A Reporter's Guide to American Indian Law

AP PHOTOS

Dalton Walker was trapped between two worlds.

In one world, the member of the Red Lake Band of Chippewa watched as his community — and specifically his high school alma mater — was ravaged in 2005 by a mass shooting and suicide that grabbed international attention.

In another world, the student and aspiring journalist teamed with another American Indian reporter, Dana Hedgpeth of *The Washington Post*, to tell the story of the Red Lake tragedy.

"This was something way bigger than me, but I had a perspective that no one else had," Walker said.

Covering American Indian communities should be a lot like covering city hall, the courts or crime. But the beat is like no other.

The legal underpinnings for seeking access to meetings, records or an interview on American Indian-controlled land more resemble requesting information from Canada or France than city government or the courts.

continued inside

AP PHOTO
Law enforcement officials talk to the media in March 2005, one day after the shootings in Red Lake, Minn. Many journalists encountered access hurdles while reporting the story.

That is because Indian tribes have rights separate and independent from the U.S. government and its constitution. And that sovereignty gives tribes the right to decide their level of press freedom — whether to shut down completely in the media spotlight or to open their doors to scrutiny.

"It's really important to remember that you're dealing with [562] government entities that all have their own processes and codes and constitutional processes," said Mark Trahant, editorial page editor of the *Seattle Post-Intelligencer*. "It's so easy to think of Indian Country [as a single entity] rather than this real complex area of tiny different states."

The lessons of Red Lake

In the aftermath of the March 21, 2005, Red Lake massacre in which 16-year-old Jeff Weise killed nine people and injured seven others before taking his own life in a classroom, tension swelled between tribal leaders and journalists.

One day after the killings, tribal officers handcuffed and briefly detained two news photographers who took pictures from a moving car of a roadside memorial, which the photojournalists thought was in accordance with tribal orders not to leave the main highway that runs through town.

The tribal chairman directed all media to a parking lot outside the Red Lake Reservation's jail, a move that, despite objections from reporters, was legal.

"It's their sovereign authority to have within their territory who they want," said Robert Odawi Porter, a Syracuse University College of Law professor and a member of the Seneca Nation. "If you don't have any ability to control your own territory, then you've lost. I think this was just an internal issue. It's up to the people in that nation how they want to deal with it."

Many of the journalists who descended on Red Lake were not aware of the true meaning of tribal sovereignty or the application — or lack thereof — of traditional First Amendment protections on reservations.

"The media chose not to check beforehand, they just rushed over there like it's another city murder," said Duane Beyal, editor of the *Navajo Times*, which circulates in Arizona, Colorado, New Mexico and Utah.

Despite the legality of keeping journalists off sovereign land, local journalist Bill Lawrence, a member of the Red Lake Band, thinks the tribe's actions were unacceptable.

"That was an abuse of office, an abuse of authority, and a denial of the rights of both sides. That should never have been allowed to happen," said Lawrence, who founded the weekly *Native American Press/Ojibwe News*.

Louise Mengelkoch, a journalist and professor at nearby Bemidji State University in Minnesota who has written extensively about the media's actions at Red Lake, said that the "public sentiment here among non-Indians was sympathetic to what [tribal leaders] were doing."

But the tribe was not completely justified in shuttering the process, she said.

"I think when it got to the point where they were getting pretty aggressively angry towards the media, it was definitely over the top," Mengelkoch said. "Because they live in such a closed culture . . . if you don't see how others see you, you do end up going over the top because you don't have any context."

Some reporters did not face the access clampdown that some of the national media faced.

"We got more access because they know us," said Brad Swenson of *The Bemidji* (Minn.) *Pioneer*. "I guess from our standpoint, we treated it with sensitivity, too. We kind of walked around the edges and we got what we needed to get."

Walker knew when Hedgpeth called to ask for his help that reporters would soon flood his boyhood home. Some so aggressively pursued the story that they were rude, said Walker, a 2000 graduate of Red Lake High School.

"I understand that situation, but at the same time as a journalist you have to respect people, too," he said. "That just ruins it for the rest of us when you have one journalist being disrespectful or overly aggressive."

Hedgpeth watched as Walker, with strength and sensitivity, juggled the conflict between the demands of his chosen profession and the suffering of his community. But even he faced a backlash, she said.

"In general, people were sort of kind of turning against him and talking about him behind his back at times, even saying some threatening things," Hedgpeth said.

This guide was compiled by Reporters Committee legal intern Peter Saharko, and was funded by the Ethics & Excellence in Journalism Foundation.

Walker also felt some of the animosity of the community toward journalists.

"I wasn't going to shy away because I was called names," Walker said. "I put the journalism . . . before everything. . . . From my perspective [the reporting] will be objective, but it will just be from a different viewpoint."

Hedgpeth, a member of the Haliwa-Saponi Tribe in North Carolina, admired the way Walker handled himself. She noted that Walker said, "If I don't cover it, someone else will, and I'm more likely to get it right."

John Shurr, bureau chief of The Associated Press in Columbia, S.C., and member of the Cherokee nation, agreed.

"It's kind of a two-way street — the tribe has to be willing to work with the mainstream [media], and that's at least 50 percent of the problem that the Red Lake Chippewa [encountered]," he said.

Hedgpeth ultimately found ways to avoid being limited by the tribe's denial of access.

"It was miserable, it was terrible, it was especially terrible being a native reporter," she said. "At the same time, that's what got me in. I never once got to that bullpen where they were keeping reporters. I didn't have time for that."

