Anishinabe Legal Services Newsletter

Serving the Leech Lake, Red Lake, & White Earth Reservations

Cass Lake, Minnesota • February 2021

P.O. Box 157, Cass Lake, MN 56633 • Phone 218-335-2223 or 1-800-422-1335

From the Director:

By: Chari LaDuke-Clark
Admin Director

Boozhoo! We are so excited to finally be in our brand new building again at our permanent location: 411 1st Street Northwest in Cass Lake!

Staff moved in on January 11th and we are able to meet individuals in person on a call ahead/appointment only basis. If you need notary or copying services, please call ahead. Our phone/fax numbers and staff extensions have stayed the same, however we are fortunate to receive a grant for new phone technology. This will allow our staff to have direct dial phone numbers for ease of calling your casehandler.



Entryway lumber and materials donated by anonymous, labor donated from the G&S Exterior business

The 2021 case priorities were approved by the board of directors at their fourth quarterly meeting held in December. There are no notable changes, it is still high priority for our staff to assist on civil matters for victims of domestic abuse, stalking or sexual assault, elder law matters such as estate planning services, child protection casework in the Leech Lake and White Earth courts, and other civil matters.

COVID-19 precautions for clients

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The Indian Child Welfare Act

By: Ellen Weinberg
Staff Attorney

In this article, the term "Indian" is used only when it is part of a direct quote or part of a name or title. When the author is using her own words, the term used is "Native American."

The Indian Child Welfare Act is a federal law that was passed in 1978 and signed into law by President Jimmy Carter. For short, the law is often referred to as ICWA, pronounced "ikwa."

ICWA's purpose was to remedy a wrong that had been done to Native American families for decades. Native American children in child protection cases were often placed with non-Native American foster parents. Estimates are that twenty to thirty-five percent of Native American children were removed from their homes in child protection and adoption cases. The children were at risk of losing contact with their extended families and their culture, and their tribes were at risk of losing them as members. These losses did happen in many cases.

ICWA uses the term "Indian child" to refer to

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The Indian Child Welfare Act

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the children it covers. An "Indian child" is a child (an unmarried person under eighteen) who is either a member of a federally recognized Native American tribe, or the biological child of a member of a federally recognized tribe and eligible for enrollment. ICWA does not define "Indian child" in terms of blood quantum. If the tribe accepts the child as a member or as eligible for membership, ICWA applies.

ICWA gives tribal courts jurisdiction, or the right to jurisdiction, over child protection cases. Jurisdiction is the power of a court to hear a case and make decisions in the case.

When a Child in Need of Protection and Services (CHIPS) case comes up on a reservation and involves an "Indian child" as defined by ICWA, the state court does not have jurisdiction. Only the tribal court has jurisdiction.

In every CHIPS case that is not on a reservation, the child protection workers and the judge are required to ask at the beginning of the case whether the child is Native American. If so, the child's tribe must be notified of the case. The petitioner is responsible for sending this notification.

The tribe has a right to demand that the case be transferred to tribal court. If the tribe makes this demand, the case must be transferred unless one of the parents objects. Once the case has been transferred, jurisdiction stays with the tribal court.

If the tribe chooses not to demand that the case be transferred, the case stays in state court. However, at any time before the case is concluded, the tribe may demand that jurisdiction be transferred.

ICWA does not apply in divorces, or in custody disputes between the parents, even if the parties are Native American. This means that the tribe does not have any say if the dispute is between the parents.

However, ICWA does apply if a custody dispute is between the parents and another individual such as a grandparent. It also applies in adoption proceedings involving an Indian child.

ICWA does not apply to a Native American father if he is not, or has not been, married to the child's mother AND he has not legally established paternity. (In most cases, having been married to the mother at any time during her pregnancy establishes paternity.)

ICWA does not apply in juvenile court proceedings if the child is charged with something that would be a crime if the child were an adult. ICWA does apply if the child is charged with a "status offense." A status offense is something that is illegal for children but legal for adults. Skipping school, running away from home, drinking, and smoking are all status offenses.

Under ICWA, when a Native American child is removed from his/her parents, child protection workers must look first to the extended family for placement, and then, if no suitable family member is found, to other members of the tribe. If no suitable member of the tribe is available, the third option under ICWA is placement with a member of another Native American tribe. Only if there is no suitable Native American household should the child be placed in a non-Native-American foster home.

During the child protection case, the workers are supposed to make "active efforts" to reunite the child with his parents. This inc providing services, as treatment, to the ents to help them get children back.

ICWA has been lenged several in federal court or ground that it is ra discriminatory and t fore unconstituti But each time, the c have ruled that it i racially discrimin and is constitutional tive Americans are s eign nations, not sp cally racial groups, ICWA is one of the that the governmer knowledges and ho that status. In the of *Brackeen vs. Bernh* the Fifth Circuit Cou Appeals ruled in Jan 2020 that "Indian c is a political classifica not a racial one. The C also noted that ICW "…related to tribal government and the vival of tribes."

ICWA was design protect Native Ame culture and tribal s eignty as well as to tect children. Becaus federal courts recog that, there appears t no danger that it wi overturned.

ICE Camps Akin to Indigenous Peoples' Histor

By: Faith Neumann
Former Staff Attorney

Over the summer of 2020, many societal issues were highlighted in such a bright color that no one could look away. One being when a whistleblower exposed questionable health practices at Immigration and Customs Enforcement (ICE) camps. They alleged that migrant women received unnecessary and unwanted hysterectomies while being detained in the camps. This could shock anyone to the core but for Indigenous people this pain rang familiar from not so long ago.

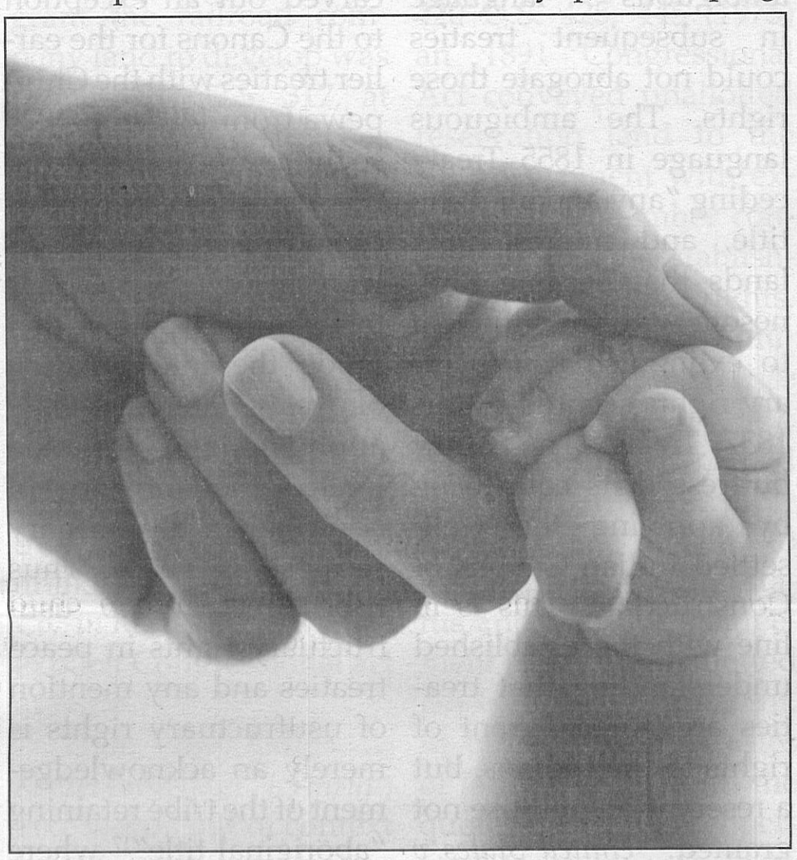
Throughout the 19th century Indigenous Black women were fo fully sterilized by United States gov ment. Devastatingly, ilization did not end

