition appeals court by several tribes, appellate court needs have been included in the staffing pattern and budget as associate judges. Probably all courts, except possibly the very largest, will have several associate judges. This has a number of advantages: one or more judges can be limited to appeals; replacement of a judge related to a party with an unrelated judge will be easier; substitute judges will be more readily available for judges who are overworked, attending training sessions, ill, or on vacation.

Prosecutors and defenders are included in the proposed staffing pattern for convenience in budgeting, although it is recognized that they should not be considered "staff" of the court in the same sense as court employees who are under the judge's supervision. The need for these positions is discussed in Chapter 2. Other observers have pointed out that tribes are quite aware of the need.[17]

The recommended staffing pattern includes court clerks for whom the need is great.[18] Probation and parole officers can be fundamental to fair and effective

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[16] See BIA Task Force Analysis, supra note 1 at 95; and American Indian Policy Review Comm'n, Report on Federal, State, and Tribal Jurisdiction, at 149-150 (1976).

[17] BIA Task Force Analysis, supra note 1 at 95; AILTP Report, supra note 6 at 112.

[18] AILTP Report, supra note 6 at 112.

dispositions in criminal cases and should be available to every court.[19] This is especially important as an alternative to incarceration in juvenile cases. Ideally, both male and female officers are needed. Tribes may wish to split a position between two or more part-time officers, at least one of whom is a female. Training programs for probation officers are needed. Probation and parole officers should receive no less in salaries and benefits than they would get as police officers.

The economics of small, rural courts are difficult. A court simply cannot exist without some basic staffing. Good administration, judicial impartiality and better adherence to due process requirements are all more likely in a court where there is a full-time judge and clerk. The need for a prosecutor has been pointed out by at least one federal district court.[20] And, notwithstanding the fact that the Indian Civil Rights Act does not specifically require counsel to be furnished to indigents without charge,[21] considerations of equal protection and due process[22] suggest that indigent defendants ought to be provided with free defense counsel (tribally licensed advocates or professional attorneys) as in state and federal courts.[23]

A basic court staff is imperative given the congressional dedication to the existence of fair judicial forums for Indians. The fact that the cost per case may seem high is a necessary evil. Fairness and effectiveness dictate that courts exist and operate closely enough and frequently enough for persons subject to their jurisdiction to have ready access. This simply means that many Indian courts will operate at less than the optimum size, notwithstanding resulting diseconomies.

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[19] BIA Task Force Analysis, supra note 1 at 84-85.

[20] Wounded Knee v. Andera, supra note 3.

[21] See 25 U.S.C. §1302(6).

[22] See 25 U.S.C. §1302(8).

[23] See Argersinger v. Hamlin, 407 U.S. 25 (1972). But see Tom v. Sutton, 533 F.2d 1101 (9th Cir. 1976).

The problem of relative costliness is shared by other rural courts.[24]

There are some possible solutions for the disproportionate costs of small courts. Whenever the caseload and schedule of a court permit, personnel should be retained and used on a part-time basis. However, it is not recommended that a court system operate with any less than a full-time judge and clerk. Consolidation of functions is an obvious means of saving money. It is assumed that in small courts the chief judge will perform duties which are done by a court administrator in large courts. Even where caseload is very low, a judge can be kept productively busy with these administrative tasks and with other court related business such as time consuming informal dispute resolution. Similarly, the clerk will serve as a secretary and court reporter in small courts. Large courts should have one or more secretaries and may elect to have full-time court reporters, but the functions may be combined for economy. Bailiffs should be present whenever court is in session, but for our purposes it is assumed that the clerk can administer oaths and tribal police can keep order when necessary. Many tribes may want to budget a separate position for bailiff.

One of the soundest approaches for small court systems is to form coalition courts in cooperation with other nearby tribes. This alternative may prove impractical if no tribe is close enough geographically or if the nearby tribes were alienated from each other by differing customs, historic distrust, or rivalry. But it is strongly recommended that every tribe with an annual caseload of under 1,000 cases seriously consider sharing court personnel (and facilities where practicable) with another tribe. The costs of maintaining a court to deal with annual caseloads under 500 are especially difficult to justify. Reasonable alternatives must be explored and planners should assume that such courts should be eliminated by consolidation if at all possible. Distance or the difficulty of cooperating

[24] See National Center for State Courts, Rural Courts: The Effect of Space and Distance on the Administration of Justice (1977).

with a neighboring tribe may prevent consolidation in many places.

Personnel changes are also needed within the BIA. A judicial officer should be hired for area offices with responsibilities for tribes with functioning judicial systems. These now include Aberdeen, Albuquerque, Billings, Minneapolis, Phoenix, and Portland. The judicial officer would serve an important communication link between the Washington BIA office and the Indian courts in the area. The judicial officer can be an advocate for Indian courts within the area office where funds are sometimes diverted and priorities diluted. It has been proposed that the area judicial officer assist the planning team on each of the reservations in an area. The officer also can help with budgeting, administration and other court problems. He/she will aid in making contacts between individual courts and the NIJRI in order to help them find technical assistance and funds. The judicial officer should supply on-site technical assistance to the extent he/she is competent to do so and should assist in organized and informal training. There should be some degree of line authority between the Judicial Services Officer in Washington, D.C. and each of the area judicial officers. This will assure prompt response when data and other information are needed.