Hedgpeth said the best result now would be for the tribe and the journalists who covered the tragedy to open a dialogue.

"If the Red Lake Tribal Council and the journalists are really smart, they will use it as an opportunity to fall on their swords and say they made mistakes," she said.

Sovereignty is the key

The 562 legally recognized tribes within the territorial boundaries of the United States are not states, nor are they subject to the laws of those states in which they exist.

U.S. Supreme Court Chief Justice John Marshall noted in 1831 that the U.S. Constitution's Commerce Clause distinctly separates regulation of states from regulation of Indian tribes.

Cherokee Nation Principal Chief Chad Smith said the "most fundamental concept of sovereignty is self-government. Our first treaty was with Great Britain in 1721. We existed before there was ever a United States in the community of governments."

But tribes are also not like foreign nations, completely independent of U.S. laws and the Constitution. The U.S. Supreme Court has called tribes "distinct political communities, having territorial boundaries, within which their authority is exclusive."

The right to exclude

When reporters are excluded from places usually considered "public," they think, often rightfully, that they are being illegally denied access. This is not the case on reservations.

"Tribes have the authority to exclude people from the reservation," said Lucy Simpson, staff attorney for the Indian Law Resource Center in Montana. "The source for that is their inherent sovereignty, rights they have from time immemorial."

The U.S. Supreme Court has held that a tribe has the power to exclude nonmembers entirely or to place conditions on their presence on reservations. As the Court noted in 2001 in *Atkinson Trading Co. v. Shirley*, "a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians . . . within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

Derived from the right to regulate is the right to keep reporters off a reservation, according to Frank Pommersheim, professor of Indian law at the University of South Dakota School of Law.

Trust land v. Non-trust land

Land on reservations can be divided into two general broad categories: trust land and non-trust land. The trust relationship is derived from individual treaties between the United States government and tribes and is based on several 19th-century Supreme Court decisions that created this framework.

The first, *Johnson v. M'Intosh* in 1823, institutionalized the conquest of American Indian lands and stripped American Indians of their full property rights to the lands in a decision observers agree is marked by rampant misconceptions and crude stereotypes of the American Indian population prevalent at the time.

Another case, *United States v. Kagama* in 1886, recognized the dependency of tribes on the federal government and their independence from states.

"One of the things that flows from those . . . cases is that . . . native people have the right of use and occupancy of those lands and that the United States as title holder has the responsibility to protect the use and occupancy of native people as well as their rights of governance," Pommersheim said. And that means that reporters may be excluded from reservations.

The First Amendment — or something like it

Seemingly, the First Amendment's free press protections would offer some access

A timeline of American Indian history affecting reporters' access to land, records and meetings.

1721 — The Cherokee Nation signs its first treaty with Great Britain.

1823 — A controversial U.S. Supreme Court decision, *Johnson v. M'Intosh*, institutionalizes the conquest of American Indian lands, stripping American Indians of their full property rights.

1831— The U.S. Supreme Court in *Cherokee Nation v. Georgia* determines that regulation of states is separate from the regulation of Indian tribes.

1896 — The U.S. Supreme Court in *Talton v. Mayes* rules that the Fifth Amendment, guaranteeing the right of due process and protecting against self-incrimination, does not affect powers of tribal self-government.

1934 — Congress passes the Indian Reorganization Act, allowing tribes to reorganize their governments and consolidate their land bases, and providing a boilerplate constitution from which tribes can develop their own supreme law.

1968 — Congress passes the Indian Civil Rights Act, incorporating many of the provisions of the Bill of Rights, including the First Amendment, into Indian tribal governance.

1978 — The U.S. Supreme Court in *Santa Clara Pueblo v. Martinez* rules that tribal sovereignty means tribal courts may interpret constitutional provisions incorporated under the Indian Civil Rights Act differently than federal courts do.

1988 — Congress passes the Indian Gaming Regulatory Act, requiring tribes to enter into compacts with states to engage in certain gambling activities.

2000 — The Cherokee Nation passes the Independent Press Act of 2000, codifying the tribe's commitment to principles of free press and free speech.

2003 — The National Congress of American Indians endorses a resolution favoring a "Free and Independent Native Press."

2005 — The shootings at Red Lake High School in Minnesota, which leave nine people dead and seven injured, highlight tension between the right of tribes to sovereignty and the desire of reporters from around the world to gain access. ◆

AP PHOTO

Navajo Supreme Court Associate Justice Lorene Ferguson, right, questions attorneys during a 2003 hearing. The Navajo courts apply their own traditions, not American common law, to interpret free speech rights.

to journalists, since Indian tribes are in part regulated by the federal government. But the constitutional protection is not as straightforward on land controlled by American Indian tribes.

In 1896, the U.S. Supreme Court ruled in *Talton v. Mayes*, that the Fifth Amendment's limit on the government's use of eminent domain did not affect the powers of tribal self-government, and that holding has been expanded to include other protections generally afforded under the Bill of Rights.

Congress passed the Indian Civil Rights Act (ICRA) in 1968. The law, in a section mirroring the language of the First Amendment, says that "no Indian tribe in exercising powers of self-government shall make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble and to petition for a redress of grievances."

The most significant case to interpret the Indian Civil Rights Act is *Santa Clara Pueblo v. Martinez*, in which the Court ruled in 1978 that the act should not interfere with tribal sovereignty.

