Anishinabe Legal Services Newsletter

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

Cass Lake, Minnesota • June 2020

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

Greetings from ALS! We have several important updates. First of all: **we have not closed**, in fact we are expanding our case types in consideration of the Covid-19 pandemic issues that have arisen, and we continue to work on all the other important issues that face our community members. Please call to do an intake as our office doors may be closed to walk in clients. We also continue to accept online intakes done through: https://www.justice4mn.org/a2j/

In case you hadn't

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The Origins of Sovereign Immunity and its Use Today in Indian Country

By: Steve Campbell
Staff Attorney

Do you remember Henry the VIII? If you do, you will not be surprised that the doctrine of sovereign immunity found its origins with Kings like Henry the VIII. Sovereign immunity was derived from British common law doctrine based on the idea that the King could do no wrong. Thus, if the King can do no wrong, courts lack jurisdiction to address any claim against the Crown. No remedy in law or equity exists for either the common citizen or the largest corporation.

The doctrine of sovereign immunity crossed the Atlantic with the Pilgrims to North America, a world inhabited by thousands of indigenous nations. English and other European settlers approached political actions with Native people as sovereign to sovereign. Treaties were made to acquire land or create military alliances and trade. Using then-existing western concepts of law, tribes became entitled to sovereign immunity. The Chief can do no wrong.

Of course, it took over a hundred years for most tribes to adopt and use western style court systems; the United States had to coerce many tribes to do so. Some tribes had long-existing and very advanced formal government systems prior to colonization, such as the Iroquois Confederation. All tribes had traditional forms of dispute resolution.

THE INDIAN COMMERCE CLAUSE

The United States also entered into treaties with tribes on a sovereign to sovereign basis. However, as the United States became ever more powerful, the treaty era ended around 1871. Congress had envisioned new methods to interact with Indian Nations. The Indian Commerce Clause, found at Article One, Section 8, Clause 3 in the United States Constitution, is a clear notice to all that Congress has plenary power in Indian affairs. Congress alone has the authority "[t]o regulate Commerce . . . with the Indian Tribes."

The founding fathers did not want any foreign nations entering into treaties with tribes. Nor did they want any states or other third parties engaging in commerce with tribes. Congress thus reserved the right to regulate Indian commerce. Federal protection in litigation includes representation of tribes by federal attorneys from various agencies.

A consistent pattern of United States Supreme Court opinions starting with the Marshall trilogy have strongly upheld the maxim that tribes and tribal officials enjoy the protection of sovereign immunity. However, tribal sovereign immunity ***is not an absolute defense;***

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From the Director

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heard, ALS is moving forward on our building project. At the time of this writing, the new building is in the process of being constructed in a factory offsite. ALS will work with the Leech Lake Department of Public Works for demolition of the current building in June. The program plans to have a temporary office in place to allow clients and staff local access to services. Please check our facebook page or website for specific details concerning the temporary office hours and location. We do not anticipate any change to the telephone or fax numbers during our transition.

Our contractors for the building construction and foundation will begin setting foundation in our cleared-out corner lot once demolition is completed, and then we can begin moving our completed building on the prepared site. We are very excited to be working with Homark Homes from Fosston and Bremer Bank of Detroit Lakes for the custom build project. Our new building plans include all offices on one level, handicap accessibility throughout, and energy efficiency considerations for lighting and heating. Inside the new building, staff hope to be able to decorate the front lobby with local artwork and highlight the Anishinaabe culture.

Many thanks to all of our funders as we continue to raise money towards this project! We are halfway there with recent donations received from private individuals, Blandin Foundation, tertail Power Compa Foundation, and ma others! Your continu support of our organi tion through the build fund is greatly appre ated.

Staffing updates: n to ALS is Samir Grov paralegal, who is wo ing with disabled in viduals on their bene cases, and Andrea Sza attorney, who will be t ing over Leech Lake ch protection and other c

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Sovereign Immunity

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there are exceptions to tribal sovereign immunity.

Exceptions to Tribal *Sovereign Immunity*

One well recognized exception to sovereign immunity exists when a tribal official acted beyond his or her authorized authority. The fact that a tribe cannot be sued does not defeat all challenges to the exercise of its power. The Supreme Court has held that a tribal officer is not protected by the tribe's immunity from suit for declarative and injunctive relief. Santa Clara Pueblo v. Martinez, 436 U.S. at 59. See also, Michigan v. Bay Mills Indian Community, 572 U.S. 782, 2013..1

If the official acts beyond his or her authority, or beyond the authority that the tribe had the power legally to confer, the official may be sued. See Dawavendewa v. Salt River Project, 276 F.3d 1150, 1159–61 (9th Cir.2002); Baker Elec. Coop, Inc. v. Chaske, 28 F.3d 1466, 1471–72 (8th Cir.1994). Tribal immunity does not bar a suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct.