Recommendations

1. Every Indian court should have a basic staff according to the formula recommended above.

2. Each tribe should budget for an adequate court staff according to individual tribal needs assessments; government agencies should respond with adequate funding.

3. An area judicial officer should be appointed for every BIA area office having responsibility for tribes with significant judicial business.

Action Required

Federal agencies—must reserve adequate funds in all future budgets for the basic court staffing formula, for the BIA area judicial officers in every area office, and other needs embodied in individual tribal requests.

Tribes—must begin the planning process and include in budgets amounts appropriate to reflect their needs.

NIJRI—must begin assisting tribes in the planning process so their budgets can reflect actual needs as soon as possible.

Time Required

Federal agency budgets for the next regular program year should include funds necessary to meet the basic court staffing requirements. Implementation should be immediate as soon as funds are available.

Individual court needs assessments as proposed above should begin as soon as possible.

A BIA judicial officer can be placed in appropriate area offices as soon as funding can be made available or possibly sooner by reallocation of existing funds.

Cost

Costs of the basic court staffing formula for typical small, medium and large courts are calculated as follows:

Small Court (1,000 cases/yr. capability)

1 judge x $14,000	$ 14,000
associate judges x $55/day x 70 days	3,850
1 clerk x $8,000	8,000
1 prosecutor x $9,000	9,000
1 defender x $35/day x 130 days	4,550
1 probation/parole officer x $9,000 x 1/2 time	4,500
jury fees[25] - 25 days x $120/day	3,000
Total	$ 46,900

[25]While not properly considered a personnel cost, jury fees are included here to enable a projection of overall costs of operating a court, exclusive of direct expenses for space, equipment, supplies, and travel.

Medium Court (3,000 cases/yr. capability)

1 chief judge x $15,000	$ 15,000
1.5 associate judges x $14,000	21,000
1 chief clerk x $9,000	9,000
1 deputy clerk x $8,000	8,000
1 prosecutor x $9,000	9,000
1 defender x $35/day x 200 days	7,000
1 probation/parole officer x $9,000	9,000
jury fees - 75 days x $120/day	9,000
Total	$ 87,000

Large Court (8,000 cases/yr. capability)[26]

1 chief judge x $15,000	$ 15,000
2 associate judges x $14,000	28,000
1 court administrator x $12,000	12,000
1 chief clerk x $9,000	9,000
2 deputy clerks x $8,000	16,000
1 secretary x $7,000	7,000
2 prosecutors x $9,000	18,000
1 defender x $9,000	9,000
1 defender x $35/day x 70 days	2,450
2 probation/parole officers x $9,000	18,000
jury fees - 200 days x $120/day	24,000
Total	$158,450

Total annual costs can be projected as follows:

Small courts ($46,900 x 75)	$3,517,500
Medium courts ($87,000 x 26)	2,262,000
Large courts ($158,450 x 8)	1,267,600
Total Annual Cost	$7,047,100[27]

Cost of area judicial officers:

6 area offices x $30,000/yr. (includes salary, benefits, and travel)	$180,000

[26]The Navajo Nation court system has been excluded from these calculations because of its extraordinarily large size. It regularly engages in a careful budget process.

[27]It should be noted that the overall costs projected here do not differ significantly from estimates made for an "exemplary" court staffing cost in the BIA's 1975 Task Force Analysis, supra note 1 at 95-97.

Community Relations and Education

Lack of understanding and respect for the role of Indian courts is one of the most pervasive problems of Indian courts discovered by the research and field-work of the NAICJA Long Range Planning Project. This is shown by an inordinate number of impeachments or recalls of Indian court judges, disobedience of court orders, and general attitudes toward the Indian judiciary both on and off the reservation. The causes are diverse:

- Indian courts were originally, and still resemble, alien institutions
- many Indian courts are subject to political pressure (or at least suspected of it)
- some Indian courts are influenced by BIA officials
- Indian court judgments and orders are often not enforced outside the reservation

As explained in Chapter 1, Indian courts are of relatively recent origin and were initially imposed as agents of an alien, non-Indian government. The section of this chapter on tribal legislation suggests that respect for tribal law could be enhanced if tribal laws reflect values held by the reservation community, including its traditions and customs. It is also important to educate the community, especially tribal officials, social services personnel, and BIA officials, about the modern role of the courts in the tribal structure. Although the courts themselves may reflect Anglo institutions, the function they are performing is indispensible to the exercise of sovereignty. And courts could be better understood as attributes of tribal self-government if they related more to tribal values.