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ICE Camps Akin to Indigenous Peoples' History

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and the tradition continued through coercive methods into the last fifty years. The government implemented the Economic Opportunity Act of 1964 to deal with expanding populations and fear of lack of resources. This Act resulted in many women of color and impoverished women who entered public hospitals being coerced into signing forms that agreed to sterilization. One Native woman reported she went in for an appendectomy and unbeknownst to her was given tubal ligation (the fallopian tubes are cut, tied, or blocked to permanently prevent pregnancy). According to a General Accounting Office (GAO) report from 1976 that reviewed the practices of then-existing Indian Health Service hospitals, more than 3,400 Native American women were sterilized at four locations from 1973 to 1976. In fact, in 36 proven instances, IHS physicians violated federal policy against sterilizing mentally incompetent patients and patients under age 21. The complete number of sterilizations may never be known because this report accounted for the practices of only four of the 12 then-existing Indian Health Service hospitals.



In the fall of 2020, another haunting similarity of Indigenous history to ICE camps today came to light when immigration lawyers reported they could not find the parents of 545 migrant children following a federal judge order from 2018 to find and reunite these families. In 2017, these parents and children were separated at the border as a deterrent to migrants seeking asylum. Children who were separated from their parents were released to sponsors, typically family members or friends, but also included countless foster families. In these three years, two-thirds of the parents were deported. This two-year delay of reunification seems to show this judicial order is an impossible feat.

For Native people this may sound like the crisis that led up to the Indian Child Welfare Act (ICWA) in 1978. The official closure of the last of Indian Boarding Schools taught by religious order from the US government happened in 1973 after

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This Case Seems Fishy: On Treaty-Interpretations & The Usufructuary Rights of the Anishinabe People

By: Andrea Szabo
Staff Attorney

Disclaimer: This article uses the term "Indian" to refer to the indigenous inhabitants of the United States as a legal term.

The 1855 Treaty Rights Authority is comprised of treaty beneficiary members to the 1855 Treaty between the Chippewa Indians and the United States. They planned a civil disobedience day of direct action to assert treaty-secured usufructuary rights[1] off the reservations to challenge Minnesota's Department of Natural Resources' (MNDNR) stance that tribal members need state licenses to exercise these rights. In the hopes to bring a test case forward to settle the issue, the 1855 Treaty Rights Authority hosted a "Rice-Off" at Lake Hole-In-The-Day in 2015.[2] The MNDNR decided not to risk a court case, instead issued "special permit" to allow tribal members a free pass to rice there on that day.[3] Not so easily thwarted, members of the 1855 Treaty Authority tore up the permit, held a quick meeting and decided to return the next day to reassert their rights.[4]

"The [MN] DNR doesn't really care about wild rice but they get very touchy about their fish," said Leonard Thompson.[5] Leonard pitched the idea to break out the gill net to his son, Todd Thompson, and Jim Northrup.[6] Together they paddled out onto nearby Gull Lake[7] and set the net from their canoe. MNDNR could not resist and pursued the duo for not having

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This Case Seems Fishy

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a state-issued permit which is a gross misdemeanor.[8] This was the makings of a test case the 1855 Treaty Rights Authority had been waiting for. However, the result was a mixed bag. Good news: after the Rice Off, Minnesota Legislature passed a statute that tribal members from Minnesota reservations are deemed to have a state license to harvest wild rice;[1] and Todd Thompson as member of the White Earth Band had his charges dropped by the County Attorney because after Mille Lacs (discussed below) it was unavoidable the White Earth Band has treaty-secured usufructuary rights on Gull Lake. The bad news: the charges against Jim Northrup, a member of Fond du Lac Band, were pressed on.[2] The District Court in Crow Wing County convicted Northrup of a gross misdemeanor in 2018 and he appealed. The case became State v Northrup.[3] The Court convicted Jim Northrup of the charges in December 2019 because the Fond du Lac Band did not sign the treaties of 1855 and 1864 which cleared Todd. The court determined the usual rules of Indian treaty interpretation did not apply to the 1795, 1825, and 1826 treaties which should have cleared Jim too, because the Fond du Lac Band signed those. To understand how the court reasoned Jim was properly convicted, it's worth going over some important legal background.

Treaties made under the authority of the U.S. government are the "supreme law of the land."[1] It follows that an individual state has no power to limit rights secured by treaties between the U.S. government and tribes but that hasn't stopped them from trying! In 1896, Wyoming argued that any rights secured by treaties between the United States and the Indians were extinguished when Wyoming achieved statehood.[2] The Supreme Court rejected this and presumably laid it to rest with subsequent decisions. Over one hundred years later, Minnesota attempted the same in Minnesota v Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 119 S. Ct. 1187 (1999). In Mille Lacs, Minnesota argued usufructuary rights secured by the 1837 Treaty extinguished when Minnesota achieved statehood in 1858. The Supreme Court reiterated a rule it already solidified in US v Dion, 476 U.S. 734 (US 1986). The rule being that only Congress may abrogate Indian treaty rights and when it does, it must clearly express its intent to do so. In Dion, the court was very direct – there must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." Dion at 740. Such explicit Congressional statements are required because "Indian treaty rights are too fundamental to be so easily cast aside." Id. at 739. Needless to say, the Court struck down Minnesota's argument, but Mille Lacs is important for more than that.

The Supreme Court determined that the Mille Lacs Band secured usufructuary rights in the 1837 Treaty[14] and ensured ambiguous language in subsequent treaties could not abrogate those rights. The ambiguous language in 1855 Treaty ceding "any and all right, title, and interest in"[15] lands that became Minnesota was not sufficient to extinguish usufructuary rights secured by the 1837 Treaty. The Court buttressed its conclusion by applying the well-settled Indian Canons of Construction.[3] This is in line with the established understanding that treaties are not a "grant of rights to the Indians, but a reservation of those not granted." *United States v Winans*, 198 U.S. 371, 381 (1905).

