

## INDIAN LEGAL SERVICES PROGRAMS: THE KEY TO RED POWER?

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The Economic Opportunity Act of 1964<sup>1</sup> created a variety of federally financed social service programs intended to eliminate "the paradox of poverty in the midst of plenty in this Nation . . . ." <sup>2</sup> Title II of the Act authorized the establishment of community action agencies to coordinate programs designed to make low income Americans more self-sufficient. The term "community" was defined to include Indian reservations, as well as ordinary political subdivisions within each state.<sup>3</sup> Currently, more than 60 community action agencies are functioning under Indian authority on reservations across the nation.<sup>4</sup>

Although the legislation made no mention of legal services, it soon became evident that lawyers would be useful in achieving the goal of the Act. Consequently, the Office of Economic Opportunity (OEO) funded several legal services programs under provisions authorizing grants to community action agencies.<sup>5</sup> In 1965 the Legal Services Program was created as a separate division within OEO, and in fiscal year 1966 over \$27.5 million was allocated for legal services.<sup>6</sup> Though the vast majority of local programs were established in urban areas, a few were located in rural environs. The founding of the Navajo DNA program<sup>7</sup> in 1967 marked the creation of the first legal services program on an Indian reservation. Presently, Indian legal services programs are in operation within nine states.<sup>8</sup>

This comment will examine the operation of Indian legal services pro-

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<sup>1</sup> 42 U.S.C. §§ 2701-981 (1964).

<sup>2</sup> *Id.* § 2701.

<sup>3</sup> *Id.* § 2790(c) (Supp. V, 1970).

<sup>4</sup> 116 CONG. REC. 10,895 daily ed. July 9, 1970) (President Nixon's Message to Congress on Indian Affairs) [hereinafter cited as President Nixon's Message].

<sup>5</sup> 42 U.S.C. § 2785 (1964).

<sup>6</sup> Note, *Neighborhood Law Offices: The New Wave in Legal Services for the Poor*, 80 HARV. L. REV. 805, 806 (1967) [hereinafter cited as *Neighborhood Law Offices*].

<sup>7</sup> The program was originally funded through the local community action agency, the Office of Navajo Economic Opportunity. DNA stands for Dinebeilna Nahiilna be Agaditahe which means "Attorneys Who Contribute to the Economic Revitalization of the People." The name was suggested by John Rockbridge, a Navajo member of the program's board of directors.

<sup>8</sup> In addition to the Navajo and Papago Reservation programs in Arizona, OEO legal services programs are currently in operation on the Cheyenne River Sioux and Rosebud Sioux Reservations in South Dakota, the Choctaw Reservation in Mississippi, the Leech Lake Reservation in Minnesota, at Zuni Pueblo in New Mexico, and in a statewide program in California. Furthermore, the Wisconsin, Montana, and Alaska statewide programs each have a heavy Indian emphasis. Interview with J. Roger Detweiler, Office of Legal Services, OEO, in Washington, D.C., Aug. 3, 1970.

grams in terms of their realized and potential ability to provide the assistance required by their clientele. Emphasis will be placed on those unique factors which influence a reservation program, as contrasted with an OEO program designed to furnish legal services primarily to non-Indian clients in a non-reservation setting.

The legal services programs currently in operation on the Papago and Navajo Reservations will be examined in terms of their operational setting, administration, service and non-service functions.<sup>9</sup> The programs' relationships with other institutions on these reservations will also be investigated. Although both programs function primarily within Arizona,<sup>10</sup> they are widely disparate in the size of their organizations and client communities, their relationships with the respective tribal governments, and the forms of assistance they emphasize. Because of these differences, examination and comparison of the Papago and Navajo programs can lend insight into a variety of those factors which shape the nature and function of an Indian legal services program.

#### INDIAN LEGAL SERVICES PROGRAMS

##### *The Need for Legal Services Programs on the Reservation*

Of the more than one-half million Indians in the United States, approximately 250,000 reside on reservations.<sup>11</sup> The availability of publicly-financed legal services is especially important to reservation Indians for two interrelated reasons. First, most reservation Indians live at an appalling level of economic deprivation,<sup>12</sup> below that of every other American minority group.<sup>13</sup> The income of 80 percent of reservation Indians falls below the poverty line; the average annual income of reservation families is \$1,500.<sup>14</sup> Moreover, the unemployment rate among working-age Indians on reservations reaches 30 to 50 percent,<sup>15</sup> with a few of the poorest tribes reporting rates as high as 80 percent.<sup>16</sup> Under these circumstances, the Indian's economic status creates a need for legal assis-

<sup>9</sup> The phrase "non-service functions" is taken from *Neighborhood Law Offices*, *supra* note 6, at 813. It is used to designate those functions which are directed at improving the legal position of a program's entire prospective clientele, as opposed to "service functions" which provide the individual client with legal assistance.

<sup>10</sup> Although the Navajo Reservation extends into New Mexico and Utah, 70 percent of it is located in Arizona.

<sup>11</sup> COMMISSION ON THE RIGHTS, LIBERTIES, AND RESPONSIBILITIES OF THE AMERICAN INDIAN, REPORT: THE INDIAN: AMERICA'S UNFINISHED BUSINESS 11 (W. Brophy & S. Aberle eds. 1966) [hereinafter cited as COMMISSION REPORT].

<sup>12</sup> Indian reservations have been referred to as "the purest examples of underdeveloped enclaves within American society . . ." Note, *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818, 1838 (1968) [hereinafter cited as *The Indian: The Forgotten American*]. See generally COMMISSION REPORT, *supra* note 11, at 62-87.

<sup>13</sup> COMMISSION REPORT, *supra* note 11, at 62; President Nixon's Message, *supra* note 4, at 10,894.

<sup>14</sup> President Nixon's Message, *supra* note 4, at 10,895.

<sup>15</sup> COMMISSION REPORT, *supra* note 11, at 68.

<sup>16</sup> *Id.*; President Nixon's Message, *supra* note 4, at 10,895.

tance but also precludes him from obtaining the services of retained counsel.

Secondly, the Indians' plight as a people caught in the painful transition from traditional to modern society increases their need for publicly-financed legal services.<sup>17</sup> The distinctive cultural background of the Indian has inadequately prepared him for economic, social, and governmental interaction on an equitable basis with the dominant Anglo society. Linguistic barriers, lack of formal education, and unfamiliarity with the basic rules and values which govern Anglo society are but a few of the factors which frequently place the Indian at a disadvantage in intercultural exchanges.<sup>18</sup> The Indian's economic condition compounds this hardship by restricting his bargaining power and thus often forcing him to accept imposed terms in contractual relationships. These factors frequently combine to make the Indian a victim of injustice. Yet the protection he needs most—the services of a lawyer in the broadest sense of advocate and counselor—is, as a practical matter, unavailable to him.

#### *Unique Difficulties Encountered by Reservation Programs*

The paternalistic system under which Indians have lived since the creation of reservations<sup>19</sup> is the source of several unique problems confronting an Indian legal services program. Under this system the Bureau of Indian Affairs (BIA),<sup>20</sup> white traders, public school systems, and other institutions have continually imposed their own standards upon the Indians. These standards reflect an alien culture and, to a great extent, were formulated with little consideration for the interests and desires of the Indians.<sup>21</sup> With the decision-making aspect of their lives thus vir-

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<sup>17</sup> One writer notes that the primary social problems encountered over the past one hundred years by two of this country's largest non-white minority groups, Negroes and Indians, stem from the diametrically opposite treatment respectively afforded each group by the white man: while blacks were systematically *excluded* from all of white society's institutions, the major thrust of legislation and practice directed at Indians was to require them to *conform* to these same institutions. See V. DELORIA, *CUSTER DIED FOR YOUR SINS* 7-8 (1969) [hereinafter cited as DELORIA].

<sup>18</sup> See C. KLUCKHOHN & D. LEIGHTON, *THE NAVAHO* 167 (1946); S. STEINER, *THE NEW INDIANS* 151 (1968) [hereinafter cited as STEINER]; *The Indian: The Forgotten American*, *supra* note 12, at 1842.

<sup>19</sup> Relying on treaties and agreements between the tribes and the United States Government, the Indians surrendered claims to vast tracts of land and consented to accept life on government reservations. In exchange, the government "agreed to provide community services such as health, education, and public safety, services which would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans." President Nixon's Message, *supra* note 4, at 10,394. The failure of the government to achieve this goal has furnished the basis for many of the problems currently faced by reservation Indians. See also COMMISSION REPORT, *supra* note 11, at 24-25.

<sup>20</sup> For a discussion of the BIA's contribution to this paternalistic system, see STEINER, *supra* note 18, at 259-63. See also *OUR BROTHER'S KEEPER: THE INDIAN IN WHITE AMERICA* (E. Cahn ed. 1969).

<sup>21</sup> The power of the BIA to disapprove an Indian's will (25 U.S.C. § 373 (1964)), and the manner in which this authority has been exercised exemplify such an imposition of alien standards.

tually usurped by these institutions, reservation Indians have become anomic.<sup>22</sup> Furthermore, the legal services programs have discovered among Indians a lack of understanding of the concept of rights<sup>23</sup> and ignorance of the individual's rights vis-à-vis the institutions which exercise power on the reservation.<sup>24</sup> An Indian may be aware that one of these institutions has been improperly unresponsive or that he has been cheated, but the OEO lawyer will very likely have difficulty convincing him that, with the assistance of counsel, he can remedy the situation.

A related handicap faced by these programs stems from the perspective in which many Indians view the law as an influence in their daily lives. Virtually unlimited Congressional power over the Indian tribes,<sup>25</sup> and the frequently arbitrary manner in which that authority is exercised,<sup>26</sup> have created an atmosphere that law is intended to prevent: "it has contributed uncertainty and provided an abrasive influence."<sup>27</sup> Many Indians view law as a distant force that sanctifies decisions of the power-wielding governmental institutions rather than as a force which can place limits on this establishment.<sup>28</sup> To them, law is a negative force of denial, rather than an instrument of social justice.<sup>29</sup>

Furthermore, the white man persistently has paid little heed to traditional tribal law. He has preferred instead to impose his own rules of behavior, even though they may conflict with the Indians' customary prac-

If, in the opinion of the reviewing official, the Indian has not provided adequately for his relatives, the will is voided and the rules of intestate succession applied. Overruling an individual's decision on the allocation of his wealth after death is itself objectionable, but the Government compounds the problem by refusing to issue any guidelines on what constitutes adequate protection of relatives, or to discuss the validity of a will before probate. *The Indian: The Forgotten American, supra* note 12, at 1826 (footnotes omitted).

<sup>22</sup> One set of writers has commented that

[a]lthough the normal expectation in American society is that a private individual or group may do anything unless it is specifically prohibited by the government, it might be said that the normal expectation on the reservation is that the Indians may not do anything unless it is specifically permitted by the government. *Id.* at 1820.

<sup>23</sup> Under a paternalistic system there is no concept of right. Largesse is granted upon the whim of the powers that be. As a result the [Indian] has been conditioned to obtain his desired objectives, not by asserting the rights that he might have, but by playing upon the sympathy of the persons in power. DNA APPLICATION FOR REFUNDING, 1970-71 (OEO Grant No. 9878) 1 (annual request for refunding submitted to OEO) [hereinafter cited as DNA REFUNDING APPLICATION].

<sup>24</sup> The tribal government should be included within this classification of institutions.

<sup>25</sup> See U.S. DEP'T OF THE INTERIOR, OFFICE OF THE SOLICITOR, FEDERAL INDIAN LAW 21-22 (1966). Through broad grants of administrative authority, Congress has delegated much of this power to the Secretary of the Interior and the BIA. See 5 U.S.C. § 485 (1964); 25 U.S.C. § 1a (1964).

<sup>26</sup> See Price, *Lawyers on the Reservation: Some Implications for the Legal Profession*, 1969 LAW & THE SOCIAL ORDER 161, 163 (1969).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> See note 30 *infra*.

tice.<sup>30</sup> Not only is this a myopic approach to the formulation of a system of law for the reservations, but it also involves a misapplication of the basic tenets of the common law.

