

**THE COMMITTEE ON LIAISON WITH NATIVE AMERICAN TRIBES OF
THE NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS**

Background of Committee And Project

The National Conference of Commissioners on Uniform State Laws (the Conference) was formed over a century ago to bring harmonization to state laws to facilitate economic development among the states and ease of movement of citizens. Years ago the Conference recognized there might be a similar need among tribes, tribal members, and states. Thus, the efforts of the Conference to establish relations with Native American Tribes go back for many years. The Committee for Liaison with Native American Tribes has attempted throughout its existence to act as a conduit for communications between the Conference and Native American Tribes and as a resource for Tribes and Tribal Organizations seeking information about the products of the Conference.

In 1999, as a result of the increasing economic development occurring on Reservations and the increasing commercial interaction between Native American Tribes, entities and individuals with off-reservation businesses, the Executive Committee of the Conference charged the Committee with the task of encouraging coordination of uniformity of laws on appropriate subjects by building relationships with tribes and organizations of tribal governments that would facilitate the introduction and use by tribes of uniform and model acts that have been adopted by the states.

The Committee initially undertook the task of contacting tribes to determine the degree to which tribes were using uniform acts and what obstacles, if any, existed to tribal adoption of uniform acts. The Committee heard anecdotal evidence that while tribes made use of uniform and model acts, some tribes had found the acts to be unsuitable for their use.

During the course of this investigation, it became clear that the adoption of uniform acts by tribes was uneven throughout the country. Some tribes in states such as Oklahoma had adopted several uniform acts including current versions of those acts, such as the Uniform Partnership Act and the Uniform Limited Liability Company Act. Others tribes had adopted either prior versions of Acts or versions of Uniform Acts that had been modified either by other tribes or organizations. It also became clear that the primary focus of tribal adoption of uniform laws had been the UCC.

The Committee determined that the best way to fulfill its charge was to undertake a pilot project to create a version of an existing uniform act that would be suitable for tribal adoption. The Committee initially considered various Articles of the UCC such as Articles 2 and 9 or the Uniform Arbitration Act as well as other uniform laws. Upon further investigation, the Committee determined that several tribes in the Northern Plains and Rocky Mountain regions had adopted various versions of Article 9 and other tribes

were considering adoption of some version of Article 9, but that these efforts had lost momentum. It was also apparent, however, that few of the tribes which had adopted Article 9 had adopted a version that contained the refinements contained in current revised Article 9. The Committee also determined that the State of South Dakota and the Northern Cheyenne Tribe had recently entered into a compact to address issues of filing under Article 9 by permitting filing with the State central filing office for tribal filings.

Against this background, in August of 2001, the Committee started a project of drafting a version of Article 9 for adoption by Tribes. A number of tribal representatives, including counsel for Sac and Fox, Cherokee, Navajo and others have been involved in the drafting effort.

Following contacts with tribal representatives and the retention of Professor Maylenn Smith of the University of Montana as a reporter, the Committee met in March and October of 2002 to discuss issues that needed to be considered in preparing a draft Article 9 for tribal use. Following those meetings, the Reporter prepared a first draft of an article 9 for tribal use, which was reviewed by the Committee at a meeting in April of 2003. Revised drafts have been reviewed at meetings in October of 2003 and February of 2004. The Committee anticipates completing the drafting of Article 9 by late 2004 or early 2005. After this version of Article 9 is finalized, the Committee will work with tribal representatives and other interested parties to disseminate the draft to tribes for their consideration and to assist in any adoption efforts.