Fast forward to December 2019 and the Minnesota Court of Appeals handed down an unpublished opinion in *State v Northrup* as evidence of departure on these critical points. Recall that *Mille Lacs* was decided in 1999 by the highest court in the US system, but the decision in Northrup relies heavily on a Minnesota Supreme Court decision from 1980, *State v Keezer*, to guide its reasoning, 292 N.W.2d 714 (1980). Seem fishy to you?

The Court in *Keezer* declared the same ambiguous language from the same 1855 Treaty in *Mille Lacs* was suffic to abrogate usufructu rights. *Mille Lacs* mac clear this interpreta of the 1855 Treaty not abrogate usufru ary rights secured by earlier treaty. But *Kee* findings still had ra fications in *Northrup* cause the *Keezer* c carved out an excep to the Canons for the lier treaties with the C pewa from 1795 and so the court could say no usufructuary ri on off-reservation la were reserved. The being – the Canons guide the interpreta of treaty language apply to land cessa treaties therefore do apply when the prin purpose is peace. tribes reserve no fructuary rights in p treaties and any mer of usufructuary righ merely an acknowle ment of the tribe retai "aboriginal title"[17] w usufructuary rights incident to that title, er than treaty-secu Under the court's when a Band cedes to the United States, Indian title ackn edged by a peace trea extinguished and w their usufructuary ri

To reach the co sion that peace treatie serve different treatr *Keezer* cites a termin era Supreme Court *US v Northern Pacifi Co.*, 311 U.S. 317, 61 264, 85 L.Ed. 210 (1 *Keezer* at 718. The rel is misguided. In *Nor Pacific Ry. Co.* the acknowledged the t at issue had Indian

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This Case Seems Fishy

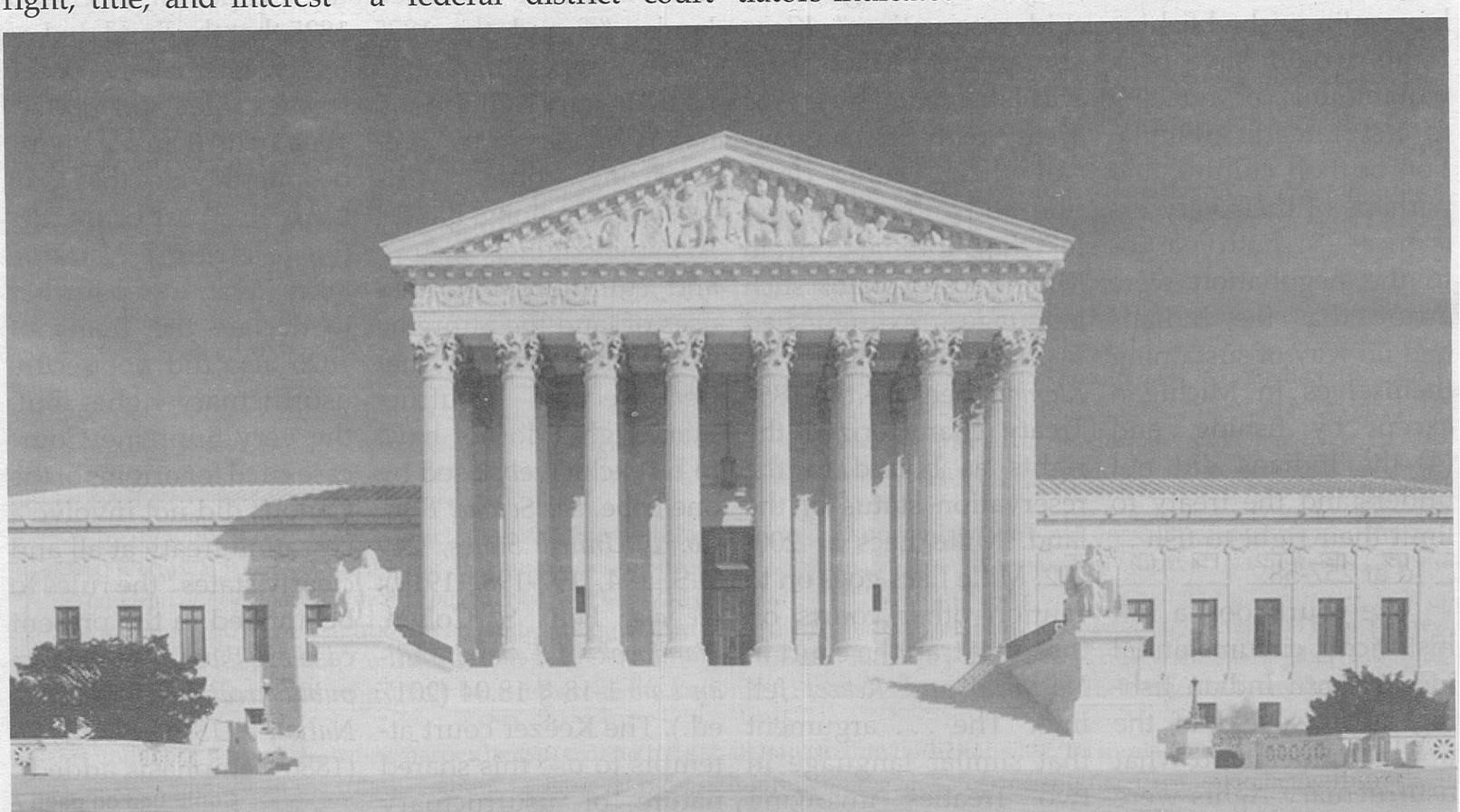
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to territories defined by peace treaties, but those territories were not a part of established reservations. So, an 1864 Congressional Act specifically providing for the extinguishment of Indian title to lands that were not part of established reservations in order to grant the railroad company land to develop was proper. 311 U.S. 317, at 347-348. Keezer stretches this decision to conclude the 1795 and 1825 treaties with the Chippewa were peace treaties undeserving of the Canons where any mention of usufructuary rights were simply an acknowledgement of Indian title and not a treaty-secured right. But, unlike *Northern Pacific Ry. Co., in Keezer* there was no explicit Congressional act at issue.

