Anishinabe Legal Services Newsletter

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Enhanced Tribal Jurisdiction *over non-Native American Perpetrators of Domestic Violence in Indian Country under VAWA 2013.*

In 1978, the United Supreme Court held that Tribal Courts lack criminal jurisdiction over non-Native American defendants (see Oliphant v. Suquamish Indian Tribe, 435 U.S. 191). Criminal jurisdiction within Indian Country involves a complicated division of Tribal, State, and Federal authorities with case by case specifics determining proper jurisdiction. These specifics include the race of the alleged perpetrator, the race of the alleged victim, the location of the crime, and specific crime(s) alleged.

This complex jurisdictional maze has greatly impacted the effectiveness of law enforcement within Indian Country, and the effectiveness of criminal justice within Indian Country as a whole. At the same time, domestic violence within Indian Country has long surpassed epidemic levels. In 2008, the CDC issued a report finding that 39% of Native American women reported being a victim of intimate relationship violence, the highest reported rate of violence among all demographic groups (The Facts on Violence Against American Indian/Alaska Native Women from Futures Without Violence formerly Family Violence Prevention Fund at https://www.futureswithoutviolence.org/userfiles/file/Violence%20Against%20AI%20AN%20Women%20Fact%20Sheet.pdf). Furthermore, the Department of Justice reports that 70% of violent crime experienced by Native Americans is perpetrated by persons of another race. (Facts on Violence Factsheet at above webpage).

For these reasons among others, Congress enacted legislation in 2013 that partially rolled-back the holding in Oliphant as part of the 2013 Violence Against Women Act reauthorization (VAWA 2013) (see VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2013, 127 Stat. 54, Public Law 113-4, Title IX-Safety for Indian Women). While offenses covered by this expansion of criminal jurisdiction are in part determined by Tribal law, VAWA 2013

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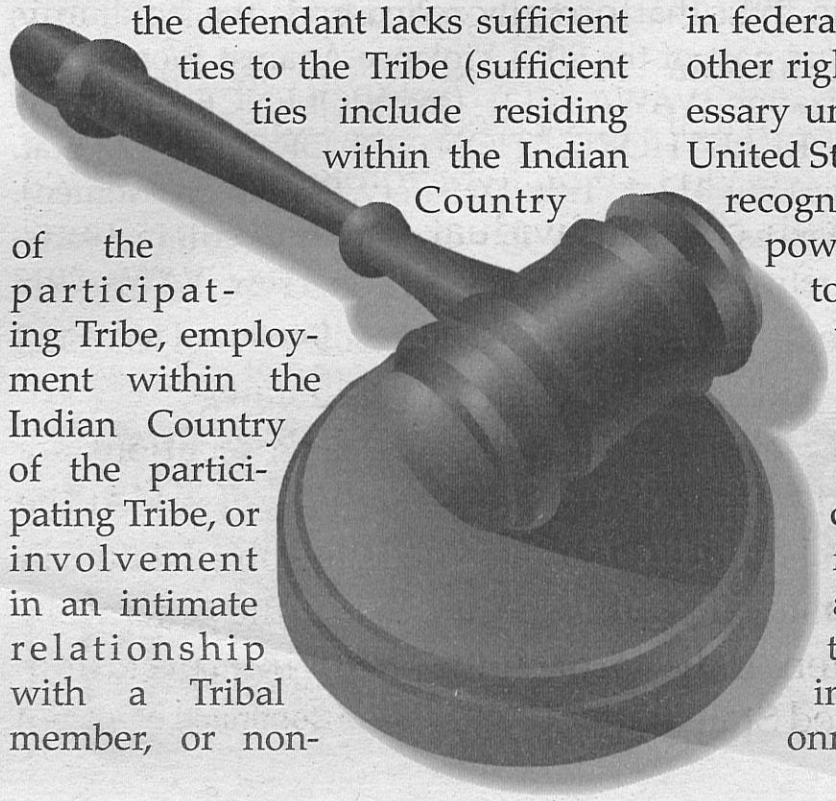
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limits covered offenses to crimes of domestic violence, dating violence, and criminal violations of protection orders. This expanded jurisdiction is not mandatory for Tribes and they can elect to implement or not-implement as they so choose.