Reasons for a Tribal Version of Article 9

Many Native American people believe that their future and the future of their tribe depends on the ability to pursue economic development for both the tribe and its individual members. Until the late 1980's, there was only minor economic development in Indian country. Although there were a variety of reasons for this, a major contributing factor for the lack of economic development was the lack of access to capital in Indian country. There were reports that capital was not flowing into Indian country because many banks were skeptical of doing business there.¹ When tribes attempted to borrow money, they faced a variety of legal issues that included questions concerning waiver of sovereign immunity, how to deal with a lack of standard commercial practices, and uncertainty concerning the enforceability of security agreements involving cash and personal property collateral.² Despite a multitude of barriers, a number of tribes have shown an amazing ability to develop economic growth. One example is the skyrocketing success of Indian gaming across the country. There are also successes outside of the gaming industry that range from setting up gas stations and smoke shops to the

¹ See 37 New England Law Review 517, Current Trends in Tribal Economic Development.

² See **Id.**

establishment of businesses that harvest and sell wild rice or other types of crops raised in Indian country.³

One obstacle that still exists to economic development is a lack of standard commercial practices in Indian country. A recent article in the *Kansas Journal of Law & Public Policy* points out some of the problems that tribes encounter due to the lack of standard commercial practices and the UCC. The authors reported that “[b]y and large, if a non-Indian corporation does business in Indian land, tribal courts will be the only judicial forum whereby disputes can be resolved. In general, with the exception of a small percentage of tribes, most tribes fail to have commercial and business regulatory laws, and if they do, odds are that the tribes have not published their laws. Additionally when most tribal courts adjudicate decisions, their opinions are unreported and thus, not accessible to most.”⁴ These same authors point out that the first question often encountered by someone who wants to do business with a tribe or on a reservation is whether the tribal court follows the UCC. Many corporations will be more comfortable doing business in Indian country if tribes have adopted some version of the UCC.⁵

To continue economic development among the tribes and in Indian country, banks generally must be willing to loan money. However, the bank’s desire to invest in Indian country will be stymied unless they feel secure in their transactions. Without some security, banks and other investors will be reluctant to participate in economic development in Indian country. They need to know that they will enjoy basically the same protections that most secured creditors receive when they do business outside of Indian country.

The first step in this process is drafting uniform laws in the necessary subject areas. It will be important for tribes to pass legislation that is similar to what other tribes and the states are passing. Thus, many tribes may find themselves in a position similar to what the states found when they created the Conference over 100 years ago.

The purpose of this committee is to encourage uniformity of laws among tribal nations and the states on appropriate subjects by first building relationships with tribal nations and associations of tribal governments that ultimately may facilitate the adoption and use by the tribes of uniform and model acts drafted by the Conference, but modified, as necessary, to suit particular tribal needs. The committee is modeled in concept on the operation of the Conference Committee on Cooperation between the Uniform Law

³ See 11 WTR Kan. J.L. & Pub. Pol’y 441 “Tribal Economic Development: What challenge lies ahead for Tribal Nations as they Continue to Strive for Economic Diversity?”

⁴ Id. at 450.

⁵ Id. at 451.

Conference of Canada and the Conference.⁶ If a tribe wishes to increase economic development on the reservation it may be important to have a law similar to Article Nine. Of course, in a transaction involving a party outside of Indian Country, the law of a state might be chosen. But is that a desirable approach for a tribe as the law may not be entirely suitable? Moreover, this might involve a waiver of the tribe's sovereign immunity which would otherwise protect the tribe from lawsuits by secured creditors. There is a long line of cases describing the sovereign nature of tribal government. The Committee believes the law of the tribe protecting as appropriate sovereignty immunity is a better approach. Thus, drafting a law that provides specific protection for secured creditors as well as the tribes and its members will be less cumbersome and easier, and it will ensure that the tribe still has control and input on how transactions will occur within their jurisdiction.

The process that the Committee on Liaison with Native American Tribes has established is intended to do all of this. Tribes that have a secured transactions code will hopefully encourage economic development in their part of Indian country. Furthermore, because the tribe and a variety of representatives from many different parts of Indian country have been involved in this process, hopefully a draft of a law will evolve that will assist the tribes where they wish and be reflective of their desires and concerns.

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⁶ 36 Tulsa Law Journal 305, "Uniform Laws: Possible Useful Tribal Legislation" by Fred Miller & Duchess Bartmess