Therefore, a party claiming that a tribe is acting beyond its power under federal law can sue tribal officials to enjoin enforcement, just as plaintiffs can sue state officials under Ex parte Young, 209 U.S.123 (1908). Crowe & Dunlevy, P.C. v. Stidham, 640 F.3d 1140 (10th Cir. 2011); Vann v. U.S. Dept. of Interior, 701 F.3d 927 (D.C.Cir.2012); Thlopthlocco Tribal Town v. Stidham, 762 F.3d 1226 (10th Cir.2014).

Sovereign Immunity Today

It is a judicious decision by tribes not to use sovereign immunity as a failsafe. Most trib are engaged in compl economic activities su as gaming, tourism, a many other business tivities. Limited waiv of immunity are oft demanded by the priva sector. Tribes balance t pros and cons of nego ating limited waivers a project by project bas Can other quality vendo be found that will acce Tribal Court jurisdicti or no waiver of immu ty? The larger the proje the more likely limit waivers will be require Some large gaming trib conduct significant len ing to other tribes. Su agreements typically co tain waivers of sovereig immunity and choice law clauses.

For the individua the so called "little guy how is sovereign imm nity applied today? T answer from my lengt career of legal practi throughout Indian Cou try is that tribes seem

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ANISHINABE LEGAL SERVICES

Sovereign Immunity

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assert immunity even more vehemently.

Due process and adequate notice of adverse actions by tribal governments are critical constitutional rights. When you are indigent, perhaps elderly or disabled, your tribal housing unit may be your only protection from homelessness. What is the remedy when the Tribal Housing Board sets a meeting, with no notice, and terminates you from your lease and immediately evicts you?

Essentially one would seek judicial review, but here comes the tribal attorney stating… I am very sorry but this case cannot proceed, sovereign immunity removes all jurisdictions to hear the case. Case closed before the merits are considered! The Chief can do no wrong, remember? Did you ask Tribal Council to waive immunity in this case? What, they refused really? You even argued the Tribal Constitution requires due process before the tribe can take your property?

Oftentimes, the only real opportunity to be heard when sovereign immunity is in play is through an appeal. You will need a good lawyer, and it may take six or more months for a decision.

Tribes can take minor but important steps that make a world of difference. Firstly, require notice of eviction actions on all parties at least 7 days prior to hearing. Secondly, require judicial review of all automatic evictions prior to forcible removal by Tribal Police.

Most tort claims against tribes will fail. Contract cases will also fail unless the tribe has signed a written waiver of sovereign immunity. Individual tribal members asserting constitutional rights such as due process often struggle to get through the courthouse door. Even where tribal constitutions clearly grant members due process or equal protection under the law, tribal courts may be reluctant to deny sovereign immunity defenses. Not all tribes have strong separation of powers. Tribes do not want to be engaged in litigation.

It's common practice for tribes to sign limited waivers of sovereign immunity when engaging in private sector economic development. Large banks and investors demand waivers from tribes knowing the risk of doing business without a waiver; further, it is common for choice of law provisions to be contained within contracts. Federal District Court is often agreed to in advance of any dispute. Arbitration clauses are common as well. The "little guy" does not have that kind of leverage.

Tribal sovereign immunity has been for the most part protected by Congress. Congress does not want Indian tribes subject to lawsuits from states or individuals without their consent. A considerable body of law documents the history and application of sovereign immunity in Indian Country. Very skilled attorneys use the doctrine as protection for tribes in business and economic development. When doing business with a tribe you must understand sovereign immunity. Never forget, the Chief is always right!

Native American Preference in Employment

By: Ellen Weinberg
Staff Attorney

In general, United States law forbids discrimination in employment on the basis of a number of factors, including race, color, and national origin. However, Native American preference is an exception to that rule. This article will discuss the practice of giving Native American applicants preference in hiring. The term "Indian" will be used in quoting and where it is part of a name; otherwise, "Native American" will be used.

Native American preference laws actually date back to 1834. A law passed that year requiring preference to qualified people of Native American descent in the hiring of "interpreters or other persons employed for the benefit of the Indians." Laws passed required Native American preference in a variety of *specific* occupations.