"The Supreme Court ruled … that the enforcement of the Bill of Rights would be up to the tribe," Trahant said. "So the same institution that might be thwarting [press freedoms] would also be judging [whether violations occurred]."

That key decision also demonstrated the deference to tribal courts in many matters, said professor Steven J. Gunn, who teaches American Indian law at the Washington University School of Law in St. Louis.

"What the Supreme Court said was that … the Court will construe narrowly statutes that affect Indian rights of self government," Gunn said. "The Indian Civil Rights Act is an act that limits or restricts the powers of tribes, so the court construes it narrowly and interprets it liberally in favor of the Indians."

Lawrence said the high court's ruling "emasculated the ICRA," in part because lawsuits from reporters against a reservation for a violation of press freedoms protected under ICRA would be heard in the tribal judicial system, with very little chance of an appeal to the federal court system.

"To go into a tribal court and win is virtually impossible," Lawrence said of his experiences. "They're controlled by the governing administration."

How tribal courts operate

Which legal matters are handled by tribal courts, as opposed to state and federal courts, depends on the tribe's sovereignty, its laws and its judicial decisions. When a non-Indian is involved in litigation, even more jurisdictional issues arise, Simpson said.

State law would generally not apply to legal proceedings involving only American Indians that relate to activities on a reservation.

The issue is more complex when a state claims authority over the conduct of non-Indians on a reservation; in such cases, courts look to relevant treaties and statutes and consider them in the context of the goal of promoting sovereignty and independence.

Because of their sovereignty, tribes are not required to adhere to the traditional notions of separation of powers among executive, legislative, and judicial branches, although most do. According to Gunn, the most common form of tribal government is one organized under the Indian Reorganization Act. The act, passed in 1934, allowed tribes to reorganize their governments and consolidate their land bases. It also provided a boilerplate constitution written by the Department of Interior from which tribes could develop their own supreme law, and 172 tribal governments adopted such a constitution, which institutionalizes executive, legislative, and judicial branches.

Many tribes have since amended their constitutions to promote greater separation of powers, according to Gunn. "The dominant trend is to create a [greater] separation of powers and greater judicial independence," he said.

Tribal courts have their greatest power when they are judging matters involving tribal members. Mark D. Rosen, in the Fordham Law Review, cited the 1996 Navaho court ruling *Navajo Nation v. Crockett* to show that Navajo tribal courts have used Navajo common law rather than federal common law to interpret free speech rights. Thus, the Navajo courts speak of freedom with responsibility, which can place content-related limitations on speech, Rosen wrote.

There were 511 tribal courts — created either by tribal constitution or by an act of a tribal legislative body — in the U.S. at the turn of the century, according to Rosen.

His study of reported tribal court decisions shows that the First Amendment has been interpreted in similar though not identical ways to federal court standards. In *Chavez v. Tome*, a Navajo appellate court overturned a trial court requirement that a newspaper print a retraction for an article found to be libelous, noting the "right of the press to be free of governmental intervention. … A responsible press is desirable, but it cannot be legislated by the Navajo Tribal Council or mandated by the Navajo courts."

The court determined that when an article was found to be libelous, damages can be assessed but a newspaper cannot be forced to print a retraction, according to Rosen's article. ◆

Constitutional crisis spurs Cherokee reform of press freedoms

Dan Agent, editor of the *Cherokee Advocate* tribal newspaper, had a great story.

In 1997, after the Cherokee Judicial Appeals Tribunal — the Indian nation's highest court — ordered the nation's principal chief, Joe Byrd, to release his spending records, Byrd tried to fire marshals sent to enforce the order.

The newspaper wrote what Agent called a balanced report on the affair, which was sparked by a records request by members of the Cherokee Tribal Council.

After the newspaper published its next issue, which included more news about the controversy, Agent's job as was "reorganized" out of existence.

"They told me … I had until noon the next day to get my stuff and go home," Agent said.

Three years later, after Byrd was defeated in the next election, the crisis led to a re-examination of basic freedoms by the nation and eventually to the passage of free press and freedom of information laws that many consider a model for other tribes seeking to increase public access.

Agent returned to the newspaper, which for the first time in decades operated separately from the nation's public affairs office.

The Cherokees' move has served as a model for some of the largest and most influential Indian tribes and nations to allow greater access and more press freedoms.

"We think we've established model legislation that other tribes can look to try to get a free press," Agent said. "I've had maybe half a dozen newspaper editors talk to me [about the concept] … but the bottom line is you have to have leadership that believes in it."

The autonomy is crucial, according to John Shurr, chief of The Associated Press' Columbia, S.C., bureau and a member of the Cherokee Nation who has worked on its freedom of information law.

"A free press, either tribal or mainstream, is good for the people," he said. "I think it helps keep the politicians honest. I think knowledge is a great benefit for all people who have to rely on government to do something for them. I think the trend … is to get more tribal governments to embrace a free press and do that by passing free press acts or constitutional revisions or letting the tribal newspaper sever itself from fiscal dependency on tribal money so that it can, without the threat of having its funding cut off, do what it deems journalistically responsible."

AP PHOTO

Former Cherokee Nation principal chief Joe Byrd.

The Cherokee experience

The Cherokee Nation comprises 260,000 citizens, half of whom live in 14 northeastern counties of Oklahoma.

For Cherokee Principal Chief Chad Smith, who defeated Byrd in 1999, the main purpose for passing free press and freedom of information laws was survival.