There are several due process requirements Tribes must meet prior to exercising this expanded criminal jurisdiction over non-Native Americans in Tribal Court, and several restrictions in place on jurisdiction

For examples of broad restrictions and exceptions to expanded jurisdiction, Tribal Courts still do not have criminal jurisdiction in domestic violence cases when the crime(s) is committed outside of the Tribe's Indian Country, if the crime is between two non-Native Americans, if the crime involves two strangers (including non-intimate partner sexual violence), or if the defendant lacks sufficient ties to the Tribe (sufficient ties include residing within the Indian Country of the participating Tribe, employment within the Indian Country of the participating Tribe, or involvement in an intimate relationship with a Tribal member, or non-Tribal member Native American residing within the participating Tribe's Indian Country).



Furthermore, Tribes wishing to implement the expanded criminal jurisdiction provided under VAWA 2013 must meet certain conditions ensuring due process. Examples of these requirements include: a) Tribal Courts must provide the defendant a right to trial by an impartial jury, b) the jury pool must reflect a fair cross section of the community and jury members must be drawn from sources that do not systematically exclude any distinctive group in the community, including non-Native Americans, c) the Tribal Court must timely notify anyone detailed under this expanded jurisdiction of their rights and responsibilities, and d) the Tribal Court must notify defendants of their right to file a petition for a writ of habeas corpus in federal court, and ensure that "all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant" are provided.

Along with these due process requirements, Tribes are further required to provide additional due process protections if the Tribal Court imposes a term of imprisonment of any length. These additional requirements include, a) defendants provided with effective assistance of counsel equal to what is guaranteed in the U.S. Constitution, b) indigent defendants must be provided a law licensed defense attorney at the Tribe's expense, c) the presiding Tribal Court judge must be law licensed and have adequate legal training to preside over criminal trials, d) the Tribe must make their rules of criminal procedure, criminal law, and evidence publically available prior to charging a defendant, and e) Tribal Courts must maintain a record of the criminal proceeding.

Under the United States Supreme Court holding in U.S. v. Lara, 541 U.S. 193 (2004), expanded criminal jurisdiction for Tribes under VAWA 2013 is concurrent with either State or Federal criminal jurisdiction as applicable. There are no double jeopardy restrictions on dual Tribal and Federal/State prosecutions for the same offenses as they are considered separate sovereigns.

Finally, it is important to note that implementation of the expanded criminal jurisdiction under VAWA 2013 will not commence until at least March 7, 2015 with the limited exception of Tribes participating in the pilot project authorized by VAWA 2013 allowing for earlier implementation. As of November 2014, three Tribes have been approved for earlier implementation under VAWA 2013, the Pascua Yaqui Tribe of Arizona, the Tulalip

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Enhanced Tribal Jurisdiction

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Tribes of Washington, and the Umatilla Tribes of Oregon.

This article is intended only as a broad overview and brief introduction to enhanced crimnal jurisdiction under VAWA 2013. Several helpful sources have been utilized in creating this article and can provide additional information on specific rules and requirements under VAWA 2013.

These sources include:

Introduction to the Violence Against Women Act. Tribal Court Clearinghouse (a project of the Tribal Law and Policy Institute) at http://www.tribal-institute.org/lists/title_ix.htm

Violence Against Women Act (VAWA) Reauthorization 2013. United States Department of Justice at http://www.justice.gov/tribal/violence-against-women-act-vawa-reauthorization-2013-0

Justice Department Announces Three Tribes to Implement Special Domestic Violence Criminal Jurisdiction Under VAWA 2013. United States Department of Justice at http://www.justice.gov/opa/pr/justice-department-announces-three-tribes-implement-special-domestic-violence-criminal

Operation Squarehook:

Federal Prosecution of Native Americans Highlights Competing Methods of Treaty Interpretation

Operation Squarehook is the code name for a three-year cooperative special investigation conducted by the Minnesota Department of Natural Resources, the U.S. Fish and Wildlife Service, the Red Lake Band, and the Leech Lake Band. Several individuals were charged with misdemeanor and gross misdemeanor charges in Minnesota State court, and several tribal members are facing alleged violations of tribal code with citations issued in tribal courts. The allegations are that these individuals were involved with the illegal purchasing and sale of game fish, namely walleye, in Minnesota and on tribal lands.

In addition to the state proceedings, there were ten individuals charged in United States District Court with alleged federal violations of the Lacey Act. The Lacey Act is a federal law that prohibits the import, export, sale, acquiring, or purchasing of fish, wildlife or plants that are taken, possessed, transported or sold in violation of United States or tribal law, or in interstate or foreign commerce involving any fish, wildlife, or plants taken, possessed, or sold in violation of State or foreign law. The ten individuals charged in federal court are accused of selling or purchasing walleye in violation of tribal and state law.

These federal prosecutions are not fully resolved as of yet. At the heart of the unresolved issue in this specific case is the general approach for treaty interpretation

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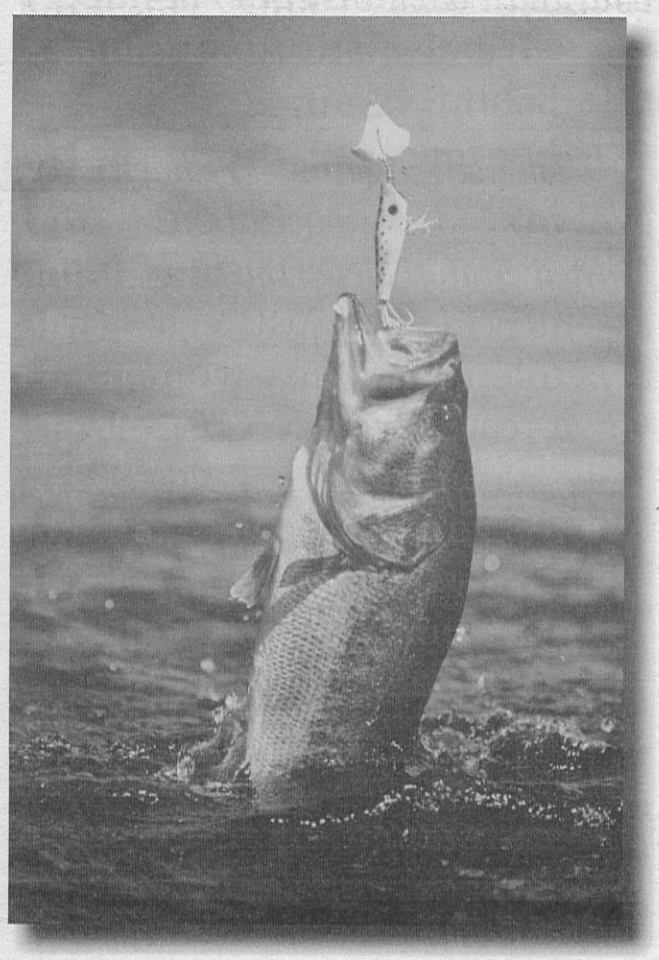
and whether certain treaty rights exempt Indians from federal prosecution for Lacey Act violations. One side of the argument is that the defendants were engaged in traditional and culturally appropriate practices that they have enjoyed for millennia, the barter of food and sustenance that is recognized by treaty and therefore exempts them from facing jail time and fines. The other side claims that it places unsustainable pressure on the natural resources of the tribe and the federal law being used should apply to all individuals who engage in the prohibited conduct.