In 1934, the Indian Reorganization Act was passed. One of the many things this law did was require Native American preference in hiring in the Bureau of Indian Affairs (BIA). The BIA is part of the Department of the Interior. The law also applies to the Indian Health Service.

In 1972, the Equal Employment Opportunity Act, sponsored by Minnesota Senator Hubert Humphrey, was passed. It forbade discrimination in employment on the basis of race, color, religion, sex, or national origin. However, it specifically allowed Native American preference in hiring by tribes and by industries on or near reservations.

The United States Supreme Court ruled on the legality of Native American preference in 1974 in a case called Morton vs. Mancari. Rogers C. B. Morton was the Secretary of the Interior in the administration of President Gerald Ford, and C. R. Mancari was a non-Native American employee of the BIA in its Albuquerque, New Mexico office.

For decades, the BIA had given Native Americans preference in hiring. In June 1972, with the agreement of Secretary Morton, the director of the BIA sent the employees a letter stating that the BIA would also

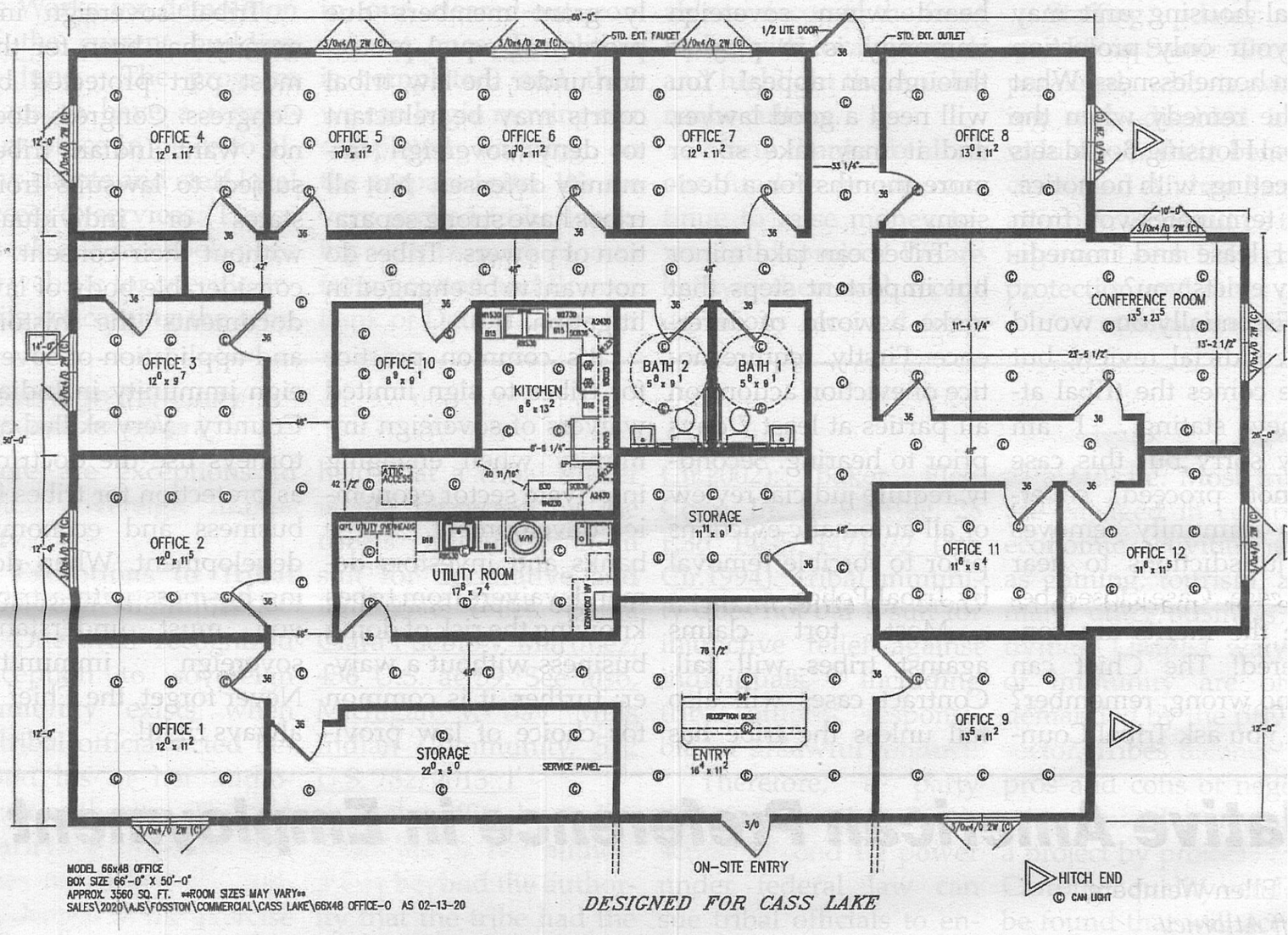
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From the Director

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es. Welcome to ALS and our community! A brief shout out to the Minnesota Justice Foundation also for awarding ALS a summer clerk to assist with client matters. Zoe Psiakis is a 1L from the University of MN Law School and will be joining us for June and July. You can learn more about all of our staff on our website: www.alslegal.org.