Tribal members frequently complain of interference by tribal leaders in the work of Indian courts. Although the problem is less prevalent in practice than it is feared to be, nonetheless, stories of interference are very damaging to the image of all courts. The most direct solution to the problem is to make changes in tribal structure which allow judges more independence, secure their tenure, and give them adequate pay. These matters are covered in the Model Standards for Indian Judicial Systems, part V, in Chapter 4. Tribal councils could understand the need for such changes better if there were a program of

information (such as films, talks, panel discussions, etc.) for tribal leaders. Community education efforts in the schools, in tribal newspapers, and in various group meetings can convey the court's independence. BIA interference with courts also should be eliminated, and BIA officials should be included in community education programs. The BIA Central Office emphatically should direct all employees to treat Indian courts as independent forums and not to become involved in their decision making.

A community relations program of communication and education can help cement better respect for Indian courts outside the reservation. For instance, news releases concerning important court developments, such as appointment of a new judge, a major decision, or attendance by judges at a training session, would help build knowledge of Indian courts in neighboring communities. Speakers and informational films can be made available to community groups. Personal associations between Indian judges and leaders of the non-Indian community will help immensely. It would be especially useful to cultivate contacts with personnel in agencies and organizations furnishing court related services (e.g., assistance to child abuse victims, programs for juveniles) which might be available to tribes under a contract or other arrangement. These measures and others may make it easier to promote the concept of reciprocal legislation and agreements between tribes and other governments. Most non-Indian jurisdictions fail or refuse to recognize and enforce orders and judgments of Indian courts. Tribes must work for reciprocal enforcement as recommended in the Model Standards for Indian Judicial Systems, part III, Chapter 4. It is essential that non-Indian officials develop a better understanding of the Indian court system. Once reciprocity exists, respect should grow for Indian courts among non-Indians.

Community relations and education is the job of everyone connected with Indian courts. Judges and court staffs, tribal leaders, Indian organizations, the NAICJA, the recommended NIJRI, and the BIA all have responsibilities. Targets for their efforts include individuals in Indian and non-Indian communities, many tribal leaders, federal, state and local lawmakers, social services personnel, and the Indian and non-Indian press. Courts should consider giving a staff

ment responsibility for disseminating newsworthy information to newspapers and other media. The person could be a clerk or chief judge or court administrator. The NIJRI should make regular releases of news and other information to the national press to promote better relations with and understanding by the non-Indian community.

The NIJRI can develop a community education program. Production of educational films and publications which would be available to tribes, schools, organizations, and other groups would be valuable. Further, the NIJRI could furnish assistance and advice to individual tribes and courts on planning a community education program. Finally, the NIJRI should promote creation of community relations and education curricula for training programs for judges and other court personnel.

Indian court judges should be encouraged to attend non-Indian judicial functions, such as training sessions and meetings, and to observe non-Indian courts in session. It also would be desirable for judges and other court personnel to visit schools and community meetings, and to encourage visits by citizens and students to Indian courts while they are in session. Regular contact and interchange with organizations representing tribal government need to be developed, and initiatives by both tribal leaders and judges should be encouraged.

Recommendations

1. The Indian judiciary should establish and maintain a community relations and education program to make information available nationally and to assist individual tribes with similar programs.

2. Judges and other court personnel should have training in community relations.

Action Required

Federal agencies—must fund activities of the NIJRI, national organizations of tribal leaders, such as NTCA and NCAI, and individual tribes for community relations and education related to Indian courts.

Tribes—(specifically judges and tribal leaders)

must recognize the need for and begin performing community relations and education functions concerning the role and importance of Indian courts.

NIJRI—must create and operate a community relations and education program.

Time Required

The recommendations in this section should be implemented at once. To the extent they are incorporated into functions of other parts of this plan, such as training or the NIJRI, such implementation should be considered a priority.

Cost

The cost of the NIJRI community relations and education program is included in the NIJRI estimated budget in that section of these recommendations (page 184). Increased funds for training should accommodate programs in community relations.

National Indian Judiciary Research Institute

The most far-reaching national level recommendation in this five year plan is for the establishment of a National Indian Judiciary Research Institute (NIJRI). A central, operating arm of the Indian judiciary is needed to further the cause of Indian courts.

The Future of the NAICJA

The National American Indian Court Judges Association has functioned effectively for nine years as a special purpose association of judges of all Indian courts organized for their common interest. It has responded to needs for judicial training and the development of instructional materials. The association has no permanent, full-time staff, but rather maintains an administrative facility in Washington, D.C. with consultants hired to perform program tasks.

It is anticipated that the NAICJA will continue as the national organization of Indian judges. It will develop policy, advocate for the Indian judiciary, monitor federal programs related to courts, and promote improvement of the Indian judicial system. It will

coordinate organization of several regional associations of judges that are now forming. The NAICJA will continue serving as a conduit for expressing the Indian judiciary's interests to government officials and Congress. Committees of the NAICJA can be formed to respond to particular issues and problems. Fostering good relations and communication with Indian tribal leaders outside the judiciary will be another continuing function of the NAICJA. Designation of a judicial ethics board is an important new job for the NAICJA. This board would, with the consent of the tribes involved, become an interpreter of ethical standards relating to judges, and would render advisory opinions in ethical matters concerning individual judges.