The Independent Press Act of 2000, which codifies the tribe's commitment to principles of free press and free speech, says that "the Cherokee Nation's press shall be independent from any undue influence and free of any particular political interest. It is the duty of the press to report without bias the activities of the government and the news of interest to have informed citizens."

Smith said the nation's "most fundamental principle is we want to be here for another 200 years. If we're going to design our government, we need to design for longevity."

Before the press act was passed, there was little to stop Byrd, the previous executive, from attempting to exert undue influence over both the courts and the press, Smith said.

"After that passed, it became clear since we have a constitutional model that we needed to add the Fourth Estate, the press, as a fourth check and balance in government," Smith said. "And so, we believed that a healthy press had value in preserving the integrity of our government for the long term. I'm not a free press purist. There's simple pragmatic value to having a free press looking over my shoulder and if I do something wrong, letting constituents

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— Cherokee Nation chief Chad Smith

know about it."

Shurr was enlisted to serve on the editorial board of the paper, which returned to its original name, *Cherokee Phoenix*.

He also played a major role in crafting the free press law, writing the outline of the bill, including one recommendation accepted by the council to create an editorial board to serve as a buffer between the tribal government and the newspaper staff.

"They can offer suggestions but they can't hire and fire the editor," Shurr said.

The *Phoenix* has printed material criticizing Smith and has not faced any form of retribution, said Agent, who noted that since he returned to the paper in November 1999, no tribal leaders have reviewed or asked to review copy.

"Chief Smith has never interfered with this publication in any way," Agent said.

While the act's application to outside journalists has not been tested, Smith said the nation has never denied outside reporters access to information that would be available to tribal news sources.

"As a matter of policy we try to give the press the things they need," Smith said. "If requests are reasonable, I don't think we've ever turned a request down."

Challenges facing tribal journalists

The March 2005 shootings on the Red Lake reservation in Minnesota demonstrated just how tenuous the relationship between the news media and American Indian tribes can be. It also highlighted the sizeable misunderstandings that exist between the two groups and how important it is for reporters to understand the community they are covering.

In 1998, the late Yakama Indian journalist Richard LaCourse wrote "Protecting the First Amendment in Indian Country," a survey of the history of press freedoms in Indian Country. He noted the problems facing tribal newspapers at the time, including "political firings before or after tribal elections; political cutoff or selective reduction of publication funds; prior censorship and removal of news story copy by political officials or administrative personnel; placing of unqualified persons on news staffs by reason of blood kinships or political loyalties; firings for editorials printed … exclusion of news personnel from selected governmental meetings; restrictions on press access and withholding of governmental documents from publication or broadcast … and even occasional death threats for materials published or known to be scheduled for publication."

Agent said matters have improved with some, but not all tribes.

"I can say in general that there are a number of tribal publications that are still subject to those things occurring," Agent said.

Agent said the efforts of the Native American Journalists Association (NAJA), as well as those of editors at various tribal newspapers, shine a light on and help eliminate such problems.

The trend toward openness

Other tribal news sources also have succeeded in providing greater openness and independence.

The *Navajo Times* is one of a limited number of tribal publications that is now independently financed.

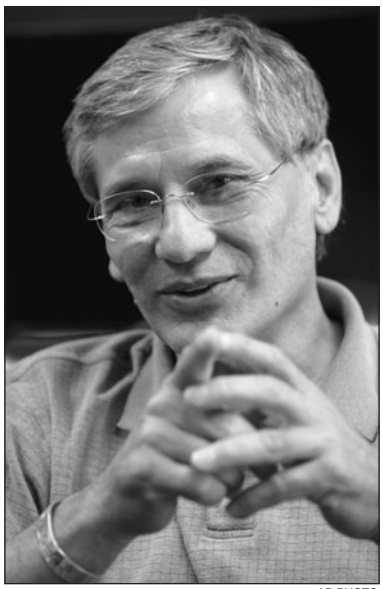
"A lot of tribal newspapers and media are dependent on tribal funding to function because there's just not enough subscribers or advertisers to financially sustain an independent publication," Agent said. But financial backing from the tribe does not necessarily contribute to a slanted viewpoint, he said.

"How independent is Rupert Murdoch's Fox News? How fair and balanced are they?" Agent asked. "You can accuse any financially independent publication of having a bias as well."

Duane Beyal, editor of the *Navajo Times*, which circulates in Arizona, Colorado, New Mexico and Utah, said an access crisis in 1987 similar to the Cherokee story led to reform. A former chairman of the Navajo Nation who did not like the paper's coverage summoned police to shut down the paper, which did not reach its usual level of production again for a year and a half, Beyal said.

The council responded by agreeing to spin off the *Navajo Times* as a tribal corporation, incorporated under the laws of the Navajo Nation. The council also passed a law in the mid-1990s saying the news media should be free from political interference, Beyal said. Outside media that border the Navajo freely cover Navajo government proceedings, Beyal said.

"For us and our situation, the trend is toward more press freedom," Beyal said.



AP PHOTO

Cherokee Nation principal chief Chad Smith.

In 2003, the National Congress of American Indians endorsed a resolution favoring "Free and Independent Native Press."