This edition of the newsletter is dedicated to a variety of legal issues, but we have several articles that pertain to the changes that affect our community during this pandemic. We hope y have a great summer, a we hope that everyon healthy and doing w Miigwech from every at ALS!



Overview of the Social Security Disability Process

By: Rita Holler
Paralegal

I'm Rita Holler, a paralegal, and I have worked for Anishinabe Legal Services starting as a volunteer in 2012 and then full-time in 2018, running the Social Security program for this organization. Anishinabe Legal Services provides legal help for those who qualify with our income guidelines who live on or near the Leech Lake, Red Lake, and White Earth reservations.

In northern Minnesota, we have a vast number of individuals who are living in extreme poverty who are unable to access legal help when they are unable to work, due to their disabilities. This is where Anishinabe Legal Services fills a need.

The question "What does DISABLED mean?" is asked often. In the medical industry, for example, a doctor may deem you disabled or unable to continue working due to either physical or mental impairments by filling out the medical opinion form for your employer. This does not necessarily mean that in the eyes of the Social Security Administration you are disabled and therefore automatically approved for benefits. This can be very confusing to the person who is applying for Social Security Disability benefits.

The definition of abled from Social Se rity is this:

"Having had me cally determinable pairments, physical a or mental, that h lasted for 12 months a will continue to last 12 months and/or end death."

What does this m exactly? This means t whatever you have, ther physical disabili

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Social Security Disbility Process

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and/or mental health disabilities, you would have to meet the guidelines for Social Security's definition of disabled for 12 months prior to applying, and they will continue for at least 12 months after you apply for benefits. You would have to show medical proof for 24 months at least that these disabilities have caused you daily disruption, impairing your ability to work (Substantial Gainful Work Activity) or in other words your ability to continue doing the job you had been doing.

Medical proof in the eyes of the Social Security Administration is the *medical evidence or records* they will use to determine if your conditions are "severe" or "marked" to be found disabled. They will also use *your testimony* on how your conditions have disrupted your daily life. It is this combination of evidence that will be considered by the Social Security Administration to find a person disabled. It is important during the process of filing for disability benefits that you are doctoring on a regular basis. Having this evidence only reinforces your chances of a successful outcome.

The phases of the disability application process: The initial application takes the longest. You are applying for both Social Security Disability Insurance (SSDI) or Supplemental Social Security Income (SSI). These are two different types of benefits.

SSI is a federally based welfare program funded by General Funds. This program is for the people that have not worked enough or do not have enough work credits to get disability benefits based on their work record. Social Security distributes these payments. There are **strict financial guidelines** for a person to receive these benefits. The payments are for food, shelter, and clothing or daily needs. The payment amount, based on the Federal Guidelines is a set payment; it will only increase if there is a living wage increase. Today this payment would be $783.00 a month.

SSDI payments are based on your work record. Every time you have a paycheck and pay into Social Security on your taxes, you are paying into an insurance. This insurance is there if you do become disabled and are unable to work.

Now the question is, why would I apply for both? The reason is if you do have enough work credits but did not work a job that paid enough for you to get $783.00 dollars or more a month, then the SSI benefit would then make up the difference. By applying for both at the same time, you would make sure that you could be eligible for either or both. If you do not apply at the same time and were denied, then you woul have to apply again and wait again for a determination to be made on the other application.

After you initially apply, the Disability Determination Center will go through medical evidence to determine if you are disabled. They will use medical evidence, age, and past relevant work, among other factors, to make this decision. If you are determined not disabled, you will be denied. This is where most people think it is over and final; it is not. This is when you APPEAL this decision for Reconsideration.

At the reconsideration level, once reviewed and decided again by the Disability Determination Center if you are not found to be disabled, you will then APPEAL THE DECISION and request a hearing in front of an Administrative Judge.