Finally, the NAICJA should appoint a board of directors for the new National Indian Judiciary Research Institute with a majority of directors who are sitting Indian judges. Other members of the board should represent organizations involved in Indian court issues, such as the American Indian Bar Association, the American Indian Law Center, the American Indian Lawyer Training Program, the Legal Services Corporation, the National American Indian Court Judges Association, the National Congress of American Indians, the National Tribal Chairmen's Association, and the Native American Rights Fund. The NIJRI director and key government representatives could be included as non-voting members.

Functions of the NIJRI

Every Indian court must operate as an independent arm of a sovereign tribe. But experience has shown that most judges and court staffs would welcome a national entity to assist them with a plethora of tasks which go beyond their daily operations. The Model Standards for Indian Judicial Systems call for the setting of many national guidelines or standards and for other functions which are best performed centrally, such as maintaining a source of research, statistics and technical assistance for Indian courts. Training should have national coordination, as should publication of materials useful to the Indian judiciary. Many of the recommendations in this plan depend upon having a source of assistance and advice. All these national requirements of the Indian judiciary are best met by a fully staffed, operating program which should be initiated

by the NAICJA and funded by the federal agencies. A National Indian Judiciary Research Institute is proposed which would perform functions useful to the Indian judiciary. A summary of some of those functions follows.

Coordination of individual court needs assessments. The recommendation that there be an individual needs assessment for every Indian court depends upon coordination by the NIJRI. As discussed earlier in this chapter (pages 148-156), the role of a national staff familiar with the Model Standards for Indian Judicial Systems and with other court systems can be an invaluable aid in:

- promoting understanding of and interest among tribal leaders in the needs assessment process
- organizing planning teams
- assisting tribes in finding specialists to help with particular problems
- developing programs and budgets with tribes
- pursuant to their needs assessments
- making follow-up visits to tribes for evaluation and revision of needs assessments
- aiding tribes in the implementation of programs developed by them
- troubleshooting and obtaining help for tribes with specific problems in their court programs

Source of technical assistance. Frequently a tribe knows it needs help but does not know how to get it. The NIJRI personnel could assist directly with matters within their expertise.

Indian courts could benefit from the NIJRI's assistance with:

- planning and evaluation
- court organization and management
- recordkeeping
- community relations and education
- fundraising
- locating personnel and consultants

Further, the NIJRI would make referrals to experts in a variety of court related subjects based on files which it will develop. Indian courts could gain access to a great pool of resources and information if a working relationship were established with programs for

state and federal courts. Programs such as the National Center for State Courts, the Federal Judiciary Center, the Institute for Court Management, and the National College of the State Judiciary are rich sources of advice and publications on subjects of interest to Indian courts. The NIJRI should assist in directing courts and judges to appropriate state and federal programs.

Source of legal advice. Typically, Indian judges are not lawyers and are located far from law libraries, professional attorneys and other judges. While the most frequent questions can be answered based on experience or by reference to basic library sources which every court should have on hand, some issues are more difficult. The ability to obtain assistance with such problems would be invaluable to most judges.[28] This must, of course, be done consistent with the canons of legal and judicial ethics. Outside influence in individual cases is improper and advice must be based on information which avoids identifying parties.

It is contemplated that the NIJRI would maintain a toll free telephone number to be used by judges anywhere in the country who need advice. This is currently done in Texas to assist judges in rural courts. The NIJRI should have a law library in-house or nearby and lawyers and legal researchers on its staff. Further, it would have access to persons throughout the country who could respond directly by a return telephone call to the requesting judge, or who could advise the NIJRI staff in the formulation of a response. Often it would be beneficial for a judge to be put in contact with someone who could assist in his/her own region. An LEAA funded rural legal research center based at a university has been used successfully in Nebraska.[29]

A judge contacting the NIJRI for assistance might pose an hypothetical case based on an actual situation and request a research memorandum. Or the

[28] AILTP Report, supra note 6 at 115.

[29] Abt Associates, Rural Legal Research: Creighton Legal Information Center, An Exemplary Project (1977).

judge may have a question answered on the spot quick reference to a case or statute. Or an unusual question of judicial authority may arise, calling for a difficult, but immediate, ruling to stay an unlawful act of the tribal council. Or a courtroom disruption may demand a prompt response from a judge unsure of his/her powers. The possibilities are almost limitless. Court efficiency and fairness and the accuracy of rulings certainly would be bolstered by a ready source of advice.