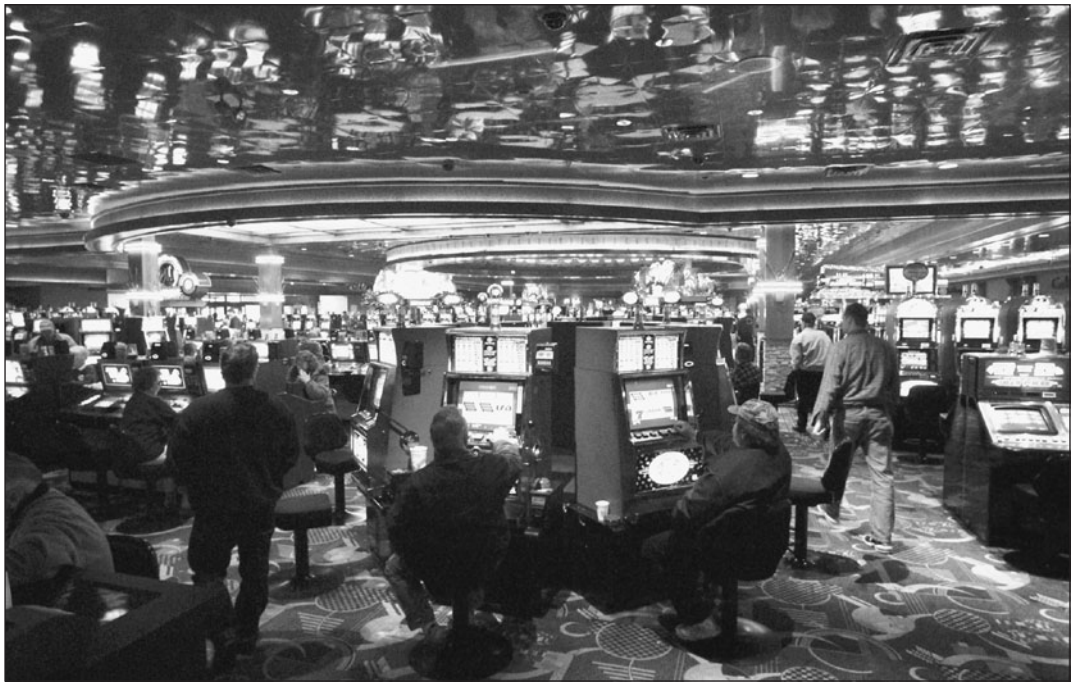
Agent noted that the Al Neuharth Media Center at the University of South Dakota has trained 25 American Indian college students as newspaper reporters, editors, and photographers. A recent NAJA convention offered training as well.

Greater press freedom does not just improve the work of journalists.

"I think that governments tend to work better when they're in the sunshine, and that's true of tribal governments as well," said Mark Trahant, editorial page editor of the Seattle Post-Intelligencer.

Frank Pommersheim, professor of Indian law at the University of South Dakota School of Law, said change in access will ultimately come from the will of members.

"Tribes move forward as they get more demands from their constituents because ultimately, the demand for an open press is more effective when it comes from tribal members and Native American press groups," he said. ◆



AP PHOTO
Gamblers play slot machines at the Grand Casino, run by the Mille Lacs Band of Ojibwe in Minnesota. The tribe fought to keep from releasing compacts with the state.

Access to records, meetings a struggle in Indian Country

When Bill Lawrence sought access to state audit information about American Indian-run gambling operations in Minnesota, he ran into legal barriers.

In addition to making claims of tribal sovereignty, the tribes asserted the information was exempt from release as a trade secret and further argued that the state should defer to federal law, which exempts such material.

The Minnesota Court of Appeals eventually ruled in favor of Lawrence, publisher of the *Native American Press/Ojibwe News* in northern Minnesota, who intervened in the tribe's lawsuit against the state of Minnesota.

Lawrence's victory was a rarity.

State public records laws do not apply

Normally, there would have been no question that a journalist could not get access to tribal records. State freedom of information laws do not apply to records of American Indian tribes, legal scholars and other observers agree.

Less certain is whether records that involve cooperation, contracts or other interactions between tribes and either the state or federal government are public. Lawrence's case is one of a limited number that have examined the issue.

Leaders of tribal publications believe opening records and providing access would improve understanding of and respect for tribal government.

"If you keep open records and you make them public, there's no reason for people to be suspicious," said Dan Agent, editor of the *Cherokee Phoenix*.

In addition to the Minnesota court ruling in Lawrence's case, Washington state courts have recognized a right to such information under state public records laws. And some access to federal documents involving tribes have been obtained through the federal Freedom of Information Act.

There are 408 Indian gaming operations within the territorial boundaries of the United States, of which 226 are full-fledged casinos, according to the National Indian Gaming Association.

In 1988, Congress passed the Indian Gaming Regulatory Act, which requires tribes to enter into compacts with states to engage in certain gambling activities. Various tribes in Minnesota, including Prairie Island, the Mille Lacs Band of Ojibwe, and the Red Lake Band of Chippewa Indians entered into compacts with the state, and the state's Department of Public Safety was placed in charge of overseeing the state's interest in such operations. The department sought and obtained financial statements from Prairie Island and Mille Lacs, information the tribes believed would not be disclosed to the public.

Lawrence first asked for the data related to Red Lake, but the department denied the request so he requested and received an advisory opinion from the state Department of Administration concluding the data was public under the state's Government Data Practices Act.

Lawrence sought the same information for Prairie Island and Mille Lacs, and the tribes sued to have the information declared non-public.