Then, the Court in *Keezer* (and later *Northrup*) take words out of context by citing cases to declare the language "any and all right, title, and interest" is "precisely suited" to abrogate Indian title and the usufructuary rights tied to it. *Keezer* at 721; *Northrup* at 11-12. However, all of these cases deal with Congressional Acts where intent is clear from legislative history and negotiations. In *DeCoteau v District County Court*, 420 U.S. 425, 445 (1975) an 1891 Congressional Act conveyed unallotted reservation land to the US government with explicit tribal member consent to the disestablishment of their land rights. *DeCoteau* at 427. Similarly, *Rosebud Sioux Tribe v Kneip*, 430 U.S. 584, 592, 97 S. Ct. 1361, 51 L.Ed.2d 660 (1977), involved clear congressional intent to terminate reservation status and the tribe's agreement to sell all unallotted lands to the government. In both cases such sales of land coupled with the quoted language operated to extinguish Indian title. Keezer also cites a federal district court case, *Us v Minnesota*, 466 F. Supp 1382, 1385 (D. Minn. 1979), which involved negotiations under the 1889 Nelson Act that Congress explicitly intended to extinguish all Indian claims upon sale to the government. The court found this operated to extinguish usufructuary rights on ceded lands, particularly when the court looked to the surrounding negotiations and history that indicated the Red Lake Band was explicitly instructed by U.S. negotiators that Band members would be subject to state law hunting and fishing requirements on the off-reservation lands. 466 F. Supp, at 1387. However, the record and memory of this instruction remains debatable. *Id.*

In contrast, *Northrup* glances at the surrounding circumstances in the 1826 Treaty (not analyzed by the *Keezer* court) and acknowledges U.S. negotiators indicated it was a matter of survival to the Indians that the Indians retain usufructuary rights in ceded lands.[18] The *Northrup* court looks to the 1826 Treaty only after following *Keezer* precedent that the 1795 and 1825 treaties did not secure usufructuary rights since they were peace treaties and finds "nothing in the terms of the 1826 Treaty sufficient to allow [the court] to reach a different conclusion in these regards." *Northrup* at 11. Such a statement manifests the Court's misunderstanding of its role in the interpretation of Indian treaties. If it faithfully applied the Canons it would have interpreted the surrounding circumstances and how the Indians understood the situation at the time as warranting impliedly reserved treaty-secured usufructuary rights off-reservation and not simply looked to "the terms" alone in reaching

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Regardless, the Northrup court determines only the 1855 and 1864 treaties with the Chippewa established reservations and primarily dealt with land cessation so they secured usufructuary rights including Gull Lake to signatory tribes which the Fond du Lac Band was not, so the state could prosecute and convict Jim.

A faithful application of the Canons to the 1795 and 1825 Treaties with the Chippewa compels the understanding that usufructuary rights on ceded lands were treaty-secured. Likewise, that the 1826 Treaty impliedly secured usufructuary rights reserved by the earlier treaties. Such an application of the Canons also compels the understanding that Minnesota has no authority to abrogate the treaty-secured usufructuary rights of the Anishinabe people on lands off reservation and only Congress has that authority but it must express its intent explicitly, which it has not done. There is no informed reason to delineate different treaty interpretations based on the *Keezer* court's artificial distinction between land cessation treaties establishing reservations and peace treaties establishing territorial boundaries. A fully informed *Northrup* court would have had the fortitude to decline to follow *Keezer* precedent and reasoned Jim was wrongfully convicted by the state for exercising his immemorial usufructuary rights on Gull Lake secured to signatory Bands in the treaties of 1795, 1825 or 1826.

1. "Usufructuary rights" are legal rights to "make a living" from the land by hunting, trapping, fishing, and gathering. These are "… rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v Winans*, 198 U.S. 371, 381 (1905).
2. John Enger, MPRNews, DNR Grants One-Day Permit, Avoids Treaty Rights Court Battle (Aug.27, 2015), https://www.mprnews.org/story/2015/08/27/special-permit-wild-rice.
3. Id.
4. Official 1855 Treaty Authority Press Release (May 11, 2018), https://www.stopline3.org/news/fishoff.
5. John Enger, MPRNews, Tribal Protesters Charged for Gathering Fish and Wild Rice (Jan. 8 2016), https://www.mprnews.org/story/2016/01/08/tribal-protesters-charged-for-gathering-fish-and-wild-rice
6. John Collins and John Enger, MPRNews, MN DNR Cites Tribal Members in Second Day of Treaty Rights Challenge (Aug. 28, 2015), https://www.mprnews.org/story/2015/08/28/rice-protest.
7. Gull Lake was a part of the Gull Lake Reservation established in the 1855 treaty with the Chippewa but it was later ceded to the United States in an 1864 Treaty with the Chippewa of the Mississippi, Leech Lake, and Lake Winnibigoshish so descendent Bands have retained treaty-secured usufructuary rights on those ceded lands, including the lake. *State v Northrup*, No. A19-0130, 2019 WL 6838485 (Minn. Ct. App. Dec. 16, 2019), review denied (Mar. 17, 2020) at 3.
8. John Collins and John Enger, MPRNews, MN DNR Cites Tribal Members in Second Day of Treaty Rights Challenge (Aug. 28, 2015), https://www.mprnews.org/story/2015/08/28/rice-protest.
9. Official 1855 Treaty Authority Press Release, May 11, 2018 at https://www.stopline3.org/news/fishoff.
10. Mike Mosedale, Minnesota Lawyer, Treaty Case Ends with Conviction (Oct 1 2018), https://minnlawyer.com/2018/10/01/treaty-case-ends-with-conviction/.
11. *State v Northrup*, No. A19-0130, 2019 WL 6838485 (Minn. Ct. App. Dec. 16, 2019), review denied (Mar. 17, 2020)
12. US Const., art. VI, cl.
13. Ward v Race Horse, 163 U.S. 504 (1896).
14. "The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded is guarantied [sic] to the Indians, . . ." 1837 Treaty with the Chippewa, 7 Stat. 537, Article V.
15. Treaty with the Chippewa of February 22, 1855, 10 Stat. 1164, Article I.
16. Canons of construction were developed in recognition that "[t]he parties are not on an equal footing, and that inequality is to be made good…" *Choctaw Nation v US*, 119 US 1 (1886) at 28. They are that: (1) ambiguous expressions in treaties should be resolved in favor of the Indians; (2) treaties ought to be interpreted as the Indians at the time would have understood them; and (3) ambiguities should be resolved in favor of the Indians. To properly apply the canons of construction, Courts are to look beyond the terms within the treaty itself including "the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Mille Lacs* at 196, 119 S. Ct. at 1200 (quoting *Choctaw Nation*, 318 U.S. at 432, 63 S. Ct. at 672).
17. "Aboriginal title", "Indian title", or "the right of occupancy" derives from the ancient Doctrine of Discovery, a convenient legal doctrine for European colonizers to employ when faced with aboriginal occupants on 'newly' discovered land. In the United States, Indian title derives from a characterization of land ownership in *Johnson v McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), where the Court held that tribes did not own fee title absolute to their lands, instead hold a right of occupancy to use and occupy lands by virtue of their aboriginal possession. This recognition also ensured only the United States, no other sovereign or individual, had the exclusive right to purchase or extinguish Indian title. Indian title necessarily includes usufructuary rights because that's how Indians used territory.
18. 1826 Treaty with the Chippewa, Articles VI, VII, Aug. 5, 1826, 7 Stat. 290 acknowledges the bleak agricultural prospects in the territory and historical records indicate the Anishinabe people needed usufructuary rights as a matter of survival. *Northrup at 11*.
19. *Oregon Dept. of Fish and Wildlife v Klamath Tribe*, 473 U.S. 753 (1985).
20. "The Indians who have a right to those lands, are quietly to enjoy them, hunting, planting and dwelling thereon so long as they please without any molestation from the United States. . ." "The said tribes of Indians, parties to this treaty, shall be at liberty to hunt within the territory and lands which they have now ceded to the United States." Article V, Article VII, Treaty of Greenville, 7 Stat. 49, 52 (1795).
21. "It is understood by all the tribes, parties hereto, that no tribe shall hunt within the acknowledged limits of any other without their assent . . . the Chiefs of all the tribes . . .allow a reciprocal right of hunting on the lands of one another, permission being first asked and obtained. . ." Article 13, Treaty of Prairie du Chien, 7 Stat. 274-75.