If the genius of the common law at large has been its ability through slow growth to conform ideals to societal mores, then that genius has not had a chance to flourish in the reservation setting; the goal, virtually from the beginning, was to use the law to mould behavior—to make Indians more like white men—rather than to make a law that codified or respected behavior.<sup>31</sup>

Under these circumstances, reservation lawyers must first persuade their client community not to regard the law as alien. Further, they must convince the Indians that its primary purpose is to insure equal justice, and that it can benefit the tribal member as well as the government. Only after surmounting these obstacles can the lawyers hope to be afforded the opportunity to demonstrate for their client community the potential value of legal services.

The triple citizenship status of the reservation Indian places additional burdens on the legal services program.<sup>32</sup> Not only does it create a maze of jurisdictional conflicts which complicates the practice of Indian law,<sup>33</sup> but it also results in the need to interact with a most unique judicial institution—the tribal court.

The effectiveness of the tribal courts is normally impeded by a variety of conditions. They are often hampered by an ill-defined jurisdictional reach,<sup>34</sup> are commonly presided over by judges who are not lawyers and who have not had extensive formal education, and are generally conducted

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<sup>30</sup> For example, the notion of criminal justice as it developed within the Indian culture placed primary emphasis on compensation, rather than on retribution. If a person were killed, livestock or merchandise was given to his family as an atonement and to avoid a blood feud. These customs are still viable in many tribes which feel that if the culprit makes a suitable restitution to his victim no further punishment is necessary. The white man's reaction to compensatory solutions to criminal acts coincided with his reaction to a great many other Indian customs. Behavioral rules of the white society were substituted for the traditional Indian practice. With passage of the Major Crimes Act of March 3, 1885, 23 Stat. 385, jurisdiction over Indians committing murder, manslaughter, or any of five other crimes was transferred to the federal courts. See DELORIA, *supra* note 17, at 9; STEINER, *supra* note 19, at 151; Comment, *Indictment Under the "Major Crimes Act"—An Exercise in Unfairness and Unconstitutionality*, 10 ARIZ. L. REV. 691, 694-95 (1968) [hereinafter cited as *Indictment Under the "Major Crimes Act"*]. Another commentator has illustrated the paradoxical nature of the white man's most recent reaction in this context: "It would not be unfair to say that if the reservations could regress in their method of adjudicating disputes, they would be replicating some of the experiments in alternate tracks and noncriminal dispositions that are now the vogue among commentators on American criminal law." Price, *supra* note 26, at 171.

<sup>31</sup> Price, *supra* note 26, at 164.

<sup>32</sup> The reservation Indian is a citizen of the United States (8 U.S.C. § 1401 (a) (2) (1964)), of the state in which he resides, and of his tribe.

<sup>33</sup> See COMMISSION REPORT, *supra* note 11, at 45-46.

<sup>34</sup> See, e.g., *id.* at 59-60. For a discussion of the jurisdiction of tribal courts, see *id.* at 49-50, 56-57; *Indictment Under the "Major Crimes Act," supra* note 30, at 694 n.17; *The Indian: The Forgotten American, supra* note 12, at 1833-34.

much more informally than state or federal courts.<sup>35</sup> Since they normally are not courts of record, an appeal necessitates a trial de novo. Moreover, because most tribal judicial systems do not provide for a prosecutor,<sup>36</sup> the judge must perform both prosecutory and adjudicatory roles. Further, the law applied by these courts is generally a complex amalgam which takes its substance primarily from the tribal code and traditional tribal law, with federal and state law being drawn upon interstitially.<sup>37</sup>

Although many tribal codes prevent lawyers from appearing professionally in tribal courts, an Indian may have the assistance and advice of a lay member of the tribe.<sup>38</sup> In response to these provisions and in order to protect the rights of their clients, several legal services programs have established the staff position of tribal lay counselor. These lay members of the tribe regularly assume the role of advocates in representing Indian clients before the tribal courts.

Finally, the OEO lawyers' desire to contribute to the well-being of the tribe and to assist the individual client may produce significant dilemmas when these goals conflict. Conflicts between individual and tribal interests may arise in such contexts as the division of reservation resources or the political process within the tribe.<sup>39</sup> The ostensible duty of the reservation lawyer is to make his services available to persons who qualify under the appropriate eligibility criteria. Yet when a member of the tribe applies for assistance in a conflict with the tribal government, determining the extent to which the interests of the individual vis-à-vis the group should be promoted becomes a complex problem. The OEO lawyers' dual role on the reservations, as defenders of individual rights and as part of a community action program designed to strengthen the tribal organization, forces them to weigh the competing interests carefully before deciding how to apply their efforts.<sup>40</sup>

#### THE PAPAGO LEGAL SERVICES PROGRAM

##### *Operational Setting*

An estimated 6,500<sup>41</sup> Papagos reside permanently on the tribal re-

<sup>35</sup> See *The Indian: The Forgotten American*, *supra* note 12, at 1834-35; Price, *supra* note 26, at 175.

<sup>36</sup> The Navajo legal system is an exception to the rule. The position of Navajo tribal prosecutor was established in 1969. Interview with Charley John, DNA tribal court advocate, in Window Rock, Arizona, Sept. 25, 1970. [hereinafter cited as John Interview].

<sup>37</sup> See *The Indian: The Forgotten American*, *supra* note 12, at 1834.

<sup>38</sup> See Fretz, *The Bill of Rights and American Indian Tribal Governments*, 6 NATURAL RESOURCES J. 581, 602 (1966). Chap. 1, § 9 of the Papago Tribal Code states: "Professional attorneys shall not appear in any proceeding before the Tribal Court. The defendant, however, may call in a member of the Tribe to advise and defend him during any court proceeding."

<sup>39</sup> Price, *supra* note 26, at 167.

<sup>40</sup> See *id.* at 168.

<sup>41</sup> Interview with Lindsay Brew, director, Papago Legal Services, in Tucson, Arizona, Sept. 19, 1970. [hereinafter cited as Brew Interview].

reservation<sup>42</sup> in southern Arizona. Their 74 villages are scattered over three million acres of land,<sup>43</sup> an area approximately the size of Connecticut. Like most reservation tribes, the Papagos derive income principally from their land resources, with the cattle industry constituting the primary source of tribal income. Although the Papagos "remain in the ranks of the most economically depressed of all American groups,"<sup>44</sup> present efforts to develop the reservation's mineral resources appear likely to yield greater prosperity within the next three years.<sup>45</sup> Concurrently, the increasing number of young Papagos acquiring college educations<sup>46</sup> is providing human resources necessary for a long-range program of economic and social development.

### *Administration*

Although the Papago Legal Services program was established in 1968,<sup>47</sup> a complete turnover in its professional staff during the past year<sup>48</sup> has resulted in what must be considered a rebirth.<sup>49</sup> The present staff includes three attorneys<sup>50</sup> and two lay counselors.<sup>51</sup>

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<sup>42</sup> The Papagos actually occupy three separate reservations: the main reservation (the Papago Indian Reservation) and two smaller ones (the San Xavier and Gila Bend Reservations.) R. DITZLER, *THE INDIAN PEOPLE OF ARIZONA* 132 (1967). Since the Papago Tribal Council governs the residents of all three reservations (*id.* at 132-33), for the purposes of this comment, these will be viewed as a single reservation.

<sup>43</sup> The Papago Reservation is second in size only to the Navajo Reservation.

<sup>44</sup> Bennett, *Problems and Prospects in Developing Indian Communities*, 10 *ARIZ. L. REV.* 649, 650 (1968). A survey conducted on the Papago Reservation in 1967 indicated that the median individual income was under \$500, while the median income for families varied from \$500-999. Taylor, *Indian Manpower Resources: The Experience of Five Southwestern Reservations*, 10 *ARIZ. L. REV.* 579, 594 (1968).

<sup>45</sup> Copper leases recently negotiated by the tribe are expected to result in the active operation of two mines on the reservation within the next three years. Of the more than 700 new jobs presently foreseen, approximately 500 will be filled by members of the tribe. The royalty dividends from the leases are expected to add an annual \$4 million to the tribal coffers. Interview with Joseph Lucero, superintendent, Sells Agency, Bureau of Indian Affairs, in Tucson, Arizona, Sept. 21, 1970 [hereinafter cited as Lucero Interview]. See also Berger, *Indian Mineral Interest—A Potential for Economic Advancement*, 10 *ARIZ. L. REV.* 675 (1968).

<sup>46</sup> More than 100 Papagos are currently enrolled in junior colleges and universities. The immediate goal is to double this figure. Lucero Interview, *supra* note 45.

<sup>47</sup> Brew Interview, *supra* note 41.

<sup>48</sup> The former staff attorney resigned in December, 1969, and the director in February, 1970.

<sup>49</sup> The present director assumed that position in March, 1970. The present staff attorney joined the program in April, 1970, and the Reginald Heber Smith Fellow joined in August, 1970, after having completed a one-year assignment with the Navajo DNA legal services program.

<sup>50</sup> The three attorneys include the director, a permanent staff attorney, and a Reginald Heber Smith Fellow. The Reginald Heber Smith Community Lawyer Fellowship Program, sponsored by OEO's Office of Legal Services and administered by Howard University in Washington, D.C., grants fellowships to law school graduates who participate in OEO legal services programs for a one-year period. Brew Interview, *supra* note 41.

<sup>51</sup> Two trailers located at Sells, Arizona, the largest community on the Papago Reservation, furnish space for the program which has a budget of \$74,000 for the current fiscal year. *Id.*

Responsibility for the external administration of the Papago Legal Services program rests with a board of directors<sup>52</sup> comprised of thirteen Papagos and four Anglos.<sup>53</sup> As a consequence of the Anglo members' record of infrequent attendance at board meetings,<sup>54</sup> the Indian members wield even greater power over operation of the program than their majority position suggests.

The opportunity to serve as a "director" affords each Papago board member a revolutionary new experience: the chance to exercise direct authority over Anglos. The paternalistic system under which the Papagos and other tribes have long existed has so successfully inculcated the image of Anglos directing Indians that the Papago board members have been somewhat reluctant to reverse this traditional relationship.<sup>55</sup> A recently issued policy statement enumerating the board's program priorities, however, could signal a new willingness on part of the Papago directors to accept their policy formulation responsibility.

Participation by representatives of the reservation community within the administrative structure of the legal services program yields several long-range benefits. It helps to assure that the program meets the specific needs of the people for whom it was created as well as aiding in the development of administrative skills useful in other reservation projects. Perhaps most important are the psychological benefits to the tribe. Effective leadership on the part of the Indian board members can demonstrate to the entire tribe that Papagos are indeed capable of controlling programs affecting reservation life. Thus all of these factors combine to provide a foundation for increased tribal self-reliance.

From the standpoint of internal administration, the size of the Papago Legal Services program is both advantageous and detrimental. The organization is small enough to provide desirable flexibility. The attorneys and lay counselors can function as a unit or as individuals, and the director is afforded maximum opportunity to supervise its operation. On the other hand, a small staff can assist adequately only a portion of the potential clientele and is precluded from enjoying the luxury of specialization.

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<sup>52</sup> Provisions of the Economic Opportunity Act (42 U.S.C. §§ 2701-981 (1964)) require that "[e]ach community action agency . . . shall administer its program through a community action board . . ." *Id.* § 2791(a) (Supp. V, 1970). In addition, the OEO Office of Legal Services recommends that each legal services program establish its own board of directors. *See Neighborhood Law Offices, supra* note 6, at 835 & n.164.

<sup>53</sup> At present, the Indian members include an elected representative from each of the reservation's eleven political districts, the chief judge of the Papago tribal court (an ex-officio, voting member), and the director of the local community action agency (an ex-officio, non-voting member). Two law school professors, a superior court judge, and a representative of the Pima County Bar Association, who is currently the privately-retained tribal counsel, comprise the Anglo contingent. Brew Interview, *supra* note 41.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

Like other legal services programs, Papago Legal Services must occasionally deal with two especially troublesome administrative problems. The first arises when legal assistance is sought by both parties to a dispute. Under past procedure, one attorney and one lay counselor was assigned to each party. This practice not only raised serious ethical questions,<sup>56</sup> but also undermined personnel effectiveness because of intra-staff conflict. In an attempt to overcome the problem, a fund has been established to employ private counsel to represent one of the parties.