One roadblock occurred when a federal district court in Minnesota concluded such audits were not public data under federal law. Despite the ruling, the state appellate court concluded in 2003 that the federal law did not preempt state law in this case, and that the audits were not wholly trade secret information. Any trade secret information included in the documents could be

Tribes, rather than denying a reporter access, will occasionally find out a reporter is planning to attend and then reschedule the meeting.

redacted, the court ruled in the case.

In *The Confederated Tribes of the Chehalis Reservation v. Johnson*, Washington's highest court in 1998 ordered the release of similar information about American Indian-run gambling operations.

"The information does not, as the Tribes suggest, deal solely with the conduct of tribal government, with no relation to state governmental processes," the court ruled. "The Gambling Commission negotiates, renegotiates and enforces the compacts on behalf of the citizens of Washington. Also, it is involved in distributing the community contributions to governmental agencies which are affected by the Tribes' gambling operations. In order to fulfill its obligations in this regard, the Gambling Commission must rely on and use the information contained in the records requested. The records relate to the conduct of the Gambling Commission and to its governmental functions. Therefore, the records are 'public records' within the scope of the public records act."

Access to certain gambling records held by a state agency has also been granted by a lower court in New York.

The key to the court victories is that the records are not construed as tribal records but instead as state records related to the compacts, or contracts, that the states enter into with tribes allowing gambling operations.

There is at least one example of a state open records law being applied directly to tribes, but this decision was due to "a framework that is unique to Maine," according to a 2001 ruling by that state's high court.

Agent said information about Cherokee gaming should be and is open to the public under tribal practice and law.

"It's a matter of public record how much money is made and how it's expended," Agent said. He questioned decisions to shutter access to such records.

"Whenever you don't provide information willingly or you try to keep something from the public, then that results in suspicion," Agent said. "We know that it's better to just get the information out there and avoid as much spin as possible. You're going to be better off in the long run."

Federal records

Communications between Indian tribes and the federal government are not excluded from the federal Freedom of Information Act, after the U.S. Supreme Court's ruling in *Department of Interior v. Klamath Water Users Protective Ass'n* in 2001 that tribal comments on a federal agency decision-making process were not private merely because of the trust-trustee relationship between the federal government and the tribe.

Frank Pommersheim, a professor of Indian law at the University of South Dakota School of Law, said despite the Supreme Court ruling, it remains unanswered whether certain tribal documents that relate to federally funded projects would be considered public documents or internal tribal documents.

What is clear is that state freedom of information laws would not apply to purely tribal documents.

"The state of Minnesota has access rules and so does the federal government," said Brad Swenson, political and opinion page editor of *The Bemidji Pioneer*. When it comes to access to reservations in Minnesota, he said, "you are kind of at their beck and call."

Other courts have not been as sympathetic to such claims. When Arizona provided compensation to Indian tribe members for highway access, the check distribution list related to the transaction was not a public record. "Arizona has no control over a disbursement of tribal or federal funds to Indian beneficiaries," the Supreme Court of Arizona ruled in *Salt River Pima-Maricopa Indian Community v. Rogers*.

Meetings

Access to meetings of American Indian tribal government can also be denied without recourse because state open meetings laws do not apply.

Swenson said in his experience covering tribes in Minnesota, any time council members want to talk about something they do not want the public to hear, they kick out the public and close the door, without explanation and without legal recourse.

Lawrence agreed, noting there is a difference in access for tribal members versus non-members.

About 10 years ago, Lawrence said, one of his reporters was cited with trespassing and spent several hours in jail after trying to cover a tribal executive committee meeting in Mille Lacs, Minn. Lawrence's paper fought the matter in the tribal courts, and eventually a federal judge ruled that the tribal police had the authority to make the arrest.

"I [as a tribal member] can go to tribal council meetings for my tribe, whereas … they have and probably would not allow [non-tribal members] to sit in on their meetings," Lawrence said.

Louise Mengelkoch, a journalist and professor at Bemidji State University in Minnesota, said in her work she often encountered a double standard in access.

"They're always glad to let you cover the presentational public events or let you reprint their press releases, but when it comes to opening tribal financial records or covering tribal meetings, that's what is harder to do, and that's got to be challenged," she said.

Tribal court proceedings are another problem. When Mark Trahant of the *Seattle Post-Intelligencer* was at the *Navajo Times*, the newspaper tried to make access to such proceedings routine, "and it was just really difficult because no one pressed and there was no good process for it."

There are also less obvious methods of keeping journalists out, Lawrence said. Tribes, rather than denying a reporter access, will occasionally find out a reporter is planning to attend and then reschedule the meeting, he said.

Since tribes generally control the amount of access they choose to provide to journalists, changes will need to come from the inside, observers agree.

One positive step was the Cherokee nation's passage of open records and open meetings acts, based on a model developed by John Shurr of The Associated Press, who has been freedom of information chairman with the South Carolina Press Association for two decades. ◆

MINNEAPOLIS START-TRIBUNE
PHOTO DISTRIBUTED BY AP

An FBI spokesman addresses the media the day of the Red Lake high school shootings.

Questions & Answers

Many reporters do not understand the meaning of basic American Indian terms of association and governance, as well as their legal rights when covering stories on American Indian land. Below is a very brief overview.

Q: What is a tribe?

A: The U.S. Supreme Court has defined a tribe as a body of Indians of the same or a similar race, united under one leadership or government, and inhabiting a particular, although sometimes ill-defined, territory. The Seneca are a tribe.

Q: What is a nation?