This Case Seems Fishy

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its conclusion. *Id.* A more faithful application of the Canons to a Chippewa treaty occurred by a Michigan federal district court. *See United States v. Michigan, 471 F. Supp. 192, 257 (W.D. Mich. 1979), aff'd as modified, 653 F.2d 277 (6th Cir. 1981).* The court held the language of an 1836 Treaty "for the right of hunting on the lands ceded, with the other usual privileges of occupancy" impliedly included the right to fish in ceded waters. Applying the understanding that treaties are not a "grant of rights to the Indians, but a reservation of those not granted," the court declared:

...(1) the Treaty of 1836 contains no language expressly relinquishing the aboriginal right of the treaty Indians to fish in the ceded waters; (2) at the time of the 1836 treaty subsistence and commercial fishing was essential to the livelihood of these Indians and for them to have relinquished fishing rights would have been tantamount to agreeing to a systematic annihilation of their culture, and perhaps of their very existence; (3) both parties to the negotiation were aware that the Indians had no way of sustaining themselves in Michigan except by fishing, and (4) the Indians did not understand the treaty to limit their right to fish . . ." Id at 257-58.

The court took a full historical circumstantial inquiry into Indian fishing as it existed at the time to understand what usufructuary rights were reserved and where by the treaty. *Id.* at 251. Pointedly, the court said:

[i]f construction of the treaties in this light results in a meaning which seems to deprive today's non-Indians of privileges which they thought were theirs, it only points up the great injustice which has been done to treaty Indians during the many years they have been deprived of their full rights for the sake of others without rights." *Id.* Nevertheless, the *Northrup* court cites a Supreme Court case decided after *Keezer* to bolster *Keezer* logic that the language "any and all right, title, and interest" is "precisely suited" to abrogate usufructuary rights incident to Indian title when lands are ceded. *Northrup* at 14-16. The case is known as *Klamath*.[19] But *Klamath* does this reading by *Northrup* because the 1864 treaty securing usufructuary rights were "the exclusive right . . .in said reservation." *Klamath* at 753. When land was later ceded by a 1901 Treaty with the language "all their claim, right, title and interest in and to," the Supreme Court in Mille Lacs explains such language extinguished usufructuary rights in *Klamath* because the 1864 Treaty characterized the rights as bound to the reservation status of the land. Mille Lacs at 200-202. Mille Lacs goes on to caution other courts on the exact trap the court in *Northrup* and *Keezer* fell into. "The . . . argument that similar language in two Treaties involving different parties has precisely the same meaning reveals a fundamental misunderstanding of basic principles of treaty construction . . . [T]he review of history and the negotiations of the agreement is central to the interpretation of treaties." 526 U.S. 172, 202, 119 S.Ct. 1187, 1203, 143 L.Ed.2d 270 (1999).

In both *Keezer* and *Northrup* the state prosecuted tribal members for exercising usufructuary rights without state requirements off reservation. But neither case deals with any explicit indication from Congress that usufructuary rights of the Anishinabe were abrogated. Unlike *Klamath*, the 1795, 1825, and 1826 treaties with the Chippewa did not indicate usufructuary rights are exclusively bound to reservation status of the land. In fact, the 1795 Treaty with the US government clearly says "to hunt and fish on ceded lands..."[20] and the 1825 Treaty also guarantees usufructuary rights to signatory Bands[21] by characterizing those rights as shared among Bands. Acknowledging history and culturally informed uses of land the Supreme Court has found that treaty-secured usufructuary rights do not have to be exclusively used by one tribe. *See Seufert Bros. Co. v United States*, 249 U.S. 194, 197-198 (1919); *see also* Felix S. Cohen, *Handbook of Federal Indian Law* 1-18 § 18.04 (2017 ed.). The Keezer court attempts to use this shared nature of usufructuary rights in the treaty evidence for Indian rather than secured u fructuary rights. Th is no logical reason to this. To be clear, the preme Court has app the Canons and fo language in other trea that mention Indian such as "to be held as dian lands are held" "to fish in the usual accustomed places" treaty-secured usufru ary rights. *See Menom Tribe v United States*, U.S. 404, 88 S.Ct. 1705 L.Ed.2d 697 (1968); *Un States v. Winans*, 198 371, 25 S.Ct. 662, 49 L 1098 (1905); *Pauya Tribe v Dept' of Game*, U.S. 392, 88 S.Ct. 1725 L.Ed.2d 689 (1968); *W ington v Washington S Commercial Passenger F ing Veseel Association*, U.S. 658, 99 S.Ct. 3055 L.Ed.2d 823 (1979).