OEO lawyers' inability to accept fee-generating cases gives rise to another problem. A practical and efficient system for referring such cases to local private attorneys must be developed. The Pima County Bar Association's Lawyers Referral Service has proven unsatisfactory because of the fee for the service.<sup>57</sup> As a result, the staff is currently compiling a list of all available lawyers in the Tucson area, from which names will be selected on a rotational basis for case referral.

### *Service Functions*

Like all OEO programs, Papago Legal Services allocates the bulk of its resources to performing service functions in response to requests from individual clients. Standardized criteria are employed to determine client eligibility for assistance.<sup>58</sup>

Serving a geographically dispersed clientele<sup>59</sup> places burdens on the reservation lawyers unknown to their counterparts in more densely populated urban areas. Even with such a high eligibility percentage,<sup>60</sup> the

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<sup>56</sup> See ABA CANONS OF PROFESSIONAL ETHICS No. 6: "It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts."

<sup>57</sup> Brew Interview, *supra* note 41.

<sup>58</sup> The eligibility criteria utilized by a particular legal services program are established by the program's board of directors with the approval of OEO. This procedure accounts for the variations in criteria that occur among these programs. *Id.* Two basic criteria are employed by Papago Legal Services to measure client eligibility: income, and residence. The income standard permits access to an attorney's services for an unmarried Papago earning \$60 per week or less or for a married couple with a combined maximum weekly income of \$80. For each additional person in the family the maximum weekly income is raised by \$12. Furthermore, a degree of flexibility can be introduced through consideration of other factors which may influence ability to secure legal assistance. A potential client's outstanding debts, assets, health, recent or future employment, distance from a private attorney, or wealthy relatives, may work to permit or preclude his eligibility for the program's services, regardless of whether he meets the required formal income criteria.

A member of the tribe who resides off the reservation and qualifies under the basic standards can receive assistance only if no other legal aid is readily available, and it will not be unduly difficult for the program to provide the services required. PAPAGO LEGAL SERVICES APPLICATION FOR REFUNDING, 1969-70 (OEO Grant No. 0219) [hereinafter cited as PAPAGO APPLICATION FOR REFUNDING].

<sup>59</sup> Some reservation villages are located over 50 miles from the Papago Legal Services offices at Sells, Arizona.

<sup>60</sup> It has been estimated that 90 percent of the Papagos residing on the reservation are eligible for the program's services, and only 5 percent of those seeking aid have been deemed ineligible. PAPAGO APPLICATION FOR REFUNDING, *supra* note 58.

theoretical availability of legal assistance is of no practical benefit unless the program's services are accessible. In an attempt to meet this need, the attorneys and lay counselors "ride circuit" to the reservation's four principal population centers.<sup>61</sup> Each of these villages is visited at least once every two weeks. The visits coincide with those of the Public Health Service to permit those Indians who must travel long distances to avail themselves of both organizations' services with a single trip. Special visits to particular clients in other reservation villages provide further opportunity for contact with members of the legal services staff. If the program's present budgetary and manpower resources could be increased, however, the director would like to establish a permanently staffed branch office at the village of Santa Rosa in the northern part of the reservation.<sup>62</sup> This additional facility would considerably increase client accessibility to the program's services.

Once the reservation lawyer is aware of a Papago's need for legal assistance, he may very likely encounter difficulty in convincing his potential client of the sincerity of his offer to help. Acquiring the client's confidence, however, does not end the lawyer's problems. For instance, Anglo society attaches great importance to particulars such as names, dates, and times, while Indian societies do not. The Indian is more likely to place emphasis on remembering details of human relationships.<sup>63</sup> Commendable or not, this trait may render a Papago unable to recall facts of legal significance. The OEO lawyer, therefore, often finds it necessary to spend much of his time as an investigator before he can serve his clients adequately.<sup>64</sup>

Papago Legal Services handles 600 to 700 cases annually.<sup>65</sup> An estimated 10 to 15 percent of its potential clientele receive some form of legal assistance from the program each year.<sup>66</sup> The active caseloads for each of the three attorneys, which average between 40 and 50 cases, have not proved excessively burdensome. Automobile cases,<sup>67</sup> including sales contract cases as well as accident cases, and general consumer transaction cases currently dominate the program's caseload. The remaining cases center principally on problems related to the distribution of public assistance benefits. A few criminal and domestic relations cases are also handled.<sup>68</sup> While the needs of some clients involve formal litigation,

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<sup>61</sup> Interview with Mark Smith, Papago Legal Services staff attorney, in Sells, Arizona, Oct. 2, 1970 [hereinafter cited as Smith Interview].

<sup>62</sup> Brew Interview, *supra* note 41.

<sup>63</sup> Smith Interview, *supra* note 61.

<sup>64</sup> *Id.*

<sup>65</sup> All information regarding the program's caseload was obtained from Lindsay Brew, director, Papago Legal Services. See note 41 *supra*.

<sup>66</sup> PAPAGO APPLICATION FOR REFUNDING, *supra* note 58.

<sup>67</sup> The extensive land area over which the reservation community is dispersed makes ownership of an automobile a virtual necessity for even the poorest of Papago families.

<sup>68</sup> An OEO legal services program normally handles few criminal cases be-

either by way of individual lawsuits or class actions,<sup>69</sup> services of a more informal nature, such as counseling, preparation of documents, and representation in administrative hearings,<sup>70</sup> are more frequently provided.

The importance of the OEO lawyer's role of protecting his Indian clients' rights is well illustrated by the example of a BIA welfare termination appeal. Although the BIA regulations do not mention hearings before or after termination of benefits,<sup>71</sup> they do provide for an appeal from a termination decision.<sup>72</sup> The appeal entails a review of the case with the social worker, an appeal to the reservation superintendent, and finally a written appeal to the area office of the BIA. In light of Indian submissiveness to authority, however, the provision for appeal was virtually unused without an attorney to represent the recipient.<sup>73</sup> In this manner the availability of OEO lawyers has broadened the scope of procedural rights accessible to reservation Indians.

Since the Papago Tribal Code precludes professional attorneys from practicing before the tribal court,<sup>74</sup> Papago Legal Services clients appearing in that court in both civil and criminal actions<sup>75</sup> are represented by the program's two lay counselors.<sup>76</sup> By working closely with staff at

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cause of the strict limitations imposed by 42 U.S.C. § 2809(a)(3) (Supp. V, 1970):

No funds or personnel made available for such [legal services] program . . . shall be utilized for the defense of any person indicted (or proceeded against by information) for the commission of a crime, except in extraordinary circumstances where, after consultation with the court having jurisdiction, the Director has determined that adequate legal assistance will not be available for an indigent defendant unless such services are made available. *Id.*

<sup>69</sup> For example, Papago Legal Services filed a class action against a Tucson used-car dealer, alleging violation of the federal Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.* (Supp. V, 1970). *Eleando v. McGinnis*, Civil No. 70-63 (D. Ariz., filed April 24, 1970).

<sup>70</sup> Papago participants in BIA welfare hearings generally need this form of assistance. These informal hearings generally focus on whether specific individual Papagos or families are receiving the welfare assistance to which they are entitled. Brew Interview, *supra* note 41.

<sup>71</sup> As a result of *Homer v. Hickel*, Civil No. 69-83 (D. Ariz., filed May 2, 1969), this situation has been changed on the Papago Reservation. Papago Legal Services filed suit on behalf of 90 Papago men who were declared ineligible for BIA general assistance when they refused to leave the reservation and accept seasonal employment. The court issued a temporary restraining order and ordered that a welfare termination hearing be held. Since that time the Sells Agency of the BIA has issued new regulations providing for hearings in all instances of welfare termination. Brew Interview, *supra* note 41.

<sup>72</sup> U.S. DEP'T OF INTERIOR, BUREAU OF INDIAN AFFAIRS, INDIAN AFFAIRS MANUAL § 3.1.9 (1965) [hereinafter cited as I.A.M.I.].

<sup>73</sup> See Wolf, *Needed: A System of Income Maintenance for Indians*, 10 ARIZ. L. REV. 597, 611 (1968).

<sup>74</sup> See note 38 *supra*.

<sup>75</sup> See note 68 *supra*.

<sup>76</sup> Even before the creation of Papago Legal Services, the Papagos followed the prevailing Indian practice of permitting an Indian who was a defendant in a criminal action or a party to a civil action being heard in tribal court to be advised and assisted by another member of the tribe. See note 38 *supra*. The representation afforded Indian clients by the OEO lay counselors, however, is of a considerably more "professional" quality than that provided by these early lay representatives. One writer has expressed the view that, in consideration of the nature

torneys in preparing their cases, they acquire training in basic court procedures, substantive law, and legal methodology, while serving their clients. These lay counselors are the first members of the Papago Tribe with any degree of legal training to appear regularly on behalf of clients.

### *Non-Service Functions*

Every OEO legal services program is dedicated to the goals of assuring its client community full access to the machinery of justice and helping them cast off their mantle of poverty. If these programs restricted themselves merely to providing service functions, their efforts toward achieving these goals would be of only limited effectiveness. Under such restrictions, the programs could not aid the many poor among their potential clientele who, for one reason or another, fail to take advantage of the services of a lawyer. To meet this need a series of functions have been implemented, each intended to benefit all of the poor residing within the specific geographical areas served by a particular program. These "non-service functions" include law reform, community education, and community action

1. *Law Reform.* In performing this function, Papago Legal Services has to date focused primarily on attempted reform within the tribal legal system.<sup>77</sup> In addition, the assistance sought by an individual client periodically furnishes an OEO lawyer with the opportunity to provide benefits for the entire tribe. A prime example is *Ruiz v. Hickel*,<sup>78</sup> in which an unemployed Papago mine worker's application for BIA general assistance was rejected because he did not reside on the reservation.<sup>79</sup> The OEO lawyers argued that the classification of Indians according to residency is unjustifiably discriminatory<sup>80</sup> and unrelated to the statute authorizing BIA welfare expenditures.<sup>81</sup> In reply, the BIA contended that its responsibilities extend only to providing welfare assistance to reserva-

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of most tribal courts, the "legal" assistance provided an Indian defendant by a lay member of his tribe ("familiar with the customs, practices, and procedures of the tribe" and fluent in its native tongue) may be more beneficial, on the whole, than similar assistance provided by a non-Indian attorney. Reiblich, *Indian Rights Under the Civil Rights Act of 1968*, 10 ARIZ. L. REV. 617, 628 (1968).

<sup>77</sup> Brew Interview, *supra* note 41. Since the drafting of the tribal code by the BIA in 1936, numerous tribal council (*see* note 90 *infra*) resolutions affecting its substance have been enacted. A law student employed by the program as a summer clerk in 1970 reviewed these resolutions and began the task of codification. He also drafted a much needed tribal juvenile code—the first in the history of the tribe. *Id.*

<sup>78</sup> Civil No. 2408 (D. Ariz., Nov. 4, 1969), *appeal filed*, Civil No. 25568 (9th Cir., filed Dec. 17, 1969).

<sup>79</sup> Mr. Ruiz resided in Ajo, Arizona, a community located 15 miles from the Papago Reservation border.

<sup>80</sup> *See* Wolf, *supra* note 73, at 610, for further discussion of this argument.

<sup>81</sup> The Synder Act of 1921, ch. 115, 42 Stat. 208, as amended 25 U.S.C. § 13 (1964), authorized the BIA, under the supervision of the Secretary of the Interior, to expend money "for the benefit, care and assistance of the Indians throughout the United States . . ." (emphasis added).

tion Indians. Unsuccessful in the district court, Papago Legal Services has appealed. The final outcome of this case could have a direct bearing on the interests of all non-reservation Papagos and, given the modern Indian's increasing degree of residential mobility, could indirectly affect the interests of the entire tribe.