Development of standards and guidelines for Indian courts. The Model Standards for Indian Judicial Systems urge the promulgation of sets of guidelines, sample laws, and various national standards which relate to the work of Indian courts. The NIJRI should assume the lead in developing and circulating to tribes such recommended standards and guidelines for Indian courts. The areas to be covered include:

- judicial ethics code
- salary guidelines
- standards for training
- guidelines for judicial disqualification
- model code of professional responsibility
- model statement of jurisdiction
- rules of courtroom procedure
- model Indian court bar admission standards
- suggested qualifications for Indian court personnel

Publications. The Judiciary Institute should publish research, reference, and training materials in topics of interest to Indian courts. Staff attorneys and law clerks will be able to research matters of broad interest and publish results of specific research of broad interest. An important NIJRI function would be collection and publication of Indian court decisions. This could be done by an Indian Court Supplement to the Indian Law Reporter. Publication of the Reporter itself would be an appropriate task for the NIJRI, too. A directory of all Indian judges and courts and of resources for courts, including social services agencies, specialists useful to courts, state, federal and tribal offices, and others should be available. The NAICJA has begun this effort but it needs expansion and continual updating. The NIJRI

would coordinate available grants and other resources for Indian courts and court related programs of organizations. Circulation of information on potential funding sources would benefit all courts. The publications program of the NIJRI should include:

- a journal of articles and reports on Indian court related subjects
- bulletins on available grants, contracts, technical assistance, and legal and legislative developments relating to the Indian judiciary
- materials for training judges and other court personnel
- directory of Indian courts and available resources
- Indian Court Supplement to the Indian Law Reporter

Training. Various training efforts have lacked overall coordination. The NIJRI could work with all agencies and organizations providing training for judges and other court personnel to fill gaps in needed training and eliminate duplication. The NIJRI's role should help assure that the Indian judiciary itself determines the nature of judicial training.

The NIJRI itself may be an ideal vehicle for conducting judicial training besides assisting in maximizing the use of training resources. A full-time staff to plan, schedule and organize training sessions, procure instructors and develop and revise materials would help make training more uniform and ease some of the burdens now borne by the NAICJA instructors.

Working for the establishment of a permanent Indian Courts Training Center would be an exciting undertaking for the NIJRI. The center could be used for training sessions for judges and other court personnel. Ideally, a building suited for training small to medium sized groups would be acquired in a location close to Indian country, easily accessible by air travel, and near adequate lodging. The NIJRI offices could be in the building to maximize use of facilities such as the library.

NAICJA staffing. If the NAICJA desires, the NIJRI could be used for NAICJA staff needs. Arrangements

for meetings, officers' correspondence, accounting, production of minutes and other staff work could be handled in the NIJRI office under a contract arrangement. The NIJRI would be a nerve center for the Indian judiciary and its staff role for the NAICJA would be most logical.

Community relations and education. The importance of fostering an understanding of Indian courts both on and off the reservation is discussed in the recommendation at pages 174-177. The NIJRI's community relations program should include:

- informing the media of Indian court related news
- developing community relations training curricula for judges
- production of informational materials, such as pamphlets, films, and videotapes
- communication with state and federal agencies for exchange of information

Other functions. The NIJRI will be available to Indian courts, organizations and federal agencies to perform a variety of court related functions. For instance, the NIJRI could be a central data collection, statistics development, and information dissemination center to aid the courts and federal agencies. The NIJRI should work closely with the Interagency Task Force recommended below, to assure that there is adequate communication of the needs and views of the Indian judiciary. It could help tribes and organizations with fundraising from federal and private sources. And it could prepare and file amicus curiae briefs in cases of importance to the Indian judiciary.

Recommendations

1. A National Indian Judiciary Research Institute should be established to perform services and programs for the benefit of the Indian court system.

2. The NAICJA should continue to serve as the advocate of the Indian judiciary and as a parent organization for the NIJRI.

Action Required

NAICJA—must initiate requests for funding of NIJRI.

Federal agencies—must respond to the funding needs of the NIJRI and provide continued basic support for the NAICJA.

Time Required

The recommendations can be implemented as soon as funding sources respond sufficiently.

Cost

Essential annual operating costs for the NIJRI would amount to approximately $500,000. This sum would be adequate for coordinating individual court needs assessments, providing limited technical assistance, maintaining a ready source of legal advice, working on development of standards and guidelines for Indian courts, publishing a monthly bulletin and an annually updated resource directory, and setting up a community relations effort. Functions such as training, publication of a journal, training materials and the Indian Court Supplement, expanded technical assistance, data collection coordination, production of major community education materials (e.g., films), establishing an Indian Courts Training Center, and the NAICJA staffing can be undertaken as the Institute's capabilities grow and funds become available from federal agencies and private sources.

The NAICJA will require an annual budget of approximately $60,000 for administration, overhead, circulation of a newsletter, an annual meeting and the functions of the ethics review board and other NAICJA committees.

Data Collection

Tribes now have very little data about the operation of their court systems and recordkeeping for court operations is inadequate. This hampers the efficient conduct of Indian court business, adequate tribal planning, and the federal funding process. The establishment of a nationally uniform data collection system is crucial for all Indian courts. It would assist the federal agencies immeasurably in doing their jobs. And a properly designed system will mean better operation of individual courts.