Northrup follo *Keezer* to declare only cessation trea get the Canons and si the treaties of 1795 1825 that the Fond du Band signed were pe treaties, they did not cure usufructuary rig despite the fact that C Lake was part of the fined territory. *North* takes *Keezer* a step furt to declare the Treaty 1826 also did not sec usufructuary rights. the very Supreme Co case cited for origins of Canons did not involv cessation treaty at all clearly states "the rule be applied in the pres case are *those which gov public treaties..." Choc Nation v US*, 119 US 1 (1886) (emphasis adde

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COVID-19 and the Essential Worker

By: Rita Ostman
Paralegal

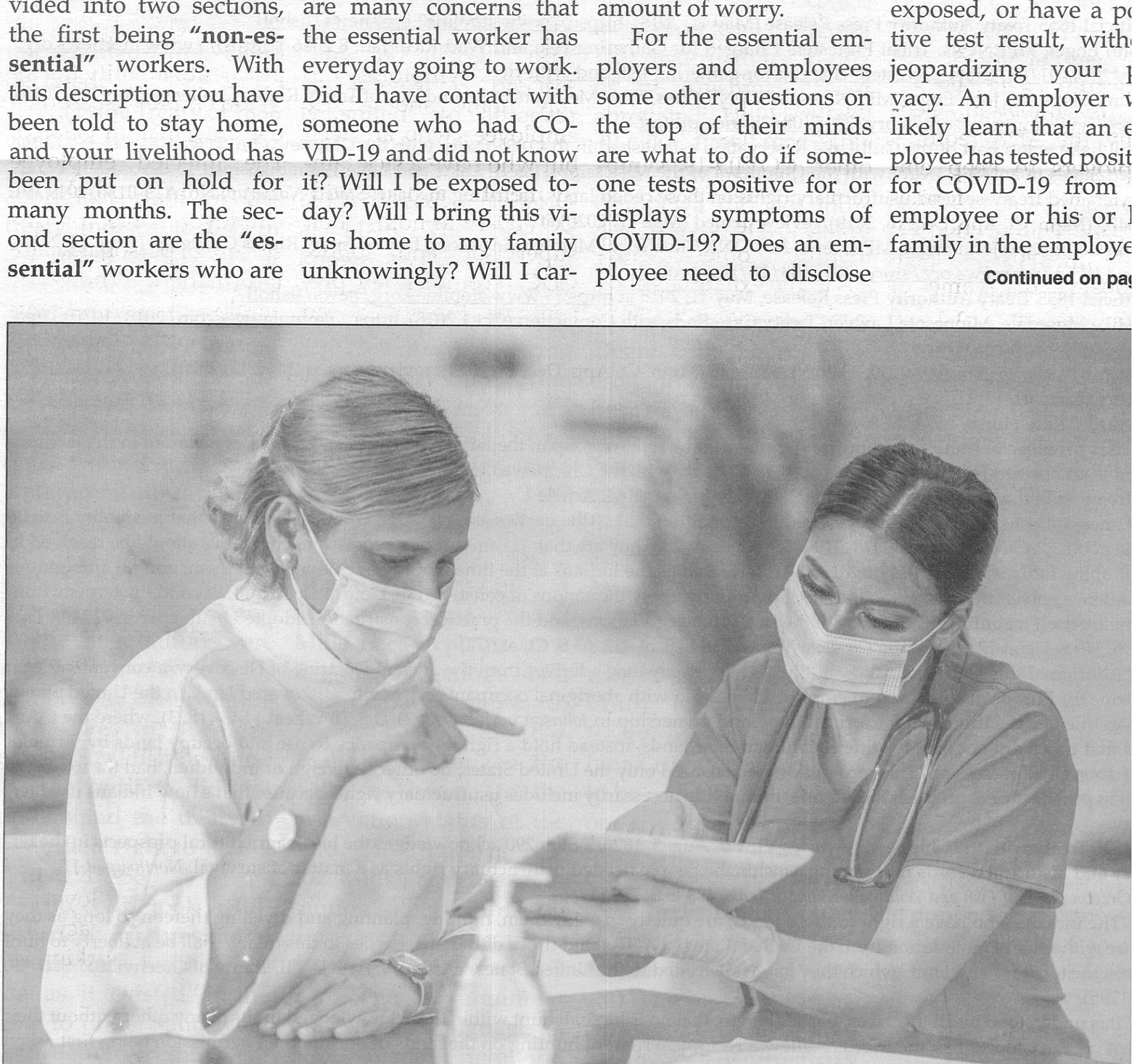
The stress of even thinking you may spread the Coronavirus (COVID-19) unknowingly has most of us in a daily panic. With that said, the worker who has either come into contact or has become infected, and their co-workers should have privacy and safety protections in place from their employer.

During the pandemic, we as employees and employers have been divided into two sections, the first being **"non-essential"** workers. With this description you have been told to stay home, and your livelihood has been put on hold for many months. The second section are the **"essential"** workers who are on the front lines working in and with the public, having to go into the workplace to provide necessary services to continue daily living, such as healthcare professionals, grocery store workers, and in places that provide other human services to individuals. The essential workers are at a higher risk, both employers, employees, and their families, to being exposed to the Coronavirus. There are many concerns that the essential worker has everyday going to work. Did I have contact with someone who had COVID-19 and did not know it? Will I be exposed today? Will I bring this virus home to my family unknowingly? Will I carry the virus to work and infect co-workers? These are serious and heartfelt questions. I for one, being an essential worker, am grateful to still be working when millions are and have been, out of work for a significant period of time. As an essential worker you take the risk of becoming infected or lose everything you have worked for by not working. Either way you are under a tremendous amount of worry.

For the essential employers and employees some other questions on the top of their minds are what to do if someone tests positive for or displays symptoms of COVID-19? Does an employee need to disclose if they are having te done even if they are showing symptoms? HIPAA implicated? W steps should they ta What can and should disclosed to protect ot employees?

An article written Cranfill Sumner and Ha og LLP explains some the steps to not only h alleviate the stress of c tact at the workplace, alleviate the stress of h ing to tell you have be exposed, or have a po tive test result, with jeopardizing your p vacy. An employer w likely learn that an e ployee has tested posit for COVID-19 from employee or his or family in the employe

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ANISHINABE LEGAL SERVICES

COVID-19 and the Essential Worker

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role as an employer, and HIPAA usually will not be implicated.

Even though HIPAA is not a likely concern, employers do not have a green light to openly disclose that an employee has COVID-19 to other employees. If an employer knows that an employee has tested positive for or has symptoms of COVID-19, that employer must balance keeping other employees safe while considering the privacy of the infected employee generally and under applicable laws.