Assistance recently provided by the OEO lawyers to Papagos participating in the Tribal Work Experience Program (TWEP)<sup>82</sup> demonstrated that informal means, such as meetings with tribal government officials or the mere threat of litigation, can also be effective in accomplishing reform. The chief judge of the Papago tribal court refused to permit convicted TWEP workers to pay fines in lieu of serving sentences, an alternative available to all other tribal members,<sup>83</sup> on the rationale that welfare money given these men was intended for use by their families, not for payment of criminal fines. In response to a TWEP participant's request for assistance, Papago Legal Services threatened to file a habeas corpus petition on equal protection grounds. After requesting reports from the judge and the legal services program director, however, the Papago Tribal Council decided that TWEP workers should be accorded the same rights in this context enjoyed by other tribal members.<sup>84</sup>

2. *Community Education.* The community education element of an Indian legal services program normally focuses on ensuring that tribal members are cognizant of the nature and extent of their rights, teaching them how to preserve and enhance these rights, and publicizing the availability of legal assistance.

During the first two years of its existence, the Papago community education program was virtually dormant due to lack of attention.<sup>85</sup> Although a full-time community education officer was employed in September, 1969, the program still suffers from the lack of adequate funding and specific objectives. To date, the organization of several consumer education courses stands as its most significant accomplishment.<sup>86</sup>

3. *Community Action.* The primary goal of an Indian legal services community action program is to replace the anomie that pervades many tribes with an attitude of self-determination capable of sustaining significant achievement through community effort. Ideally, OEO lawyers should seek to attain this end by helping members of the tribe to identify

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<sup>82</sup> Under TWEP, which is funded by the BIA and administered by the tribe, able-bodied Papago men eligible for BIA general assistance are assigned to various work projects on the reservation. TWEP participants are paid the same amount they would receive under a general assistance grant, plus an additional \$30 per month to cover work-related expenses. See Wolf, *supra* note 73, at 611-12.

<sup>83</sup> Brew Interview, *supra* note 41. In addition, while other Papagos were permitted to work off their sentences at the rate of two days for each day worked, TWEP participants earned only one day of credit for each day of work. *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> The duties of a community education director were originally delegated to a staff member who also served as a lay counselor.

<sup>86</sup> Brew Interview, *supra* note 41.

their specific needs, then by suggesting alternative means for meeting these needs, and finally by providing both directly and indirectly<sup>87</sup> the skills necessary to the success of the chosen alternative.

As a consequence of the lack of sub-tribal groups on the reservation capable of serving as channels for development, and the greater resource mobilization potential at the tribal level, the basic thrust of the Papago program's community action activities have been directed through the tribe itself.<sup>88</sup> A proposal for the funding of a public transportation system to connect the communities of Sells, Santa Rosa, and Ajo, recently prepared by the OEO lawyers and submitted to the Department of Health, Education and Welfare under authority of the Papago Tribal Council, is evidence of the program's role in reservation planning. The annual Papago tribal fair and rodeo is another example of the program's efforts. The tribal council recently decided that an attempt should be made to convert the traditional event into a profitable activity and the program director, as a member of the fair's planning committee, has personally contributed the legal services necessary to effectuate the council's desires. Further participation in the overall development of the tribe is achieved through the continuing involvement of all three program attorneys in the functioning of numerous tribal government and social service committees on the reservation.<sup>89</sup>

### *Relationship With Other Institutions on the Reservation*

A measure of the effectiveness of an Indian legal services program is the manner in which it relates to other reservation organizations. In this context, the various components of the tribal government and the local BIA agency are the most important institutions to be considered.

1. *With the Tribal Government.* The relationship between Papago Legal Services and the Papago tribal government<sup>90</sup> is marked generally by mutual cooperation. The program director's regular attendance at tri-

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<sup>87</sup> The OEO lawyer provides these skills directly by furnishing essential professional expertise and indirectly through helping members of the tribal community develop the skills necessary to permit effective community control of these efforts.

<sup>88</sup> Brew Interview, *supra* note 41.

<sup>89</sup> Two other factors concerning the community action program warrant consideration. First, legal assistance provided through normal service functions often enhances the economic position of individual Papago clients, and, consequently, the tribe. Secondly, at least in an indirect manner, nearly all cases handled by the OEO lawyers have a bearing on the reservation's economic development in that they contribute to the removal of the psychological barriers that keep men entrapped within a recurring cycle of poverty.

<sup>90</sup> The tribal chairman, elected for a one-year term of office, presides over the 22-member tribal council (two members elected from each of the reservation's eleven districts), the principal governing body. The tribal government normally functions in a slow, deliberate manner. This demeanor results in large measure from the tradition that all council decisions must be unanimous, or the matter under consideration will be "taken back to the people in the villages" for further discussion. Lucero Interview, *supra* note 45.

bal council meetings<sup>91</sup> sustains a mutually beneficial liaison between the two organizations<sup>92</sup> and assists the legal services program in its efforts to reform reservation life.

Both the legal services program and the local OEO community action agency realize the importance of their continued cooperation and realize that separate efforts to attack single aspects of the Papagos' multi-faceted problems are often likely to prove unnecessarily futile.<sup>93</sup> On the other hand, it is equally important that the legal services program maintain a sufficient degree of independence from the local parent organization.<sup>94</sup> Only then can the legal program's specialized functions be executed effectively while avoiding ethical problems such as the interposition of a non-lawyer OEO decision-maker between the lawyer and his client. Finally, funding problems have generated some conflict between the organizations.<sup>95</sup> Improved budgetary procedures are badly needed to assure that funds specifically allocated to each of the various component programs are not spent instead by the community action agency.

Papago Legal Services and the Papago tribal judiciary manifest a favorable working relationship. The OEO staff is keenly aware that the tribe's legal system could be more effective with increased funding, improved training for the judiciary, and either employment of a permanent prosecutor or training of members of the local police force to act as prosecutors. The implementation of measures to help satisfy these needs, however, is necessarily a task for the tribal council, although the OEO staff has offered to furnish any services which would assist the council in executing such measures.

The activities of the legal services program could have a paradoxical influence on the tribal court. Since there is no prosecutor, the OEO lay counselors' appearances as defense advocates in criminal cases could generate an unhealthy situation: the balance of fairness could shift against the government. In contrast, activities of the program such as its efforts to improve the tribal code<sup>96</sup> will almost certainly have a salutary influence on the general effectiveness of the tribal court.

## 2. *With the BIA.* Interaction between Papago Legal Services and

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<sup>91</sup> The director presents a regularly-scheduled report on the recent activities of Papago Legal Services at each of the council's monthly meetings.

<sup>92</sup> A formal bond between the two organizations exists only to the extent that the legal services program is funded by OEO through the local community action agency, the Papago Office of Economic Opportunity, which operates under the aegis of the tribal government.

<sup>93</sup> For example, Papago Legal Services and the Papago Housing Authority, which functions under the auspices of the local community action agency, often combine their efforts in working to meet the tribe's housing needs. Brew Interview, *supra* note 41.

<sup>94</sup> Cf. *Neighborhood Law Offices*, *supra* note 6, at 812, 835.

<sup>95</sup> During fiscal year 1969, an estimated \$12,000 of the funds appropriated for use by Papago Legal Services was instead spent by the local community action agency. Brew Interview, *supra* note 41.

<sup>96</sup> See note 77 *supra*.

the Sells Agency of the BIA is characterized by a remarkable degree of cooperation and very little dissension. This situation is surprising in that, although both organizations espouse effective contribution to the well-being of the Papago Tribe as their primary goal, their separate roles on the reservation would seem destined to conflict. The BIA, with its bifurcated duty as trustee of the tribe's resources and administrator of the reservation,<sup>97</sup> is generally cast in the image of the reservation "establishment," while the legal services program, with its avowed objectives of seeking reform on the reservation and access to justice for its clients, is frequently viewed as the revolutionary opponent of the status quo.

The conflicts which have arisen between the organizations have been relatively minor and confined principally to BIA welfare assistance and regulation of reservation traders.<sup>98</sup> On several occasions, the OEO lawyers have requested hearings to determine whether particular Papago clients are receiving the amount of welfare assistance to which they are entitled. These hearings place the OEO lawyers and the BIA in opposing adversary roles. The agency's refusal to exercise its statutory authority<sup>99</sup> to regulate the activities of traders operating on the reservation has resulted in additional friction. The OEO lawyers argue that regulation of traders is necessary to insure that they do not take advantage of Papago customers.<sup>100</sup> The lawyers' threat to take direct action against the BIA if these regulatory duties are not properly executed<sup>101</sup> presages the development of increased inter-organizational dissension.<sup>102</sup>

At times the Washington headquarters of the BIA appears to be the real perpetrator of tension between the legal services program and the local BIA agency. On several occasions, agreements between Papago Legal Services and the Sells agency superintendent concerning the implementation of new administrative procedures on the reservation have been shattered by the refusal of BIA headquarters to permit such reforms.<sup>103</sup> Under these circumstances, a BIA agency superintendent, viewing the implementation of the proposed reforms as necessary to the well-being of the tribe, may paradoxically decide that submission to an OEO-initiated legal

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<sup>97</sup> The BIA's trustee duties include the preservation and protection of the tribe's land, mineral, and water resources. Building and maintaining roads, wells, and schools and providing social services, such as its limited welfare assistance program, are examples of the responsibilities delegated to the BIA as administrator of the reservation. See COMMISSION REPORT, *supra* note 11, at 118.

<sup>98</sup> Brew Interview, *supra* note 41.

<sup>99</sup> See 25 U.S.C. §§ 261-64 (1964).

<sup>100</sup> Brew Interview, *supra* note 41.

<sup>101</sup> *Id.*

<sup>102</sup> Although the statutory authority to regulate reservation traders is vested in the BIA (see note 99 *supra*), the Sells Agency would rather let the Papago Tribe regulate them. Lucero Interview, *supra* note 45. The tribe, however, cannot provide an alternative to the traders as a source of goods. Therefore, the tribe is hesitant to accept the responsibility of applying increased regulatory pressure for fear that the traders will threaten a mass exodus from the reservation. Smith Interview, *supra* note 61. As a result, trader regulation remains minimal.

<sup>103</sup> Brew Interview, *supra* note 41.

attack on current BIA administrative procedures is the most effective means available for securing their revision.

One of the program's staff attorneys suggests that the rather short time during which they have interacted<sup>104</sup> may explain the relatively harmonious working relationship existing between the BIA agency staff and Papago Legal Services.<sup>105</sup> Perhaps the degree of cooperation existing between an OEO legal services staff and a BIA agency staff varies inversely with the duration of their interaction. Hopefully, however, the cooperative attitudes thus far exhibited by Papago Legal Services and the Sells Agency will continue in spite of the frequently conflicting roles they seem destined to play on the Papago Reservation.

### THE NAVAJO LEGAL SERVICES PROGRAM

#### *Operational Setting*

The Navajo Tribe is unique among American Indian tribes not only in terms of size,<sup>106</sup> but also in the diversity present within its reservation. While one Navajo might derive his income through the traditional vocation of sheepherding, another may be a computer operator in the tribal government's Office of Data Processing. An Indian family living near the reservation "capital" of Window Rock, Arizona, will very likely live in a hogan, the traditional Navajo dwelling constructed of wood and mud plaster, and yet do most of its shopping at the community's modern shopping center. The only college-level academic institution located on an Indian reservation, Navajo Community College, provides young Navajos with the skills necessary for competition in an industrial society, while also offering courses in the Navajo language, Navajo culture, and traditional tribal crafts such as silver working. Even their land reflects contrast: the vast 16 million acre "reservation of the Navajo—part desert, part forest, interspersed with deposits of coal, oil, uranium and other minerals—is a potpourri of wealth-producing and poverty-perpetuating territory."<sup>107</sup>

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<sup>104</sup> See note 49 *supra*.

<sup>105</sup> Smith Interview, *supra* note 61.

<sup>106</sup> The Navajo Tribe is the largest in the United States. R. YOUNG, *THE NAVAJO YEARBOOK* at v (1961). The reservation population exceeds 126,000. DNA REFUNDING APPLICATION, *supra* note 23, at CAP form 5.

<sup>107</sup> Bennett, *Problems and Prospects in Developing Indian Communities*, 10 *ARIZ. L. REV.* 649, 650 (1968). The Navajo Reservation comprises almost as much land area as the states of Vermont, New Hampshire, Connecticut and Rhode Island, combined. R. DITZLER, *THE INDIAN PEOPLE OF ARIZONA* 99 (1967).