A nation of American Indians is a large tribe or group of affiliated tribes acting for the time being in concert. The Oklahoma Cherokee are a nation.

Q: What is a band?

A: A band of American Indians is, according to U.S. Supreme Court precedent, a company of Indians "not necessarily, though often, of the same race or tribe, but united under the same leadership in a common design." The Red Lake are a band of Chippewa Indians.

Q: What is Indian Country?

A: Indian Country includes land within Indian reservations, dependent Indian communities, and Indian allotments for which the Indian titles have not been extinguished.

Q: In general, where do things stand for journalists in gaining access to Indian Country?

A: Tribal land is private property, and tribal leaders have the right to exclude outside journalists. State freedom of information and public meetings laws do not apply to outside journalists because tribes are sovereign nations. Tribal courts would be the source of relief if a reporter brought a "First Amendment" violation, and the tribal court could interpret the document differently than federal courts. Those interpretations may also be difficult to find, as not all tribes report their decisions, and even among those that are reported, not all decisions are published in legal reporting services.

Q: What is sovereignty, and what does it mean to a reporter in covering Indian Country?

A: American Indian tribes have the right to make their own laws, execute those laws, and have those laws interpreted by their court system, with the understanding that Congress has the power to limit this authority.

The federal government has exclusive authority over U.S. relations with Indian tribes, and states do not play a role in regulating tribes under normal circumstances.

Because of the importance placed on Indian sovereignty and self-government, Indian tribes have sovereign immunity from legal challenges.

"You can't sue a government unless the government consents to be sued," said Professor Steven J. Gunn of the Washington University School of Law in St. Louis. "Indian governments have sovereign immunity just like any other government."

This means reporters seeking to challenge a tribe's decision to exclude or questioning a potential violation of the media's rights must do so in the tribal court system, where tribal judicial officials have full power to interpret the laws' meaning.

Q: Do freedom of information laws apply to tribal documents and meetings?

A: Generally no, but in certain specific instances, yes. A document that is purely related to Indian tribal governance would not be subject to state or federal freedom of information laws. But journalists seeking information through these laws should not completely abandon hope. Several state courts have allowed state documents relating to gaming compacts with American Indian tribes to be considered public documents. The federal courts have taken a similar approach. If the document is a federal government document not subject to any exemption under the Freedom of Information Act, there is no blanket exemption simply because the document relates to American Indian affairs, according to the Supreme Court. State public meetings statutes would not apply on American Indian land, and thus the decision to exclude a reporter from a meeting is generally

up to the tribe. Generally, reporters who are members of the tribe will have more success gaining access. Some tribes, including the Oklahoma Cherokee, have passed their own freedom of information acts.

Q: What is the difference between trust and non-trust land, and what does it mean for a reporters' access to a reservation?

A: Land held in trust means the actual title to the property is held by the United States, and that gives the U.S. government the responsibility to protect those property interests.

Trust land can consist of tribally controlled land or individual allotments held by American Indians. "Trust land is the surest basis for the tribe to feel most comfortable in asserting its jurisdiction," said Frank Pommersheim, professor of Indian law at the University of South Dakota School of Law. Non-trust land on reservations can be held by tribes as a whole, American Indians individually, or non-American Indians. The fiduciary responsibilities of the federal government are less extensive on non-trust lands.

Therefore, access to property on a reservation can depend on whether it is trust or non-trust land, whether it is public or private, and whether it is held by the tribe or by an individual.

"To be clear, if it's private property, no matter what use it's put to, I think the owner would have the right to exclude," Gunn said.

Q: Are decisions of tribal courts published?

A: Not comprehensively. One difficulty in determining how tribal courts have ruled on constitutional issues is the limited information available. Most do not publish their opinions and even among those that do, only 100 cases per year are reported, according to Mark D. Rosen in the Fordham Law Review.

Q: When a crime is committed on American Indian land, who is in charge of the investigation?

A: According to Gunn: "In 1953, Congress passed Public Law 280, which gave certain states criminal jurisdiction over some, but not necessarily all, Indian reservations within their borders. In these states — commonly referred to as P.L. 280 states — the states and tribes have concurrent criminal jurisdiction. (The federal government does not exercise criminal jurisdiction here, except in cases of ordinary federal crimes, like drug crimes, etc.) Some tribes in P.L. 280 states may not have their own criminal justice systems, deferring instead to the state criminal systems in place. Many tribes in P.L. 280 states do have their own police, etc., and they enjoy shared jurisdiction with the states. In non-P.L. 280 states, criminal jurisdiction over crimes involving Indians is shared between the federal and tribal governments. In short, tribal governments have misdemeanor jurisdiction over offenses committed by Indians. In non-P.L. 280 states, the federal government has felony jurisdiction over crimes by Indians and all jurisdiction by crimes committed by non-Indians against Indians. The states do have some jurisdiction over crimes by non-Indians against non-Indians."

Q: Does the First Amendment apply to American Indian tribes?

Yes and no. Congress required tribes to incorporate the protections of the First Amendment in the Indian Civil Rights Act of 1968. But the U.S. Supreme Court interpreted the law to say that tribes can interpret those protections according to whatever principles their own court system adopts. That means that the traditional protections understood under federal law might not apply, and bringing a challenge in a tribal court system could yield a very different result than in the federal court system.

Q: What are good sources of information?