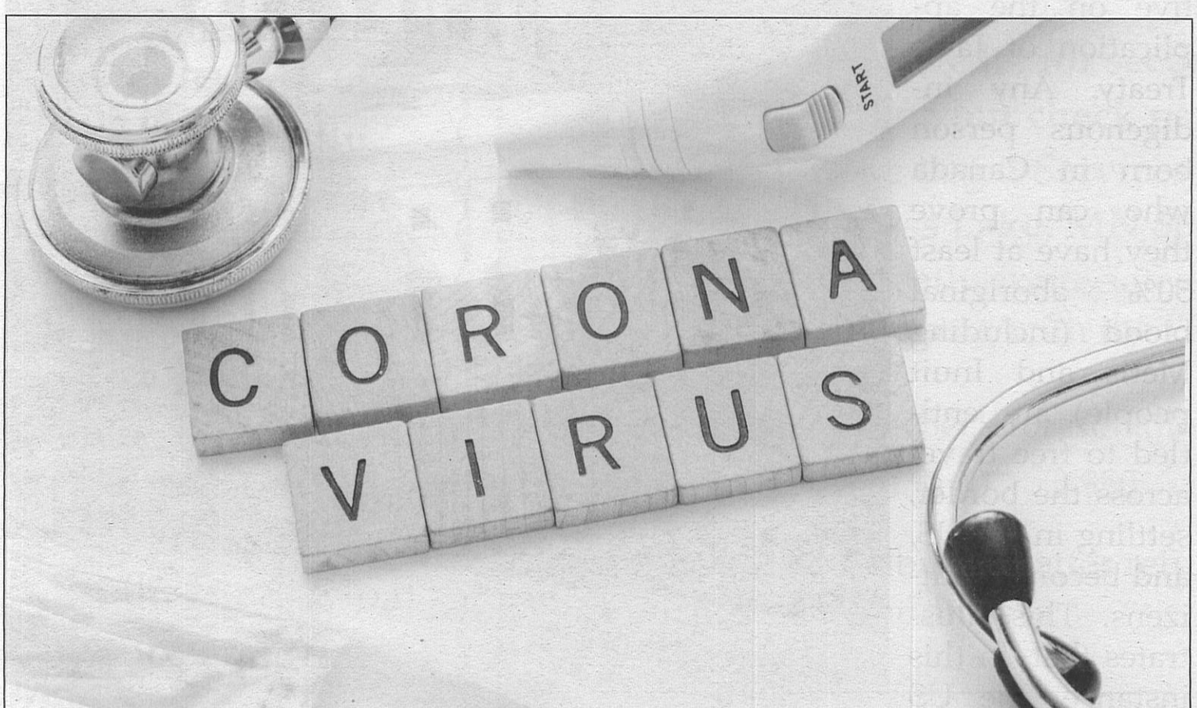
The Americans with Disabilities Act (ADA) protects applicants and employees from disability discrimination. Generally, the ADA requires employers to keep employee medical information confidential and prohibits employers from disclosing the name of any employee with a disease, unless disclosing the name is required by another Federal law or directed by the Centers for Disease Control and Prevention (CDC) or applicable public health authority.

The COVID-19 pandemic has changed the ADA field in some respects. Currently, to help prevent the spread of COVID-19, employers can seek information about an employee's health which would typically be limited by the ADA. During the COVID-19 pandemic, ADA-covered employers may ask employees who call in sick if they are experiencing symptoms of the virus. These include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers can take employees' temperatures during the COVID-19 pandemic. However, employers must keep the fact that an employee has a fever or other COVID-19 symptoms confidential and not disclose the employee's identity to other employees to the extent possible.

The Equal Employment Opportunity Commission (EEOC) has said that the ADA does not interfere with employers following advice from the CDC and other public health authorities on appropriate steps to take relating to the workplace. The CDC has advised that employers should inform employees of any potential workplace exposure to COVID-19 as part of the effort to help decrease the spread of the disease and lower the impact of exposure in the workplace. Specifically, the CDC has advised that all employers reduce transmission among employees, maintain healthy business operations, and maintain a healthy work environment. The CDC recommends that employers actively encourage employees who are sick and/or have COVID-19 symptoms to stay home and advise employees who are well but who have a sick family member at home with COVID-19 to notify their supervisor and follow CDC recommended precautions. Employers can inform other employees of potential workplace exposure to COVID-19 including, for example, if an employee has tested positive for, is suspected to have, or has been exposed to COVID-19, but only to the extent necessary to adequately inform other employees of their potential workplace exposure and while complying with ADA confidentiality requirements. A good rule is to disclose what is necessary to keep employees informed and safe without revealing the identity of the infected employee.

As always, when dealing with health information, employers should exercise caution when disclosing even general information about potential workplace exposure to COVID-19. It may be possible for other employees to identify the infected employee based on the information shared. The infected employee may attempt to hold the employer liable for disclosure of personal health information; however, employers can take steps to protect themselves by following the CDC's Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19) and guidance issued by other government authorities. The COVID-19 pandemic is rapidly evolving and its complete impact on employers is unknown. Be sure to check the CDC and appropriate government authorities for updated information.

It is a big responsibility, and a fine line, for employers and employees to ensure both privacy and safety for all working on the frontlines.



Border Crossing & Effects of COVID-19

By: Samir Grover
Paralegal

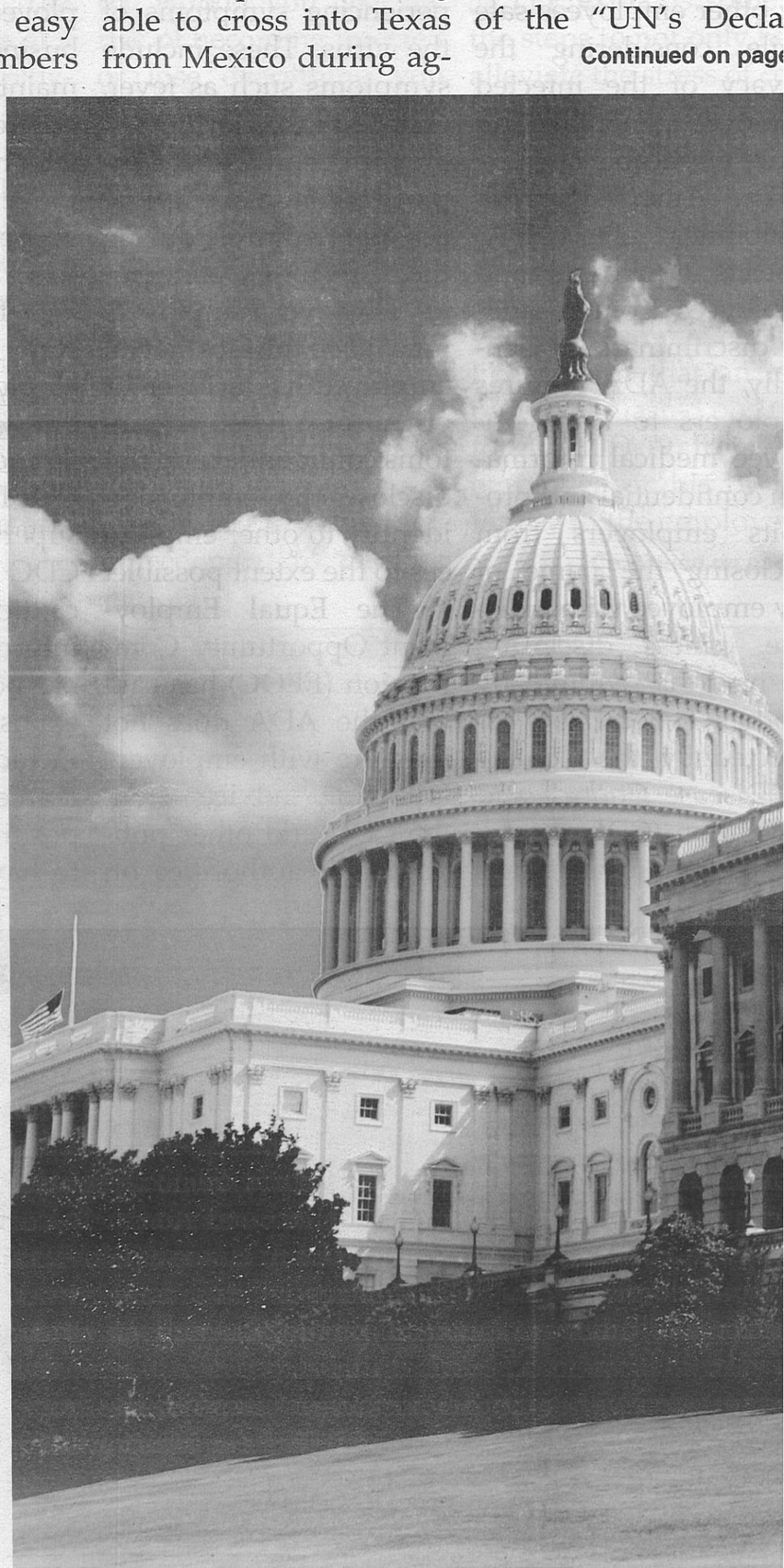
Indigenous peoples in the US and Canada have had the right to freely cross the US Canadian Federal Border since Jay's Treaty was enacted in 1794. However, the enforcement as well as interpretation of these rights has changed over the years. During COVID-19, "Registered Indians under the Indian Act" are still able to enter Canada. In addition, Canadian people with "at least 50% aboriginal blood" can still enter, live in, and work in the United States as well as receive public benefits. There are currently quarantine guidelines in place in both countries, with Canada's laws being much more stringent requiring a mandatory two weeks of isolation. Overall, the border has been closed for non-essential travel since March and has no signs of fully opening as of now.