Although collectively among the richest Indians, individually the Navajo rank among the poorest. The annual tribal income is estimated at \$12 to 14 million. The bulk of this revenue is derived from royalties on reservation mineral production, both directly and through interest on the tribe's approximately \$50 million deposited in various financial institutions. Interview with Graham Holmes, director, Navajo Area Office, Bureau of Indian Affairs, in Window Rock, Arizona, Sept. 25, 1970 [hereinafter cited as Holmes Interview]. Many individual Navajo, however, continue to exist on poverty-level incomes. The unemployment rate among members of the Navajo labor force exceeds 50 percent. DNA REFUNDING

### Administration

In addition to the central office located at Window Rock, DNA operates an agency office in each of the reservation's five geographical subdivisions.<sup>108</sup> These six offices employ a combined staff of 90 persons,<sup>109</sup> including 17 attorneys and 28 lay advocates.<sup>110</sup> Although an Anglo attorney served as director of DNA until February, 1970,<sup>111</sup> both the current director and deputy director are Navajos, and neither is an attorney.<sup>112</sup>

DNA's corporate bylaws vest in its board of directors primary and final authority to formulate policy for the program.<sup>113</sup> DNA's desire to function in an atmosphere of responsive cooperation with its client community is evidenced by the fact that every community on the reservation plays a role in the operation of the program. Of the board's 22 voting members, ten are indirectly elected by the tribal membership through five agency committees comprised of community representatives.<sup>114</sup> Communication between board members and the client community is channeled through these same committees. Under this system of representation,

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APPLICATION, *supra* note 23, at 15-J. With a family index of 5.6 members, the median Navajo family income in 1967 was \$2,600. COMPTROLLER GENERAL'S REPORT TO THE HONORABLE SAM STEIGER, HOUSE OF REPRESENTATIVES: INVESTIGATION OF CERTAIN ACTIVITIES OF DINEBEIINA NAHILNA BE AGADITAE, INC. 3 (Oct. 31, 1969).

<sup>108</sup> The BIA, for administrative purposes, divided the reservation into five geographical agencies in 1955. See R. YOUNG, THE NAVAJO YEARBOOK 602 (1961). The DNA office for the Fort Defiance Agency is located in Window Rock. The other four agency offices are located in the communities of Chinle and Tuba City in Arizona and Crownpoint and Shiprock in New Mexico.

<sup>109</sup> The only non-Navajo employees of DNA are the attorneys. All administrative and clerical personnel, as well as the lay advocates and interpreter-investigators, are Navajos. During fiscal 1970, DNA operated on a total budget of \$1,010,700. Interview with Leo Haven, director, DNA, in Window Rock, Arizona, Sept. 24, 1970 [hereinafter cited as Haven Interview].

<sup>110</sup> DNA prefers to use the title "lay advocate" in order to avoid any confusion which might arise from the general custom of addressing an attorney as "counselor." *Id.*

<sup>111</sup> The resignation of Theodore Mitchell, the "founder" and first director of DNA, became effective February 28, 1970. DNA REFUNDING APPLICATION, *supra* note 23, at E-18. Mitchell currently serves as director of the program's Litigation and Law Reform Unit.

<sup>112</sup> Director Leo Haven formerly served DNA as its Director of Community Education and Relations. Deputy Director Peterson Zah is also one of three tribal lay advocates who comprise DNA's Law Development and Litigation Unit. See text accompanying notes 177-181 *infra*.

<sup>113</sup> DNA Bylaws § 100.

<sup>114</sup> For each of the five agency subdivisions of the Navajo Reservation there exists a DNA committee, comprised of representatives elected from each chapter (the reservation's 102 "chapters" are the smallest geographical subdivisions within the tribal political structure.) The agency committees elect ten directors from their own membership, two from each committee. Nine other directors (including two tribal concilmen) are then elected by these ten. In addition, three more tribal concilmen are appointed directors by the tribal chairman (see note 194 *infra*). Haven Interview, *supra* note 109. The board's total membership of 26 also includes four ex-officio, non-voting members: two representatives of the Office of Navajo Economic Opportunity, the Chief Justice of the Navajo Tribe, and the DNA program director. DNA APPLICATION FOR REFUNDING, *supra* note 23, at 49.

every Navajo theoretically is afforded the opportunity to make known his suggestions and criticisms regarding the program's operation. Likewise, this system furnishes DNA with an efficient means for communicating periodic reports on program activities directly to its client community.

The voting membership of the board is composed of 17 Navajos and five Anglos.<sup>115</sup> The Navajo board members have shown less reluctance than their Papago counterparts to accept their prescribed responsibilities. Their expressed desire to take matters slowly and their admonition to the DNA leadership that all proposed changes in the program's operation be thoroughly explained to them<sup>116</sup> denote an intention to exercise their policy-making authority.<sup>117</sup>

Two matters regarding the program's internal administration are the subject of continuing debate. The DNA attorneys are divided in their views on whether the program needs amplified administrative coordination in terms of established guidelines,<sup>118</sup> with some apparently fearing limitation of their personal professional freedom.

A second debate centers on the non-lawyer status of DNA's current director, Leo Haven. Having a Navajo in this position is desirable for obvious reasons, and Haven's demonstrated public relations expertise<sup>119</sup> makes him especially valuable to the program. At least one member of the OEO team that conducted DNA's required annual evaluation in June, 1970, however, feels that Haven's lay status significantly diminishes his effectiveness as a legal services program administrator.<sup>120</sup> In response, Director Haven emphasizes the advantages derived from his Navajo heritage and his years of experience as an employee of DNA and several service agencies of the Navajo Tribe.<sup>121</sup> He also argues that advice of his attorney and lay advocate assistants more than compensates for his own lack of legal training.<sup>122</sup>

DNA's experience in handling situations requiring case referrals to

<sup>115</sup> The Anglo board members include four practicing attorneys and a law school professor. DNA APPLICATION FOR REFUNDING, *supra* note 23, at 49-50.

<sup>116</sup> Matters under consideration by the board are discussed in both English and Navajo.

<sup>117</sup> Haven Interview, *supra* note 109.

<sup>118</sup> Interview with Richard Barlow, DNA staff attorney, in Window Rock, Arizona, Sept. 24, 1970 [hereinafter cited as Barlow Interview].

<sup>119</sup> See note 112 *supra*.

<sup>120</sup> Interview with Paul G. Rosenblatt (member of 1970 DNA evaluation team), Administrative Assistant to Representative Sam Steiger, in Washington, D.C., July 28, 1970 [hereinafter cited as Rosenblatt Interview].

<sup>121</sup> Haven's experience prior to joining the DNA staff included five years' service as Supervisor of Welfare and Director of Public Services for the Navajo Tribe and two years with the Navajo Office of Economic Opportunity as its Project Coordinator and Director of the Local Community Development Program. DNA APPLICATION FOR REFUNDING, *supra* note 23, at C-1.

<sup>122</sup> Haven Interview, *supra* note 109. The most practical means for ending this dissension, employment of a Navajo lawyer as DNA program director, may be accessible in the near future. Although no Navajo attorneys exist today, ten young Navajos are currently enrolled in law schools. These same students return to the reservation during the summer months to work for DNA as law clerks. *Id.*

private counsel parallels that of Papago Legal Services. Ineligible clients or clients with fee-generating cases are referred to attorneys selected on a rotational basis from panels designated for each of the five agency offices.<sup>123</sup> To avoid having DNA attorneys within the same office represent opposing parties to a lawsuit, DNA originally assigned staff members from other agency offices to represent one of the parties.<sup>124</sup> Dissension among the agency offices resulting from their adversarial roles, however, led to the use of private counsel.<sup>125</sup>

### *Service Functions*

In its most recent application for OEO refunding, DNA lists 15 major categories of substantive problems facing the Navajo which fall into four general classifications: exploitation of the Navajo,<sup>126</sup> repression of Navajo self-determination,<sup>127</sup> discrimination against the Navajo,<sup>128</sup> and other Navajo community needs.<sup>129</sup> Although aid provided by DNA through its law reform and community action functions plays a significant role in solving these problems, the bulk of assistance is dispensed through the program's service functions.

Of the more than 126,000 Navajos on the reservation, approximately 100,000 are potentially eligible for DNA assistance.<sup>130</sup> During the past

<sup>123</sup> DNA REFUNDING APPLICATION, *supra* note 23, at app. A.

<sup>124</sup> Haven Interview, *supra* note 109.

<sup>125</sup> *Id.*

<sup>126</sup> The problems falling within this category are generated by Navajo consumer transactions with traders and off-reservation car dealers, the BIA's actions as trustee of the Navajo tribal resources, and Navajo employment as railroad workers and migrant laborers. See generally DNA REFUNDING APPLICATION, *supra* note 23, at 2-7.

<sup>127</sup> This category includes the need for greater community participation in and control of reservation schools, as well as the need to eliminate the many obstacles which hinder establishment of Navajo-owned reservation businesses. See generally *id.* See also Fannin, *Indian Education: A Test Case for Democracy*, 10 ARIZ. L. REV. 660 (1968).

<sup>128</sup> BIA employment discrimination, prejudicial treatment accorded Navajos by police in some off-reservation towns, and provisions of the Arizona and New Mexico financial responsibility laws which create special hardships for Navajos, comprise this group of problems. See generally DNA REFUNDING APPLICATION, *supra* note 23, at 2-7.

<sup>129</sup> This classification includes the need for increased and improved reservation roadways, increased availability of medical services (through the Public Health Service), increased means to adequately deal with Navajo family problems, reform of current state and BIA welfare practices, and improvement within the Navajo legal system. See generally *id.*

<sup>130</sup> DNA REFUNDING APPLICATION, *supra* note 23, at 15-J. The basic test for eligibility is whether the applicant can reasonably afford to pay a private attorney or lay advocate for the legal services needed. In applying this test the following guidelines are used: (1) Applicants with a net taxable income within the following limits are considered prima facie eligible for the services of DNA's attorneys and lay advocates: (a) single individuals with a maximum annual income of \$2,000; (b) married couples with a combined maximum income of \$2,500; and (c) for each dependent the maximum limits under (a) and (b) are increased by \$500. (2) Flexibility can be injected into the income criteria by also considering the following factors: employment status, total outstanding financial obligations including living expenses, any assets or property or interest therein owned by the applicant(s), and

three years, DNA has provided legal services in over 25,000 cases,<sup>131</sup> and an estimated 11,000 clients will be assisted during fiscal year 1971.<sup>132</sup>

The large number of Navajos seeking legal assistance places extreme burdens on the DNA staff members. The Fort Defiance office, serving the reservation's most populous subdivision, is illustrative. During the past two years that office has handled approximately 6,000 cases.<sup>133</sup> Each of the four attorneys and eight lay advocates currently carries an average load of 100 cases.<sup>134</sup> As a result, they often have difficulty in devoting adequate attention to the more time-consuming client problems which periodically arise. Although experimental administrative practices are being tested in an attempt to overcome this predicament,<sup>135</sup> additional staff members are sorely needed.

Consumer transaction problems, stemming from automobile sales contracts and alleged abuses committed by the reservation traders,<sup>136</sup> are the largest source of DNA's caseload.<sup>137</sup> Administrative practices, such as the distribution of public assistance benefits,<sup>138</sup> and employment problems generated within the administrative agencies operating on the reservation<sup>139</sup> also comprise a significant portion of the program's caseload. Business-related problems<sup>140</sup> engender some cases, and the DNA staff represents defendants in criminal cases under special circumstances.<sup>141</sup>

the estimated cost of the legal services required by the applicant(s). *Id.* at 16-17.

It should be noted that although DNA's clientele is primarily Navajo, members of other racial-ethnic groups who individually meet the eligibility criteria also can utilize the program's services. In fiscal year 1969, DNA served 13 Mexican-Americans, 26 other Caucasians, and 4 Negroes, in addition to its Navajo clients. *Id.* at CAP form 84.

<sup>131</sup> *Id.* at 15-J.