Two types of data are needed by the BIA and other federal agencies in their funding efforts:

*information compiled on a case-by-case basis
*statistics and facts which are collected or updated annually

A uniform data collection system must be developed, containing all information individual courts need to know about particular cases for recordkeeping purposes, and the raw data on which annual statistics will be based. Forms should be designed with spaces for entry of needed information. The forms should not ask for unnecessary information; they should be able to be used quickly and easily. The system should be designed to streamline court operations. The BIA has asked its Automated Data Processing Division to develop a data collection system for Indian courts, but the system would be for statistics, not for the day-to-day recordkeeping needed by the tribes. It is recommended that any system serve both purposes. If the tribes see a benefit in the system, there will be an incentive to use it.

The uniform data collection system should include all information which is important to the relevant government agencies and to individual courts. At a minimum this includes:

- civil or criminal case
- adult or juvenile
- nature of action or offense
- member or non-member
- Indian or non-Indian
- alcohol related
- family dispute
- jury request, if any
- types of hearings held
- disposition or remedy
- appeals
- relevant dates, locations, and identifying information
- financial records (court fees, bail, deposits, etc.)

Each court periodically should submit to government agencies data compiled from the case forms used in the recommended system or copies of the forms.

Other information about Indian courts could be required for agency review and justification of congressional appropriations, including:

- all court personnel
- budget
- actual expenditures
- funding sources
- basic demographic information about the tribe and reservation
- self-evaluation of facilities and programs available to the court

The Long Range Planning Project has concluded that mandatory requirements imposed by government agencies are generally obnoxious to tribes because they are paternalistic and tend to be infringements on the right of tribal self-government. But a requirement that tribes adopt a uniform data collection system as a precondition to BIA funding is recommended. This need not have oppressive overtones and definitely would inure to the benefit of the tribes in the long run.

Recommendations

1. A uniform Indian court recordkeeping and data collection system with appropriate forms should be developed at once.

2. The use of the uniform recordkeeping and data collection system for Indian courts should be made mandatory and a precondition of federal funding.

Action Required

Federal agencies—must immediately determine, together with representatives of the Indian judiciary, what basic information is to be included on the forms for their own purposes and to satisfy tribal needs.

Tribes—must replace present recordkeeping systems, if any, with the new system.

Time Required

It should take a year for the appropriate federal agencies, in cooperation with tribes and relevant organizations, such as the NAICJA and the proposed NIJRI, to develop the data collection system. Its use by all tribes could be required the following year.

Cost

Cost to the federal agencies for developing this system and forms should be minimal. Presumably the task can be done using existing personnel and equipment. Printing charges should not exceed $10,000 initially and $5,000 in subsequent years. The necessary compilation of data should be within the capabilities of existing systems at the BIA and in other agencies. The cost to tribes is negligible as all must maintain records as a part of their regular functions.

Training

Considerable ground has been broken in training Indian judges. The NAICJA program was a pioneer among judicial training programs; most states had no such programs prior to 1968 when NAICJA's training started. Indeed, funding for training has been greater for the Indian judiciary than for the judiciary of almost any state.[30] Nevertheless, only a fraction of the judicial training needs of Indian courts are being met. First, Indian judges have less formal education than most judges, even lay judges, in the non-Indian system. Second, there is a high turnover of Indian judges. Third, training for Indian judges must be tailored to varying tribal and regional needs.

The format of the NAICJA training program is workable. Periodically (usually twice a year), national training sessions are held and regional sessions are held more frequently. But the training of judges has been narrow in subject matter. Basic criminal law training is provided by LEAA funding; family law and child welfare training has been made available by the BIA. These subjects are vital to the work of Indian courts, but training in other subjects is sorely needed. Possible curricula include:

- handling civil cases
- integration of traditional principles and remedies
- the role of the judiciary in community relations and education

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[30] National Center for State Courts, State Judicial Training Profile, at 1-7 (1976).

- the role of the judiciary in the budget process
- techniques for handling factional, family, and clan disputes
- court administration
- handling of everyday matters, such as divorces
- handling jury trials
- hearing and deciding appeals
- techniques for maintaining judicial demeanor and control
- juvenile law and handling of children before the court
- motions and other special proceedings
- judicial review of tribal legislation
- review of administrative proceedings and decisions
- matters of regional interest (e.g., hunting and fishing)

In the past training in particular subjects has been instituted because funds were available for specific purposes. The better approach would be to determine the types of training which are most needed by the Indian judiciary and then to seek funds for them. The NIJRI would be a vehicle for determining the will of Indian judges, ascertaining training priorities, and coordinating training efforts. Thus, it would identify new areas of training and attempt to influence organizations to do such training and funding sources to support it. The NIJRI would try to assure that training programs are not duplicative. It should work with the Interagency Task Force on the Indian Judiciary recommended in this chapter (pages 190-192) to accomplish these goals.