Native American Journalists Association: www.naja.com

Bureau of Indian Affairs: www.doi.gov/bureau-indian-affairs.html

National Congress of American Indians: www.ncai.org

National Museum of the American Indian: www.nmai.si.edu

The Freedom Forum's Al Neuharth Media Center: www.freedomforum.org/templates/document.asp?documentID=13147 ◆

Challenges facing American Indians

There are 2.4 million American Indians living within the territorial boundaries of the United States, according to the 2000 census. Although a full picture is less than clear and statistics vary from tribe to tribe, there are challenges that exist across Indian country. Median wages for both American Indian men and women are below the national average. Many tribes have poverty rates above the national average. The poverty rate for Cherokee is 18.1 percent, for Chippewa, 23.7 percent, and for Navajo, 37 percent, based on the 2000 Census. The Associated Press reported in July that the results of a Freedom of Information Act request show that the Navajo Nation lost $9.2 million a year in Head Start funding due to broken playground equipment, heaters, and a host of other problems.

There is also rampant drug abuse facing many tribes. According to congressional testimony of William P. Ragsdale, director of the Bureau of Indian Affairs, methamphetamine use "is destroying lives in Indian country."

"Tribal leaders are using terms like 'out of control' and 'epidemic' when describing to me their tribe's experience with meth," Ragsdale said in the testimony. "Some leaders are suggesting that on their reservations, a whole generation of young people may soon be lost to this one drug. The social effects of meth use go beyond destroying the body and mind of the user. Addicted parents are neglecting to care for their own children and meth is fueling homicides, aggravated assaults, rape, child abuse, and other violent crimes."

Some see a direct connection between the lack of access to official tribal records and proceedings and social ills facing reservations.

"My position is that it's the number one cause of poverty and corruption on reservations," said Bill Lawrence, editor of the *Native American Press/Ojibwe News* in Minnesota and a member of the Red Lake band. "Until that's changed, reservations will never improve and they'll continue to deteriorate and get worse."

Tips for reporters covering American Indian issues

Despite barriers to reporters — including the right of property holders on Indian reservations to exclude outsiders — there are steps journalists can take short of legal challenges to gain access to Indian news.

• If there are American Indians in your coverage area, do not ignore them in your stories.

"There are complex legal issues [to access], but there are also barriers of benign neglect," said Mark Trahant, editorial page editor at the *Seattle Post-Intelligencer* and a member of the Shoshone-Bannock Tribe.

Dana Hedgpeth of *The Washington Post* said consistency is the key. "Cover [the American Indian community] like you'd cover any other community," she said. "Just cover it like you'd cover the Energy Department — stick a beat reporter on it. … If you're a paper in Indian Country and you're not covering Indian Country, you have your head in the sand."

• Develop a relationship of trust and be fair.

"It's a very closed community," said Brad Swenson, opinion page/political editor of *The Bemidji Pioneer* in Minnesota, who has covered American Indian affairs for two decades. "Just walking up to the door and asking for comment is not going to get you anywhere."

To get past that door, be fair. "As long as you are fair, you are treated well," he said. Tribal members are used to dealing with people they know, and relationships of trust that develop over a long period of time are the most likely route to access, he said.

• Do not give up when one door closes.

"Be a dogged reporter," Hedgpeth said. "If you got shut out of a city council meeting, you wouldn't sit there with your notebook and cry."

If one door is locked, try to open another, she said.

"Don't come back with an excuse. Don't come back and say, 'They wouldn't talk to me.' Find somebody who will. … There is always someone who will talk and there is always someone who will give you documents," Hedgpeth said.

• Regularly read tribal newspapers.

"Look at who votes 'no' all the time," Hedgpeth said. "That's agate that every single tribal newspaper runs. If you look back at six issues of a newspaper and you find the one guy or gal who consistently voted against the majority, that person will break."

• Find experts on legal and cultural issues.

Duane Beyal, editor of the Arizona-based *Navajo Times*, said journalists seeking to cover tribes should find an expert on sovereignty and other legal issues, as well as experts on the culture of the particular tribe they are covering.

"Any tribe has their culture, their customs, and those need to be respected, and people should take the effort to find out what those customs may be and try to follow them," Beyal said. "On the Hopi reservation, some of the villages do not allow cameras. It would behoove a media person to check that out first."

• Get past the surface.

Cherokee Principal Chief Chad Smith said that the news media have "a tendency to oversimplify. … There's a tendency to try to fit [all American Indians] into a mold that people already understand. It really takes a reporter that has a sense of history and open-mindedness to try to portray tribes accurately."

John Shurr, chief of The Associated Press' Columbia, S.C., bureau agreed. "I think most of the mainstream media coverage of what's going on on reservations is shallow," he said. "It typically looks for casino issues, it typically looks at the unusual aspects of tribal versus mainstream life. There's still a lot of the 'noble savages' approach — 'hey aren't they unique, let's write about them.' That contributes to the perception that [the media] only write negatively."

• Get the facts straight.

Hedgpeth said the media often makes the simplest of mistakes, like getting people's tribes wrong or not even asking a person's tribe.

"It's like saying someone from West Africa is from South Africa," she said.

• Simply be a professional.

Perhaps the greatest key is courtesy.

"Journalists in general, when they're coming on to our land, they're our guests, and they should [conduct] themselves as such," Beyal said.

Smith said, "For us, all we ask is for people to be straight up, come in, tell us what they want, and adhere to all the conventions that a good reporter would adhere to — check the facts, be fair, be straightforward and professional." ◆

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