<sup>132</sup> *Id.*

<sup>133</sup> Barlow Interview, *supra* note 118.

<sup>134</sup> *Id.*

<sup>135</sup> These practices include closing the office early, refusing to accept attorney's cases for one week periods of time, and restricting client interviews to one day a week for each attorney. DNA REFUNDING APPLICATION, *supra* note 23, at 24.

<sup>136</sup> The allegations of unfairness made by Navajos against the Anglo traders most frequently center on three practices: (1) over-pricing items for sale, (2) charging usurious interest, and (3) misuse of duties as the local postmaster by forcing Navajos to sign over to the trader incoming welfare checks as payment on their accumulated trading post debts. *Id.* at 2.

<sup>137</sup> Barlow Interview, *supra* note 118; DNA REFUNDING APPLICATION, *supra* note 23.

<sup>138</sup> The cases in this context generally focus on welfare payments, social security payments, and workmen's compensation payments. Barlow Interview, *supra* note 118.

<sup>139</sup> DNA assists clients seeking redress of alleged use of discriminatory employment practices by reservation agencies such as the BIA and the Office of Navajo Economic Opportunity. These grievances generally center on allegedly discriminatory allocation of job training and advancement opportunities, as well as allegedly discriminatory hiring and firing practices. Interview with Marshall Tome, deputy director, Office of Navajo Economic Opportunity, in Window Rock, Arizona, Sept. 25, 1970 (Mr. Tome is a Navajo) [hereinafter cited as Tome Interview]; Barlow Interview, *supra* note 118.

<sup>140</sup> See text accompanying notes 188, 192 & 193 *infra*.

<sup>141</sup> Although criminal representation under the program is strictly limited

Finally, the very few domestic relations cases brought to DNA are handled by the lay advocates in the tribal court.

The principal goal of DNA is "to work, within the limitations of a legal services program, to make the necessary changes in the attitudes and substantive problems which help to perpetuate the poverty that pervades the Navajo Reservation."<sup>142</sup> Two lesser objectives are included within this comprehensive goal: the protection of individual rights and the strengthening of Navajo tribal sovereignty.<sup>143</sup> The "school clothing case" is illustrative of attempts to protect individual rights. Under provisions of the *Indian Affairs Manual*, the BIA is required to pay families receiving BIA welfare assistance an \$8 monthly clothing allowance for each child attending a reservation boarding school.<sup>144</sup> In lieu of the first five months' payment, each family can request a lump sum grant at the beginning of the school year.<sup>145</sup> The local BIA office, however, never made this alternative widely known to welfare recipients and, consequently, few families requested the lump sum. When late in 1969 the BIA ceased making even the \$8 monthly payments,<sup>146</sup> almost all BIA welfare families were left without any clothing allowance for their children. Two DNA attorneys succeeded in obtaining a hearing on behalf of a Navajo mother receiving welfare. Although originally denied relief, their client was successful on appeal to the Navajo area director of the BIA. As a result of this decision, the payments were restored and every welfare family will be notified of its eligibility for the clothing allowance.<sup>147</sup>

Strengthening Navajo tribal sovereignty is occasionally the primary objective in cases initiated by DNA. For example, in *Arizona v. Turtle*,<sup>148</sup> a habeas corpus proceeding, DNA succeeded in establishing the Navajo tri-

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(see note 68 *supra*), the DNA advocates and attorneys occasionally represent in tribal and state courts individuals charged with misdemeanors when it is evident that adequate legal assistance is unavailable to them from any other source. DNA REFUNDING APPLICATION, *supra* note 23, at 25. In addition, where these same special circumstances exist, the attorneys have represented in federal court individuals charged with "major crimes" under 18 U.S.C. § 1153 (Supp. IV, 1969). Barlow Interview, *supra* note 118. See also *Indictment Under the "Major Crimes Act," supra* note 30, at 694-95.

<sup>142</sup> DNA APPLICATION FOR REFUNDING, *supra* note 23, at 8.

<sup>143</sup> *Id.* at 8, 20.

<sup>144</sup> The monthly clothing allowance paid recipients of BIA general assistance must equal the standard amount furnished recipients of state welfare assistance. I.A.M., *supra* note 79, at § 3.1.12C. The standard clothing allowance paid welfare recipients in Arizona is \$8 per month. Brew Interview, *supra* note 41.

<sup>145</sup> Under provisions of the I.A.M., the lump sum grant must be five times the standard monthly clothing allowance of the applicable state (see note 144 *supra*) or \$50, whichever is larger. I.A.M., *supra* note 72, at § 3.1.12C.

<sup>146</sup> The BIA directed its education department to relieve its welfare department of the responsibility for making the payments. The education department, however, lacked the necessary resources to develop a program capable of meeting the clothing needs of BIA general assistance children. DNA REFUNDING APPLICATION, *supra* note 23, at 35.

<sup>147</sup> The two DNA attorneys who served as counsel in the case estimate that more than \$500,000 in additional benefits will accrue to Navajo welfare families as a result of the BIA policy change. Barlow Interview, *supra* note 118.

<sup>148</sup> 413 F.2d 683 (9th Cir.), *cert. denied*, 396 U.S. 1003 (1969).

bal government's exclusive authority to extradite Indians living on the reservation. Generally, progress toward the basic goal is made indirectly through protection of individual rights. In response to abusive repossession practices used against Navajo customers by car dealers and merchants, the Navajo Tribal Council in 1968 adopted a resolution requiring that merchants seeking to repossess goods located on the reservation first obtain either the written consent of the Navajo involved or an order of replevin from the Navajo tribal court.<sup>149</sup> Since tribal courts lack jurisdiction over non-Indian defendants,<sup>150</sup> and therefore lack the power to adequately enforce the measure, this resolution will legally bind Anglo merchants only if the courts of Arizona and New Mexico are willing to enforce it.<sup>151</sup> DNA is pursuing this objective through suits now pending in the courts of these states.<sup>152</sup> Success in these lawsuits will enhance individual Navajos' rights vis-à-vis merchants and augment the authority of the tribal council by manifesting judicial respect for its legislative decrees.

Like Papago Legal Services, DNA provides its clients with services such as domestic relations counseling, referral to other social service agencies,<sup>153</sup> and client representation before administrative bodies.<sup>154</sup> In contrast with the Papago program, however, DNA places special emphasis on class action litigation. Although DNA attorneys have utilized this vehicle primarily in welfare cases,<sup>155</sup> they have also used it in suits involving other economic interests,<sup>156</sup> in suits against the BIA,<sup>157</sup> and in a habeas corpus petition.<sup>158</sup>

Cognizant of the importance of an efficient, respected legal system to the tribe, DNA also places emphasis on assisting in development of the Navajo legal system.<sup>159</sup> Since they comprise a majority of the lay advocates appearing before the tribal court, the DNA advocates are in a posi-

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<sup>149</sup> DNA REFUNDING APPLICATION, *supra* note 23, at 31-32.

<sup>150</sup> A non-Indian is subject to suit, criminal or civil, in a tribal court only with his consent. See *The Indian: The Forgotten American*, *supra* note 12, at 1833.

<sup>151</sup> See COMMISSION REPORT, *supra* note 11, at 58.

<sup>152</sup> DNA REFUNDING APPLICATION, *supra* note 23, at 31, 32.

<sup>153</sup> Clients who need assistance other than legal services are frequently referred to subagencies of either the BIA or the local community action agency (the Office of Navajo Economic Opportunity).

<sup>154</sup> For example, clients are periodically represented before the county and state welfare boards, and the Financial Responsibility Subdivision of the Arizona Highway Department's Division of Motor Vehicles. DNA REFUNDING APPLICATION, *supra* note 23, at 15-H, 34.

<sup>155</sup> *E.g.*, DNA has employed the class action to challenge asset valuation methods used in determining eligibility for state welfare assistance and to establish a welfare recipient's right to a hearing prior to termination of assistance. DNA REFUNDING APPLICATION, *supra* note 23, at 32-33.

<sup>156</sup> *E.g.*, DNA has used the class action to seek enforcement of consumer protection statutes. *Id.* at 30.

<sup>157</sup> *E.g.*, *Rockbridge v. Holmes*, Civil No. 69-362 (D. Ariz., Dec. 17, 1969), appeal filed, Civil No. 25437 (9th Cir., filed Jan. 13, 1970), discussed in notes 167 & 168 *infra*.

<sup>158</sup> See discussion of *Curley v. Gonzales*, Civil No. 8372 (D.N.M., July 1, 1970) in text accompanying notes 164 & 165 *infra*.

<sup>159</sup> DNA APPLICATION FOR REFUNDING, *supra* note 23, at 14, 73.

tion to make a significant contribution toward this objective. If they are to achieve their maximum potential in this context, however, their formal training must be augmented. The current practice of sending these staff members to periodic legal training conferences does not fulfill their need for training in substantive law, trial practices, and especially legal research and brief preparation.<sup>160</sup> Although attorneys in several of the agency offices conduct programs to train their lay advocates,<sup>161</sup> dispersion of such programs throughout the DNA structure is needed.<sup>162</sup>

### *Non-Service Functions*

While enhancing the legal services it provides, DNA is also increasingly emphasizing its non-service functions. The creation within the central office of specialized units<sup>163</sup> reflects the program's desire to provide more effective assistance through law reform, community education, and community action.

1. *Law Reform.* The law reform function plays a primary role in the DNA program. In numerous instances reform has resulted from performance of the attorneys' normal service functions. The Gallup, New Mexico Detention Center suit is exemplary.<sup>164</sup> In February, 1970, DNA received a petition signed by 109 of the 180 inmates of the center, which was used primarily for the detention of drunks. After investigating the allegations of inhumane treatment, DNA filed a class action habeas corpus petition in federal district court.<sup>165</sup> That court issued a preliminary injunction ordering that the center's inmate population be reduced to a maximum of 60 prisoners. Ramifications of the lawsuit were not limited to relief for the prisoners. The decision also sparked a combined effort among the Navajo Tribe, the city of Gallup, and the United States Public Health Service to remedy the alcohol problem which presently plagues the Navajo.

Suits filed by DNA have resulted in reform of unjust rules even when the lawsuits were unsuccessful. In August, 1969, DNA filed a class action seeking to compel the BIA to regulate adequately the reservation

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<sup>160</sup> John Interview, *supra* note 36. Too frequently these training conferences, held periodically throughout the southwest, focus solely on the complex jurisdictional problems of Indian law. The sessions, therefore, provide little substantive legal training for the lay advocates and tribal court judges. Programs of greater duration and depth, such as the eight-week summer Indian legal training program conducted by the University of New Mexico law school, are badly needed. *Id.*

<sup>161</sup> DNA REFUNDING APPLICATION, *supra* note 23, at 19.

<sup>162</sup> Several DNA lay advocates are seeking to establish a legal training program for all DNA advocates. The proposed program would be financed by a foundation grant and conducted by one of the southwestern law schools. John Interview, *supra* note 36.

<sup>163</sup> These units include the currently operating Litigation and Law Reform Unit, the Navajo Law Development and Litigation Unit, and the Community Education Unit, and a proposed Business Law Unit.

<sup>164</sup> For another example, see *Arizona v. Turtle*, 413 F.2d 683 (9th Cir.), *cert. denied*, 396 U.S. 1003 (1969).