Training of other court personnel has begun. The AILTP has an active program of training paralegals for advocacy work in Indian courts. Antioch School of Law in Washington, D.C. has begun a program of training Indian paralegals for other quasi-legal tasks, and the American Indian Law Center has a grant for training in juvenile law. The NAICJA will soon begin a course of training for Indian court clerks. Training also ought to be available regularly to Indian court reporters, porbation and parole officers, court administrators and planners. Many training programs for judges and other court personnel are available from sources

serving primarily non-Indian courts.[31] These pr[illegible]s can be valuable to Indian court personnel. The NIJRI should collect and make available information on such programs.

Existing training should be reviewed. It is important to evaluate methods of presentation, instructional techniques and curriculum content. The review and evaluation should be undertaken by Indian judges themselves along with representatives of the organizations now involved in training Indian court personnel. Using people already acquainted with Indian courts and present training programs will streamline the process. Representatives of organizations now doing training will have their own perspectives which may result in a useful interchange and constructive criticism. The background of evaluators minimizes the preparatory work for the evaluation.

Recommendations

1. All existing training programs relative to Indian courts should be evaluated. Their weaknesses and the need for new programs and curricula should be defined. Specific proposals and budgets can then be developed.

2. Federal agencies should base their funding of training programs upon the needs expressed as a result of the recommended evaluation.

Action Required

Federal agencies—must fund and organize the recommended evaluation.

NIJRI—must furnish needed coordination of training efforts.

Time Required

The evaluation process should take no more than six months, so that proposals could be sought

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[31] J. Venhoff, "State and National Judicial Training Programs: Are They Relevant to Indian Tribal Judges?", unpublished paper prepared for the Long Range Planning Project advisory committee (1977) (Appendix 2 to this report).

and presented for needed training before the next regular budget year.

Cost

The evaluation and planning as recommended would cost approximately $25,000.

It is impossible to estimate the budgets of training programs to be recommended. However, it is unlikely that the amount required would be any less than the amount presently spent on training for Indian court related personnel (judges, paralegals, and clerks). For 1978 this exceeds $4,000,000, most of which is from the Department of Labor CETA program.

Interagency Coordination

Several federal agencies provide support for Indian court related activities:

- the Bureau of Indian Affairs (BIA) provides basic support and special programs
- the Law Enforcement Assistance Administration (LEAA) within the Department of Justice assists individual tribes in meeting special personnel needs, constructing buildings, purchasing equipment, and with other projects, and it funds training of judges nationally
- the Department of Labor under the Comprehensive Employment and Training Act (CETA) has made possible employment of a number of Indian court personnel and has recently announced funding of some new programs for training large numbers of paralegals and court clerks
- the Legal Services Corporation funds legal services projects throughout the country, some of which serve Indian reservations and provide advocates or attorneys in Indian courts
- the Department of Health, Education and Welfare and its Administration for Native Americans (ANA) have not been active with respect to Indian courts, but the mission of ANA should include assisting Indian courts

Other government agencies may have programs compatible with Indian court goals which would be available if they were aware of opportunities for participation in court development and operation.

At present there is no effective coordination of Indian court funding among federal agencies. As pointed out in Chapter 2, there is no equity in funding among Indian courts throughout the country. Some lack even the most basic needs, but sacrifice scarce tribal funds to maintain their systems. Others have full staffs, adequate facilities and do not spend any tribal funds on their courts. Court funding simply does not depend on caseload, population, reservation size, or the adequacy of present staffing, salaries or facilities. There is little logic to the present system.

There is duplication of funding in national scale programs for Indian courts. There are several programs for paralegal training, while other important needs, such as a full program of judicial training in civil litigation, go unmet. Thus, limited funds are focused on a few needs while others are completely ignored. When funds are only available for narrow purposes, there is devisive competition among Indian organizations for the same programs. Often the most vocal or persuasive applicants are funded. Instead, documented needs should provide a variety of programs so that several organizations can cooperate in working for the improvement of Indian courts.

Many Indian organizations and businesses have difficulties in participating in federal programs because they are available only to local governments or educational institutions, but not to entities organized by and for Indians. The task force should try to find administrative solutions to this problem.

A concerted effort at interagency coordination of funding efforts for Indian courts is needed. The Interagency Task Force on the Indian Judiciary would develop a master plan for allocating and pooling of agency funding available for Indian courts. The NAICJA, NIJRI, and other organizations interested in assisting the Indian judicial system should work with the task force on this master plan because of their familiarity with needs at both the tribal and national levels. The NIJRI also would disseminate information about the available programs and approaches of agencies, would attempt to interest Indian organizations in undertaking needed projects, and would help obtain the necessary funding.

The task force should meet regularly to coordinate the federal approach to Indian courts. Its work will promote an equalization of funding among the tribes. This can be facilitated by agencies sharing information about their present budgets and plans with one another. The pooling of federal information also will assure that all agencies are operating on the same data and assumptions. The task force could be an important source of information for congressional committees interested in Indian courts. Liaison with Congress would be mutually beneficial.

Recommendation

An Interagency Task Force on the Indian Judiciary should be formed by the federal agencies involved or potentially involved in funding and assisting Indian courts.