The competing interpretation theories largely differ on the order of analysis, whether to look at the treaty or the federal law first. United States Magistrate Leo Brisbois, a member of the White Earth Band of Ojibwe, first asked whether the defendants are subject to the Lacey Act prohibitions under the federal law. Magistrate Brisbois determined that Indians are subject to the Lacey Act and by case law, as the Act includes language that the violations apply to "persons" defined as any individual subject to the jurisdiction of the United States. As Indians are subject to the jurisdiction of the United States, Magistrate Brisbois concluded, the Act applies to them.

Next, the Magistrate asked whether the United States' prosecution of the defendants violates a specific treaty right to violate the law. While the Magistrate agreed that Minnesota Chippewa Tribe members generally had a right to fish on tribal land and the ceded territory of the 1837 Treaty, the Magistrate could not find any language in any treaty or other authority that would exempt Indians from the tribe being the exclusive jurisdiction of enforcement of the tribal fishing law against the defendants. Since there was no specific treaty provision protecting the defendants, the Magistrate found the Defendants subject to the Lacey Act and therefore ordered that the prosecutions move forward. The Magistrate evaluated whether the Lacey Act applied to Indians, and then whether they were exempted from the prohibited activity due to a specific treaty provision.

The Defendants then asked for judicial review of the Magistrate's decision, as is their right and as they believed established treaty rights exempted them from prosecution under the Lacey Act. The resulting decision by United States District Court Judge John Tunheim looked at the treaty language first, and determined what rights and privileges regarding hunting and fishing on the reservations

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and in the ceded territories that the defendants retained. Then, Judge Tunheim looked at the Lacey Act to see whether the law specifically abrogated (ended) those retained rights and privileges. Judge Tunheim found that the 1837 Treaty and subsequent variations (including the 1855 treaty that created the Leech Lake Reservation) provided clear language that Indians retained the "privilege of hunting, fishing and gathering the wild rice" in the ceded territory, and reaffirmed previous courts' establishment of a "usufructuary right." This is the right to make a modest living by hunting and gathering off of the land, and has survived new federal laws and courts interpreting whether those rights are retained by the Indians. Once that right was established, Judge Tunheim then looked at the language of the Lacey Act and whether it specifically took away those treaty rights of the Indians. Here, the Lacey Act mentions tribal law and treaty rights, but the Judge could not find any specific intent of Congress in the language of the Act to take away a Minnesota Chippewa Tribe's usufructuary right. Judge Tunheim then dismissed the action from federal court, finding that the United States could not enforce the Lacey Act against the defendants.

The case is now under appeal in the 8th Circuit Court of Appeals after the United States appealed Judge Tunheim's order. The briefing the appeal is complete and oral arguments were held on October 9, 2014. A decision on whether the prosecution of treaty members can move forward in federal court is expected in the next couple of months.

Tribal IV-D Child Support Programs: The Basics

In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), which for the first time allowed Tribes the opportunity to directly apply for federal "IV-D" funds to establish and operate their own tribal child support programs. IV-D refers to the section of the federal Social Security Act that authorizes federal funding for child enforcement programs. On March 4, 2004, Congress published the regulations that govern any federally-funded Tribal IV-D programs, which can be found at 45 CFR Part 309. Essentially, all tribal IV-D programs must contain certain elements within their program before they can be approved for funding, including outlining the procedures for accepting all applications, due process protections, administrative and management procedures, safeguarding procedures for privacy of participants, records maintenance, copies of applicable tribal laws governing child support procedure and procedures to ensure the processing of Intergovernmental cases (cases from other Tribes or States).