<sup>165</sup> *Curley v. Gonzales*, Civil No. 8372 (D.N.M., July 1, 1970).

trading post system.<sup>166</sup> The Bureau's laxity, DNA argued, was responsible for the exploitation of Navajo customers by some reservation traders.<sup>167</sup> Although the federal district court dismissed the action,<sup>168</sup> the Bureau, apparently in response to the DNA move, recently proposed new rules regulating pawn<sup>169</sup> and interest rates.<sup>170</sup> If enacted, these regulations will become the first maximum interest rates governing reservation transactions.<sup>171</sup>

Formal litigation is only one of several means employed by DNA attorneys and lay advocates to achieve reform. The program's reputation for willingly and successfully protecting the rights of victims of injustice has made the mere threat of intervention by DNA an effective instrument in decreasing instances of exploitation.<sup>172</sup> In other contexts, DNA attorneys seek reform through presentations made to state legislative committees as well as county and state welfare boards. For example, the Tuba City office attorneys are developing a proposal to designate the Navajo Reservation a single operating unit for the Arizona Department of Public Welfare, in lieu of the present practice of dividing the reservation along county lines.<sup>173</sup>

Two units specializing in law reform currently function within DNA's central office. The Litigation and Law Reform Unit is staffed by three attorneys. Its responsibilities theoretically include detecting priority law reform areas and conceiving appropriate reform vehicles, handling trial aspects of the program's major law reform cases, and providing supportive research for all DNA attorneys and lay advocates.<sup>174</sup> In practice, however, the agency office attorneys have shown an unwillingness to transfer potential law reform cases to the unit's staff.<sup>175</sup> Thus, with major law

<sup>166</sup> *Rockbridge v. Holmes*, Civil No. 69-362 (D. Ariz., Dec. 17, 1969), *appeal filed*, Civil No. 25437 (9th Cir., filed Jan. 13, 1970).

<sup>167</sup> DNA argued that the BIA has both a statutory duty, under 25 U.S.C. §§ 261-64 (1964), and a fiduciary duty, as trustee for the Indians, to regulate the reservation traders. Without such regulation, the OEO lawyers contended, the traders' virtual monopoly over sales on the reservation permits them to engage freely in such practices as selling inferior quality goods, using dishonest weights and measures, and charging usurious interest rates in pawn transactions.

<sup>168</sup> The action was dismissed for lack of subject matter jurisdiction.

<sup>169</sup> Small loans made by the local trader and secured by pledged items of personalty, such as Navajo silver and turquoise jewelry, constitute the Indians' primary source of ready cash. See C. KLUCKHOHN & D. LEIGHTON, *THE NAVAHO* 80 (1946).

<sup>170</sup> See 35 Fed. Reg. 5043 (1970).

<sup>171</sup> *Id.*

<sup>172</sup> Haven Interview, *supra* note 109. The threat of intervention by DNA has proven especially effective in decreasing exploitation of Navajos by off-reservation automobile dealers. *Id.*

<sup>173</sup> DNA REFUNDING APPLICATION, *supra* note 23, at 34.

<sup>174</sup> *Id.* at 23.

<sup>175</sup> Interview with Kathy Bohnam, Reginald Heber Smith Fellow assigned to Papago Legal Services (formerly assigned to DNA), in Sells, Arizona, Oct. 2, 1970. A DNA lawyer explained that most of the OEO lawyers become bored with merely handling "run-of-the-mill cases" after having been with the program for a period of time. They then begin to seek out and devote increased time to more important cases, providing opportunity for the research and litigation experience that will improve their skills as attorneys. Under these circumstances, he viewed a specialized law reform unit as superfluous. Barlow Interview, *supra* note 118.

reform cases still being effectively handled by the program's other attorneys,<sup>176</sup> the need for the specialized unit is debatable.

In contrast, the Navajo Law Development and Litigation Unit (NLDLU) has proven itself a valuable addition to the program.<sup>177</sup> Staffed by two senior lay advocates, this unit is responsible for providing DNA's other tribal advocates with both supportive research and training in the management of complex tribal court litigation.<sup>178</sup> In addition, the NLDLU currently handles all appeals of DNA cases in the tribal court system.<sup>179</sup> In the long run, however, the unit's most significant contribution will very likely be its efforts to reform the procedural and substantive law of the tribe.<sup>180</sup> In this context the NLDLU functions like a state bar committee, presenting to the lawmakers the views of practicing lawyers.<sup>181</sup>

2. *Community Education.* DNA's community education program was initiated in June, 1967. Although the responsibilities for this function theoretically devolve upon the three Navajos<sup>182</sup> who comprise the Community Education Unit, virtually all members of the DNA staff devote time and effort to it. The goals of the program are to assist the Navajos in understanding the tribal, state, and federal laws which govern them, to inform them of their rights under these laws, and to bring to their attention the diverse legal services available through DNA. A variety of media are employed to this end, including printed posters and educational pamphlets, the *DNA Law in Action* newspaper, articles prepared by DNA staff members and printed in local newspapers, tape recordings, audio-visual equipment, and radio broadcasts.<sup>183</sup>

Oral and visual presentations made by DNA staff members have proven the most successful means for educating the Navajo in legal affairs. Community chapter meetings,<sup>184</sup> special events such as the annual

<sup>176</sup> For example, the very significant "school clothing case" (see text accompanying notes 144 to 147 *supra*) was handled by two attorneys assigned to DNA's Fort Defiance office.

<sup>177</sup> The term "law development" is used instead of "law reform" to focus on the fact that little written law has developed on the reservation.

<sup>178</sup> DNA REFUNDING APPLICATION, *supra* note 23, at 74.

<sup>179</sup> *Id.*

<sup>180</sup> E.g., the NLDLU is currently seeking reform of Navajo tribal court procedural law to provide for pre-trial conferences and to require that a defendant in a civil action be required to file an answer (under present tribal law answer filing is merely discretionary). John Interview, *supra* note 36.

<sup>181</sup> DNA REFUNDING APPLICATION, *supra* note 23, at 74.

<sup>182</sup> The Community Education Unit is comprised of the Director of Community Education and Relations and two staff workers.

<sup>183</sup> Seven radio stations located adjacent to the Navajo Reservation broadcast DNA's legal education programs. In most instances these tape recordings, made in the Navajo language, are broadcast free of charge as a public service. DNA REFUNDING APPLICATION, *supra* note 23, at 45.

<sup>184</sup> The "chapter" is the smallest geographical subdivision within the Navajo tribal political structure. See *id.* at 47-48. Chapter meetings, consisting principally of reports made by local public officials and discussion of matters of community interest, are generally attended by from 30 to 300 local residents. *Id.* at 38.

tribal fairs,<sup>185</sup> and the reservation school system<sup>186</sup> are utilized as vehicles for information dissemination. Subjects most frequently discussed include consumer education, rights and responsibilities of automobile drivers, employment and domestic problems, crime prevention, individual rights under law, and community organizations and cooperatives. These presentations are especially effective because they can be made in the Navajo language and they permit DNA to gather feedback regarding the local residents' understanding of laws and legal problems and their awareness of available DNA services.

3. *Community Action.* DNA continually seeks to promote community involvement in the quest for solutions to the substantive problems facing the Navajo. Only through the development of community self-confidence and initiative "will DNA avoid becoming just another service-oriented, paternalistic institution on the Reservation, 'doing things' for a passive, apathetic group of people."<sup>187</sup> The combination of community development efforts and legal action hopefully will engender the assertive attitude necessary to break the cycle of Navajo poverty.

DNA places increasingly greater emphasis on assisting groups of Navajos sharing common problems and objectives. These groups include-business cooperatives,<sup>188</sup> community groups seeking greater local control of reservation schools,<sup>189</sup> welfare rights organizations,<sup>190</sup> and employee organizations.<sup>191</sup> Services provided by DNA include professional coun-

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<sup>185</sup> Exhibits comprised of pictures of Navajo clients being assisted by DNA attorneys and lay advocates, educational films and slide programs, and pamphlets all serve to convey information to tribal members attending these events. *Id.* at 37-42, 44-47.

<sup>186</sup> Oral and visual presentations are made by DNA staff members at junior and senior high schools both during regular class periods and at special assemblies. In addition, DNA attorneys have conducted adult legal affairs education classes at Navajo Community College. *Id.*

<sup>187</sup> *Id.* at 8.

<sup>188</sup> These cooperatives include ventures in food buying, motor vehicle purchasing, livestock raising, and the selling of handwoven rugs and silverwork. *Id.* at 15-D.

<sup>189</sup> *E.g.*, when the local public school district closed the bi-cultural high school at Ramah, New Mexico, DNA attorneys assisted the citizens of that community in a successful effort to obtain BIA funding for the first Indian-controlled secondary school in the United States. *See id.* at 61-62. The Rough Rock School, located on the Navajo Reservation in Arizona, affords another example of an educational institution operating under local Indian control. *See Fannin, Indian Education—A Test Case for Democracy*, 10 ARIZ. L. REV. 661, 669-70 (1968). The Ramah and Rough Rock experiments could represent the first steps toward complete assumption by local Indian communities of the reservation educational responsibilities currently exercised by the BIA. *See* President Nixon's Message, *supra* note 4, at 10,895.

<sup>190</sup> Two large welfare rights groups organized by DNA attorneys proved successful in making many Navajos aware for the first time of their eligibility for welfare assistance. In addition, the groups effected several procedural changes regarding the dispensation of BIA welfare benefits. Unfortunately, the groups became inactive when their attorney organizers left DNA. Some signs of the organizations' revitalization, however, have been manifested recently. DNA REFUNDING APPLICATION, *supra* note 23, at 61-62.

<sup>191</sup> DNA attorneys helped a group of Navajos create an organization called AMERIND devoted to promoting equal employment opportunities for Indian employees of the BIA. *Id.* at 57-58.

sel, document drafting, and representation of these groups before governmental agencies.

DNA devotes considerable attention to the development of Navajo businesses on the reservation. The program's objectives in this area include revising present procedures for obtaining reservation business-site leases<sup>192</sup> and helping nascent businesses obtain loans and technical assistance through federal minority group programs. DNA's strong commitment to this element of its community action function is demonstrated by its proposal for the creation of a Business Law Unit within the program structure.<sup>193</sup> This specialized staff would permit not only initiation of business development projects, but also training to provide attorneys and lay advocates with the skills necessary to assist in establishing a Navajo private business sector. The development of Navajo-owned small businesses will create on-reservation jobs for Navajos, and promote Navajo competition with Anglo businessmen operating on or near the reservation, with concomitant benefits for the Navajo consumer. In addition, attainment of this goal will aid development of the self-confidence necessary to eradicate the attitude of ineffectualness fostered by the present paternalistic system.

### *Relationship With Other Institutions on the Reservation*

1. *With the Tribal Government.* The relationship between DNA and the Navajo tribal government<sup>194</sup> under the leadership of former Chairman Raymond Nakai was characterized by a high degree of dissension.<sup>195</sup> Although strong personality conflicts contributed significantly, the primary factor underlying the confrontation was a dispute over power. DNA's development of widespread community level support and its emergence as a political force on the reservation was viewed by the Nakai tribal

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<sup>192</sup> Under present procedures the Navajo businessman must endure a delay of three to five years before obtaining approval on his business-site lease. DNA REFUNDING APPLICATION, *supra* note 23, at 4.

<sup>193</sup> This proposed unit would be staffed by two attorneys. *Id.* at 23.

<sup>194</sup> The Navajo tribal government is the largest and one of the most sophisticated in the United States. The 74-member tribal council, which represents the reservation's 102 chapters, is the tribe's principal governing body. The government's chief executive is the Chairman of the Navajo Tribe. Elected for a four-year term, his responsibilities include directing and supervising a continually growing bureaucracy of tribal government agencies and programs. Tome Interview, *supra* note 139.

<sup>195</sup> See generally Price, *supra* note 26, at 176-81; DNA REFUNDING APPLICATION, *supra* note 23, app. E.

Substantial personal animosity existed between DNA's former director, Theodore Mitchell, and Chairman Nakai and the tribe's general counsel, Harold Mott. Rosenblatt Interview, *supra* note 120. This personal conflict was greatly exacerbated when the DNA board of directors won a suit on behalf of Mitchell against Nakai after Mitchell's banishment from the reservation in August, 1968. In *Dodge v. Nakai*, 298 F. Supp. 26 (D. Ariz. 1969), the court declared the tribe's action violative of provisions of the 1968 Civil Rights Act, 25 U.S.C. §§ 1301-41 (Supp. IV, 1969), and directed that Mitchell be readmitted to the reservation. See Price, *supra* note 26, at 176 n.32.

administration as a threat to its power and importance.<sup>196</sup> Moreover, growing recognition by tribal members that DNA can often achieve results which the tribal government cannot provided an additional challenge.