Let us attempt to interpret, however, what Canada means by "Registered Indians under the Indian Act" are still able to enter Canada during COVID-19. Unfortunately, this applies to a specific number of tribes only based in Canada. Canada's definition of "Registered Indians" is very limited, and over the years, they have not upheld innate pre-colonial rights that Jay's Treaty confirmed. Canada usually does not admit Native Americans to freely enter and settle in their territory even when it comes to tribes whose land straddles both sides of the border. For example, the Akwesasne tribe is one community that resides in present day New York and Ontario. They have been requesting an ID Card in order to have easy crossing for members within their territory. The US Government complies with this request, but the Canadian Government is less supportive of this action. This is indicative of Canada's unjust policies towards tribal sovereignty as they are treating indigenous people born in America as "aliens".

On the other hand, the US Government has a broader more liberal perspective on the application of Jay's Treaty. Any indigenous person born in Canada who can prove they have at least 50% aboriginal blood (including Metis and Inuit people) are entitled to free travel across the border, settling in the US, and becoming citizens. This illustrates that, in this instance, the US Government has a greater commitment to honoring prehistoric rights than Canada. This same treatment of indigenous rights does not apply on the US-Mexico border. Nevertheless, exceptions have been made in certain cases such as the Kickapoo tribe being able to cross into Texas from Mexico during agriculture times.

All in all, due to consistencies in Amer and Canada's interp tation of the Jay's Tr ty, it is in danger of ing eliminated. Cana needs to honor the rig of Native Americans settle in Canada as th are violating Article of the "UN's Decla

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From the Director

Continued from page 1

and staff are in place still at the Main office: we respectfully request individuals wear a mask when visiting our facility. We do regular cleaning / sanitizing throughout the build.



Please call ahead to schedule an appointment—this will allow staff to notify others if necessary and to limit the number of individuals at our location at any given time.

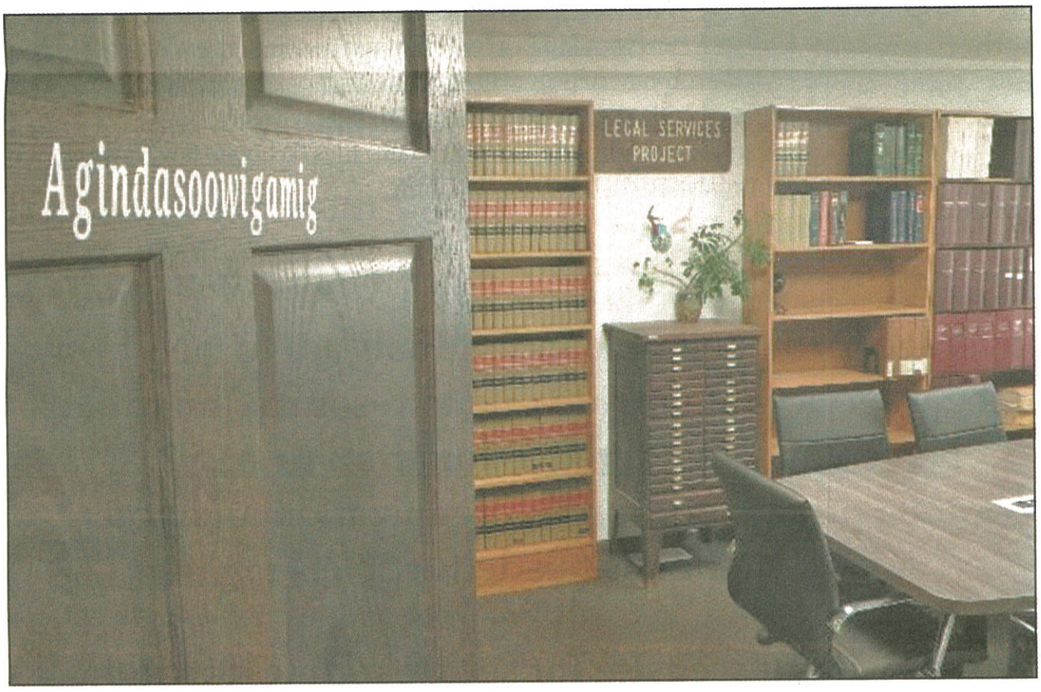
We do have a number of new grants and partners that have funded our building project and ongoing operations. Thank you to each and everyone who has contributed individually or by sharing our fundraising post, to the Otto Bremer Trust, Blandin Foundation, MN State Bar Foundation, Tiwahe Foundation, Bentson Foundation, Legal Services Corporation, Legal Services Advis Committee(MN), Ottertail Pow Company Foundation, George Neilson Foundation, Friends of LSC, and many others! We are grateful for all of these wonde partners for civil justice for l income individuals in our Nat American communities in No ern Minnesota.

We look forward to a pu open house when we have be weather to allow more social tancing.

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