A tribal child support program fulfills the following basic functions and must outline their proposed procedure and laws in these areas before qualifying for funding: 1) Locating custodial and non-custodial parents, 2) Establishing paternity through DNA

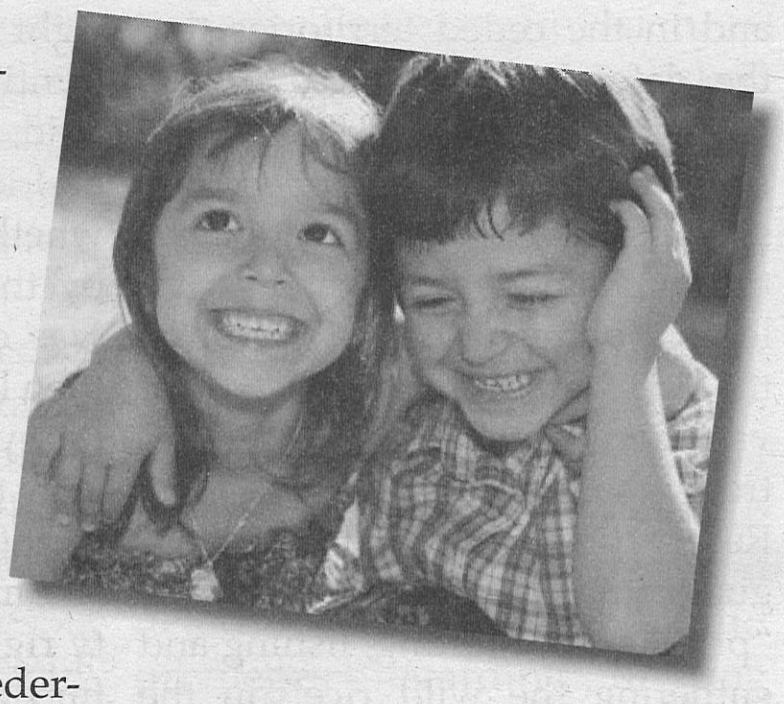
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testing and voluntary means, 3) Establishing and modifying child support orders; and 4) Collecting child support payments and sending them to the custodial parents. Tribes must look to their own traditions, customs and codes to see both where they already fulfill the requirements under the regulations, and then come up with a plan on how to meet the requirements that they do not already have laws or customs to address. While a tribe that accepts IV-D funding must meet these basic mandates outlined in the federal regulations, tribes also have the authority and sovereignty to develop their unique laws and ways of meeting these requirements. Every Tribal program has a unique way of managing their child support program, which does not always mesh exactly with the uniform system developed by the States and the Federal government.

Prior to the authorization of federally funded IV-D programs, Tribes and their members either relied on tribally funded child support programs or tribal court enforcement of child support, which are often under-funded, or State child support enforcement programs which often lacked jurisdiction within the Reservation boundaries to establish or enforce child support orders created off the reservation. State programs were often culturally insensitive and sometimes work against the values and traditions of the different Tribes. Allowing Tribes to apply for federal funding for their child support programs gives them the funding needed to meet the needs of their clients, as well as the freedom to develop and implement child support laws and programs that are more in keeping with tribal customs, values and traditions. In addition, allowing tribes access to federal IV-D funds makes them equal to all the other IV-D funded State child support enforcement programs at the National level and paves the way for State-Tribal cooperation and interaction. Currently, more than 50 tribes across the United States operate federally-funded child support programs unique to their tribal values, laws and cultures. Currently, there are four tribal IV-D programs in Minnesota: The Red Lake Nation Child Support Program, the Leech Lake Band of Ojibwe Child Support Program, the White Earth Child Support Enforcement Program and the Mille Lacs Band of Ojibwe.



The functions of any federally-funded child support program – whether Tribal or State—are: Intake and Application, Location, Establishing Paternity, Establishing and Modifying child support orders, and Enforcement. At the application stage, a custodial or non-custodial parent may apply for services with the Tribal agency. The tribal agency helps the applicant gather enough information to fully process a case. In many