DNA's continued drive toward independence from the tribal government, in contrast with other OEO programs on the Navajo Reservation, heightened the conflict. Although originally funded and operated as a delegate agency of the local OEO community action agency, DNA has functioned as a directly funded legal services grantee since April 1969.<sup>197</sup> Since that time, the Nakai administration repeatedly attempted to have the program funded through the tribe,<sup>198</sup> and consequently controlled by the general counsel of the Navajo Tribe.<sup>199</sup> This alternative could be detrimental to DNA's continued effectiveness within the reservation community for several reasons. Under such an arrangement the program would be subject to the direct control of the tribal chairman. Further, since the general counsel's office has traditionally focused its efforts on large-scale problems affecting the tribe, the legal needs of individual Navajos would very likely receive an inadequate share of attention.<sup>200</sup> In addition, maintenance of its status as an independent agency is advantageous to DNA in its efforts to make reservation institutions, including the tribal government,<sup>201</sup> accountable to the Navajo people they purport to serve. It appears important, therefore, that DNA continue to be directly funded by OEO.

Nakai's defeat by former ONEO director Peter McDonald in the November, 1970, tribal elections<sup>202</sup> may presage a new spirit of cooperation between DNA and the tribal government. During his campaign for the chairmanship, MacDonald, the first college graduate to lead the Navajo Tribe, expressed the desire to develop a more harmonious working relationship between the two organizations.<sup>203</sup> Perhaps most significant, MacDonald, voiced support for continued OEO direct funding of DNA<sup>204</sup>

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<sup>196</sup> Price, *supra* note 26, at 177, 179.

<sup>197</sup> DNA REFUNDING APPLICATION, *supra* note 23, app. E at 2.

<sup>198</sup> A majority of the tribal council members apparently disagreed with the former tribal chairman on this point. On several occasions the council's actions disclosed a desire to see DNA maintain a degree of operational independence from the tribal government. *Id.* app. E at 8-9.

<sup>199</sup> The general counsel of the Navajo Tribe is privately retained by the tribal administration to handle its legal affairs. His office employs a staff of six, including four attorneys. Interview with Bruce Bridegroom, DNA staff attorney, in Window Rock, Arizona, Sept. 25, 1970.

<sup>200</sup> Tome Interview, *supra* note 139.

<sup>201</sup> While DNA is strongly committed to the principle of tribal government autonomy, it also seeks to assure that such authority is employed to govern the members of the Navajo Tribe with justice under the concepts of fundamental fairness and governmental responsiveness. DNA APPLICATION FOR REFUNDING, *supra* note 23, app. E at 21-22.

<sup>202</sup> N.Y. Times, Nov. 15, 1970, at 66, col. 3. MacDonald took office as Chairman of the Navajo Tribe on January 5, 1971.

<sup>203</sup> Tome Interview, *supra* note 139.

<sup>204</sup> Interview with Peterson Zah, deputy director, DNA, in Tuscon, Arizona, Nov. 19, 1970.

and manifested his sincerity during a recent visit to the Office of Legal Services in Washington, D. C.<sup>205</sup>

In contrast with the tension that has existed between DNA and the tribal government, DNA and the Navajo tribal judiciary have maintained a generally cooperative working relationship.<sup>206</sup> The DNA lay advocates, by their frequent appearances before the tribal courts, have necessitated procedural modifications within the tribal legal system. The Navajo judges' promulgation of rules of civil and criminal procedure for the tribal courts in 1968 and establishment of a court calendar in 1969 evidence their willingness to cooperate in meeting these needs.<sup>207</sup>

In conjunction with the drafting of additional rules governing tribal court procedures, the tribal judiciary recently called a meeting of all persons connected with its system.<sup>208</sup> The comments and recommendations of those in attendance were received and considered by the judges. Continued maintenance of this spirit of cooperation is essential to the development of a respected and effective Navajo legal system.

2. *With the BIA.* The relationship between DNA and the Navajo Area Office of the BIA is strained. DNA contends that the Bureau personnel are not sincerely dedicated to furthering the best interests of the the Navajo,<sup>209</sup> while through the eyes of the BIA area director DNA appears to be "a government-funded agency [designed] to attack other government agencies" with the goal of "a revolution of social change."<sup>210</sup>

Certainly, the organizations' unremitting confrontations over problems such as trader regulation, BIA welfare assistance, the BIA role as trustee of the Navajos' natural resources,<sup>211</sup> and grievances expressed by Navajo BIA employees, are primarily responsible for the existing tension. Yet these conflicts merely reflect the fundamentally disparate functions of the two institutions. The role of the BIA as both protector of tribal resources and administrator of the Navajo Reservation is grounded in paternalism. DNA's manifest goals of increased Navajo self-determination and self-sufficiency stand as threats to the security of that role. Barring a radical change in function on the part of either institution, the future portends increased dissension between them.

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<sup>205</sup> Telephone interview with Bruce Bridegroom, DNA staff attorney, Dec. 10, 1970.

<sup>206</sup> It appears, however, that the relationship is not completely cordial. In the opinion of at least one lay advocate, one tribal judge repeatedly seeks opportunities to reprimand DNA lay advocates in tribal court. John Interview, *supra* note 36.

<sup>207</sup> DNA REFUNDING APPLICATION, *supra* note 23, at 73.

<sup>208</sup> The meeting was held in September, 1970. Those invited included members of the DNA staff, personnel of the general counsel's office, and private Navajo tribal court advocates. John Interview, *supra* note 36.

<sup>209</sup> DNA REFUNDING APPLICATION, *supra* note 23, at 5.

<sup>210</sup> Holmes Interview, *supra* note 107.

<sup>211</sup> DNA has accused the BIA of needlessly sacrificing portions of the Navajos' land and water resources by failing to properly exercise its duties as trustee and desiring to benefit other organizations served by the Department of the Interior. DNA REFUNDING APPLICATION, *supra* note 23, at 5.

## CONCLUSIONS

Once static and inert, Indian tribes are undergoing a metamorphosis. The revolution of rising expectations, after engulfing other American minorities, is spreading to the reservation. Young college-educated Indian militants voice their demands for "Red Power" as they seek to modernize and revitalize the old tribal ways.<sup>212</sup> Underlying this transfiguration is the goal of "creating a new Indianness out of the old."<sup>213</sup>

Transformed by the white man from one of the most self-sufficient of men into one of the most dependent, the American Indian is now regaining his lost self-reliance. The rising number of young Indians receiving college educations exemplifies the ripening of valuable human resources, while continued development of the reservations' economic potential produces new monetary resources. In addition, an increasingly greater number of tribes are acquiring federal grants for funding Indian-administered self-help programs in areas such as housing, agricultural development, public works, and business development.<sup>214</sup>

Furthermore, changes in federal government attitudes and structure appear likely to influence the trend toward Indian self-determination. In his July, 1970, Message to Congress on Indian Affairs, President Nixon recommended several significant revisions of current Indian policies. A key provision of the proposed legislation

would empower a tribe or a group of tribes or any other Indian community to take over the control or operation of Federally-funded and administered programs in the Department of the Interior and the Department of Health, Education and Welfare whenever the tribal council or comparable community governing group voted to do so.<sup>215</sup>

Similarly, Commissioner of Indian Affairs Louis R. Bruce recently began "a fundamental reform of the Bureau of Indian Affairs that is intended to put the future of the nation's Indians into their own hands."<sup>216</sup> As part of the reform plan, 15 Indians, most under 40 years old, were placed in Bureau executive positions.<sup>217</sup> Additionally, agency superintendents, now to be known as field administrators, were issued instructions that in effect told them "to stop running things, become low-key advisers, and work themselves out of jobs as the Indians take over."<sup>218</sup> With such changes in support of increased tribal self-sufficiency, at least one Indian

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<sup>212</sup> Vine Deloria, Jr., a young Indian leader and former president of the National Congress of American Indians, defines "Red Power" as a call for "the power, the political and economic power, to run our own lives in our own way." See STEINER, *supra* note 18, at 269. See also *id.* at ix-x.

<sup>213</sup> *Id.* at 157.

<sup>214</sup> See DELORIA, *supra* note 17, at 26.

<sup>215</sup> President Nixon's Message, *supra* note 4, at 10,894.

<sup>216</sup> N.Y. Times, Dec. 3, 1970, at 1, col. 6.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

writer forecasts the possibility of complete tribal independence of the federal government within the next generation.<sup>219</sup>

In the context of this metamorphosis, the contributions of the Papago and Navajo legal services programs take on great significance. The progress made by these programs toward the goal of increased Indian self-reliance is particularly salient with regard to individual rights. Their efforts to educate the Indian regarding rights which he has failed to exercise, to encourage him to assert these rights, and to assist him in doing so are proving very important, especially in the areas of welfare assistance and consumer transactions. The OEO lawyer's desire to work with his client rather than for him represents a basic revision in the normal operating procedure for service-oriented reservation organizations.<sup>220</sup> These factors merge to produce the most significant contribution of the legal services programs: their role in developing an attitude of self-confidence within the individuals they serve. The Indian's knowledge that someone with a degree of power is available and willing to intercede on his behalf has great psychological influence. Assertions of rights made by an Indian, with the assistance of an OEO lawyer, in the legal context can promote the confidence necessary to encourage affirmative acts in other situations.

On the tribal level, the contributions of the reservation legal programs are more tangible. The OEO lawyers stimulate community initiative and concurrently furnish the skills necessary to assist effectively groups of Indians in mobilizing power through organization. The numerous cooperative ventures being attempted on the Navajo Reservation exemplify this fact.<sup>221</sup> Participation by Navajos and Papagos in the administration of the legal programs provides far-reaching rewards for their respective tribes, in terms of both psychological benefits and valuable administrative experience. Further, the programs' contributions toward the continuing development of component elements of the reservation community, such as the tribal legal systems and Indian-owned businesses, and the expansion of the tribal governments' sovereign power vis-à-vis other governmental units are helping to provide the primary tools necessary for the achievement of increased tribal self-determination.

Whether Papago Legal Services and DNA will continue to successfully assist in the drive toward self-reliance depends on two key factors, the emergence of Indian lawyers and the amount of support forthcoming from OEO.

By professionalizing the role of the tribal court advocate, these programs have taken the initial step toward the establishment of an indigenous "legal profession." The range of contributions which these lay advocates can make to their respective tribes, however, is limited. Indian attorneys,

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<sup>219</sup> DELORIA, *supra* note 17, at 26.

<sup>220</sup> *Cf. Neighborhood Law Offices, supra* note 6, at 811.

<sup>221</sup> *See* note 188 *supra*.

servicing first with the legal services programs and eventually with the tribal government and as private practitioners on the reservation, are a necessity if the tribal communities are to become truly self-sufficient.

While the emergence of Indian lawyers will take time, OEO support will have a significant immediate influence. If the reservation legal programs are to achieve their full potential for assisting their respective tribes, they must receive increased financial and moral backing from OEO.

The success of a legal services program of course will lead eventually to the program's demise. OEO support is essential to insure that such success does not endanger the program prematurely, before there are enough Indian lawyers to take on all the reservation's legal work. The possibility of this situation occurring stems from OEO's intensely political nature and its susceptibility to pressure. Anglos legally attacked by the program lawyers for exploiting Indians are likely to register complaints regarding these activities with their elected representatives in Washington.<sup>222</sup> The political influence of an Anglo businessman normally being much more substantial than that of an indigent Indian, such pressure may be transferred to OEO, which may complete the cycle by applying direct pressure on the instigating legal program through the medium of annual budgetary allocations.<sup>223</sup> The legitimate actions of individual legal services programs must be defended against the criticism of vested interests if the federal government is to continue to promote increased Indian self-reliance.

The ultimate goal of the reservation legal services program must be to strengthen the Indian's autonomy while enabling him to preserve his sense of community. By assisting the Indian in developing the resources of his reservation, while concurrently providing him with the capability to interact on an equal basis with members of Anglo society, the OEO lawyer can perform perhaps his most significant service for the members of the reservation community. With this assistance the reservation Indian will then be afforded a meaningful choice between the two options which control his destiny: assimilation into Anglo society or development of progressive reservation communities.

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<sup>222</sup> Cf. *Neighborhood Law Offices*, *supra* note 6, at 834.

<sup>223</sup> Cf. *id.* at 833.