Action Required

Federal agencies—the BIA should take the initiative to organize the task force in view of its pervasive functions and responsibilities for Indian courts. The other agencies must make a commitment to the purpose of the task force.

Indian organizations—the NAICJA, NIJRI, NTCA, AILTP, AILC, and other organizations involved in furthering the interests of Indian courts have a stake in, and ought to press for, the establishment of the task force at once.

Time Required

This recommendation can be implemented immediately.

Cost

None. The functions of the task force could be performed by existing personnel under existing budgets of the various agencies.

Congressional Action

This study was not intended to recommend changes in federal law. Of course, congressional action in the form of appropriations is needed to the extent

that additional funding is required for Indian courts. However, modifications of substantive law present another, more difficult, problem. Generally, the introduction of new legislation, referrals to committees, hearings, and consideration by both houses requires an expenditure of time and effort beyond the control of the government agencies and Indian organizations to whom this report and the recommendations in it are directed. Nevertheless, recommendations for modification of one federal law and for consideration of another are made because of their apparent importance to the future of Indian court systems.

Increased Penalties

As discussed in Chapter 2 of this report, in many instances Indian courts must fill a vacuum left by federal and state law enforcement. Federal and state law offers little security for reservation Indians when authorities refuse to prosecute offenders. The concurrent jurisdiction of Indian courts over major crimes could be exercised meaningfully if the limitation of $500 and six months in jail on Indian court sentences were removed. Sentences more appropriate to other crimes now handled by the Indian courts also could be imposed.

Direct Congressional Funding

Courts in the federal system receive their funding from direct congressional appropriations after review by the House and Senate Judiciary Subcommittees. Unlike Executive departments, the Judicial Branch is not subject to budget reviews and reductions by the Office of Management and Budget. The President's budget routinely includes the budget received from the Judicial Conference, which is based on requests received from individual courts. But Indian courts are just another item in the Bureau of Indian Affairs' budget and appropriation. A small part of the overall appropriation to that agency is for courts and their needs are weighed along with the Bureau's programs for education, roads, welfare, and many other things. Until 1976, courts were not even a separate item in the BIA budget but were included with law enforcement.

There are several levels at which Indian court budgets can be eroded. In the first instance the budget

must survive parings of the tribal budget. Then the budget is reviewed by agency and area offices of the BIA. At the central office aggregate figures are fit into policies of the BIA and the Interior Department. The Office of Management and Budget imposes a stringent review, aiming to cut costs and implement the administration's budgetary policies. When the Interior appropriations committees of Congress view the budget, it already is battlescarred. The committees approach it only incidentally as a budget for courts in that only about $3 million of a total budget of $847 million (1977) is earmarked for Indian courts.

Direct funding of Indian courts as courts in the federal system potentially would provide review by a more receptive forum, accustomed to court programs and the costs of judicial administration. On the other hand, an appreciation of Indian values and goals and the importance of tribal self-government may be lacking.

The reason the federal judiciary has a simplified funding process is that it is a separate branch of government under the Constitution. If Indian courts were to be included in the appropriations for United States courts, enabling legislation would be necessary. This legislation undoubtedly would have to deal with a number of issues of concern to tribes such as the degree to which Indian courts will be subject to controls by the federal judiciary. Judicial selection and courtroom procedure should remain within tribal discretion. Some federal courts have ruled that where Indian courts receive federal funding and are subject to laws and procedures prescribed by the federal government, they are effectively arms of the federal government such that incarceration of a defendant under a tribal court order is subject to federal habeas corpus review.[32] It seems unavoidable that Indian courts must sacrifice some of their status as arms of tribal sovereignty so long as they depend upon the federal sovereign for funds. But this will be the result of federal funding whether it comes through the Executive or the Judicial Branch. Legislation on the question could clarify the situation by stating Congress' intent regarding the capacity of Indian courts.

[32] See Settler v. Yakima Tribal Court, 419 F.2d 486 (9th Cir. 1969); and Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965).

Hearings to explore the consequences of including Indian courts in the federal judiciary's budget would be appropriate. Legislation then could be proposed to provide protections for tribal self-government and independence while furnishing the benefits of direct funding enjoyed by other federally supported courts. Hearings should be initiated by the congressional committees on the judiciary.

Recommendations

1. The present limitation of $500 and six months in jail imposed on Indian court sentences by 25 U.S.C. §1302(7) should be raised to $5,000 fine and five years in jail.

2. Congressional hearings should be held on the question of direct funding of Indian courts in the same manner as federal courts.

Action Required

United States Congress—(1) must consider and pass the recommended legislation to increase allowable tribal court penalties, and (2) must initiate hearings on the direct funding question.

Indian tribes and organizations—must support the recommendations.

Time Required

The recommended legislation can be introduced at once; if there is no substantial opposition, it could be enacted within a year.

Congressional hearings on direct funding can commence as soon as appropriate committees schedule them.

Cost

None.

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☆ U.S. GOVERNMENT PRINTING OFFICE : 1979 O—285-413