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cases, one or more of the involved parties – the custodial parent, the child, the non-custodial parent, or the child support order itself – may be found outside of the Reservation boundaries. In exercising the Location function, Tribes use federal and/or State databases to find absent parents, assets and court information. Many Tribes, including the four in Minnesota, have data-sharing agreements with their surrounding State to share access to state and federal automated parent-locator databases. Establishing Paternity is the process by which under each Tribe's unique laws and customs, fathers are legally recognized as owing a legal duty of care and support to their children. Tribal IV-D programs can assist in this process by locating and notifying potential fathers, offering free or low cost paternity testing and assisting in getting fathers to sign "Recognitions of Parentage" that will place them on their children's birth certificate without a court order. Tribal Child Support Programs may also file paternity actions in their respective tribal courts if necessary and allowed by tribal code. Tribal programs assist in either establishing new orders of child support, or assisting parents in modifying existing orders as needed. Tribes enforce child support orders according to what is allowed by their tribal law and customs. The tribes in Minnesota use enforcement remedies such as income withholding, suspension of tribal rights and privileges, withholding of tribal payments and contempt. In addition, States lack jurisdiction over tribal employers on the Reservation, so any State order involving income withholding by tribal employers must first be processed through the tribal IV-D program and/or the tribal court.

Some of the challenges Tribes face in running their own child support programs involve deciding who has authority to establish and modify support when parties leave one jurisdiction and relocate to another and in working with State agencies in getting tribal court orders uniformly recognized and enforced.

Due to high homelessness rates and other economic factors, Tribes have a population that often relocates both on and off the Reservation. It is not uncommon to find that all subjects of a State child support order – the custodial parent, children and non-custodial parent – have left one State jurisdiction and entered another. If an Order is then to be modified, the participants and the Courts must determine whether that modification should take place in the original jurisdiction, or the tribal court. This determination is made more complicated in Minnesota with the overarching reach of Public Law 280, which grants the State concurrent civil jurisdiction over tribal members living within all Reservations, except Red Lake. Federal Laws such as the Full, Faith and Credit Act for child support orders, State laws such as the Uniform Interstate Family Support Act found in Minnesota Statutes 518C, and the various jurisdictional laws of each of Minnesota's four IV-D tribal support programs provide guidance in these situations. However, because each Tribe is unique and sovereign, their ideas of jurisdiction may

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conflict with the State's laws, and difficulties often arise. The Tribes and the State have been actively working on a process that may streamline cross-jurisdictional issues, but any agreement is complicated by the fact that each County in the State child support system also acts with a certain level of independence in setting its child support policies, and each County may approach problems differently from each other, from the State and from the Tribes.

While IV-D funding is supposed to elevate tribal child support programs to an equal status on the federal level to all IV-D funded State child support enforcement programs, in reality the Tribes have problems getting their child support orders enforced and recognized by other State agencies that deal with child support orders, such as MN Department of Economic Development (DEED), which oversees unemployment assistance. Minnesota and other States can have their child support withholding orders applied to a non-custodial parent's unemployment payments, but tribal programs often run into some difficulty getting their tribal court orders enforced, as DEED's automated system is not designed to interact easily with each Tribe's withholding orders. Although the advent of IV-D status should put Tribal child support programs on par with any State program, glitches and problems still arise that are currently being addressed and worked out state by state. As Tribes are fairly new to the federal child support enforcement system, many State statutes and internal agency policies may not incorporate or recognize Tribal child support agencies into their guidelines.

If you are interested in learning more about each Tribe's IV-D child support program and the services they provide, you may contact each program directly:

Red Lake Nation Child Support Program, PO Box 1020, Red Lake, Minnesota 56671 Office: (218) 679-2306 Fax: (218) 679-2390

Leech Lake Child Support Office, PO Box 577, 222 2nd Street Cass Lake, Minnesota 56633 Office: (218) 339-5640 Fax: (218) 335-3676

White Earth Nation Child Support Program, PO Box 387, White Earth, Minnesota 56591 Office: (218) 983-3285 x 5762 Fax: (218) 983-3101

Mille Lacs Band of Ojibwe Office of Tribal Child Support Enforcement, 43408 Oodena Drive Onamia, Minnesota 56359 Office: (320) 532-7461 Fax: (320) 532-7476

Contact information for every Tribal IV-D child support program can be found on federal Office of Child Support Enforcement website at http://www.acf.hhs.gov/programs/css/tribal-agencies.

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