The process of applying for Social Security Disability benefits is confusing. **This process can take up to 2 years to see an Administrative Judge.**

Anishinabe Legal Services offers legal services to people who meet our income guidelines (primarily those who are re ceiving public assistance benefits such as general assistance or MN family investment program cash assistance), with no fees to the client whether we win or lose your case. We are here to help you through the process from answering general questions, to helping submit your initial application, and all the way to representing you at the administrative appeal hearing. Please call us today for a consultation to see if you are eligible for services. 218-335-2223



Beware of Covid 19 (and other) Scam

By: Valerie Field
Staff Attorney

There have been various types of scams for generations. Scams are associated with large crime organizations and are often highly sophisticated. A criminal will attempt to use fear in order to steal from their victims. The Covid-19 pandemic has provided one more scare tactic criminals can use. As Covid-19 has become an issue, criminal organizations have been quick to take advantage of people by using the pandemic to try to steal money or personal information or upload malware to computers and cell phones. If in doubt as to whether or not an offer is a scam, feel free to contact us or look online to double check. Below are some examples of various types of Covid-19 based scams and how to look out for them.

Fake Web Sites

The fake web sites can be anything from sites offering personal protective equipment which will never be received to on line "clinics" selling fake Covid-19 testing kits. Some also appear to be government web sites. For instance, a fake site claiming people need to register in order to receive the stimulus check or those pretending to be charity organizations raising money for Covid-19 causes. There are even sites offering "cures" (no cure currently exists) for Covid-19. With people isolated at home, there may be temptations to find friendship online. This is fine, however keep in mind that there are "long distance relationship" scams as well. Criminals can sign up on web sites specifically for social interactions. If someone asks you for money online there is a very good chance the entire relationship has been a scam and it is time to end that relationship.

Phone Calls and Text Messages

Scammers are using robo calls and person to person calls that claim they will provide covid – 19 tests in exchange for personal information. Other scams target people financially hurting from their loss of work. For instance, there are fake "work from home" offers. In addition, technology now allows people to "spoof" phone numbers so a call may appear to come from a legitimate source, including programs such as the Center for Disease Control (CDC) and World Health Organization (WHO). Another scam involves a person impersonating a doctor or healthcare professional and calling to say that a friend or loved one is being treated for Covid-19 and asking for payment for a fake hospital bill .

There are also text message scams. One scam is a text message claiming that you have come into contact with someone who has Covid – 19. The text tells you to self-isolate and then click the link it provides for more information. If clicked, the link helps the scammers get your personal information. Another text scam example is a text from "FCC Financial Care Center" that offers $30,000 in relief to those affected by Covid-19. There is no such organization. It is entirely made up. The criminals sending the link want your personal information. In these examples, the caller or link claims to be from a government agency and requests personal i
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Beware of Covid 19 Scams

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Door to door

There are door to door scams where people offer various services such as shopping for you (they just take your money), offering cleaning devices that they falsely claim get rid of Covid-19 or offering other assistance.

Tips for avoiding scams:

A. Watch out for warning signs that an offer is a scam. These include being told it is urgent and you must act right now, various threats (including threats of jail time or that you will get the virus), emotional pleas or an offer that sounds too good to be true. Report threats to law enforcement. Report other scams to the FBI.

B. Do not click on unsolicited links in e-mail or text messages.

C. Do not send cash, pay with a gift card or wire money or pay with crypto-currency to anyone you do not know in person.

D. Keep your computer software and cell phone updated.

E. Research any charity requests before providing donations.

F. Contact your healthcare professional if someone offers a "cure" for Covid-19 before seriously considering it. There is not a cure at this time.

G. Beware of "get rich quick" schemes, including any investment in a "cure" for Covid-19. False investment "opportunities" for a "cure" are also a scam.

H. Never use debit cards when shopping on line. Credit cards can stop payment and have protections whereas getting debit card money back is difficult.

I. Do not give out credit card or debit card information, social security numbers or other private information over the phone. Government agencies will not ask for money or personal information over the phone. Banks will not as well.

J. There are specific scams that target stimulus checks. Scammers are sending out fake checks. Also, the IRS will not contact anyone by phone and ask for personal information. If you get contacted over the phone by someone claiming to be with the IRS, it is a scam. Be careful.

K. Check internet for scam alerts by typing "types of scams" into GOOGLE. If you're more specific, you can often get specific information about particular scams.

L. Anyone can be a victim of a scam. If you are, do not feel ashamed. Report the scam to the FBI.

Feel free to call Anishinabe Legal Services if you have any questions.

Federal Moratorium on Evictions

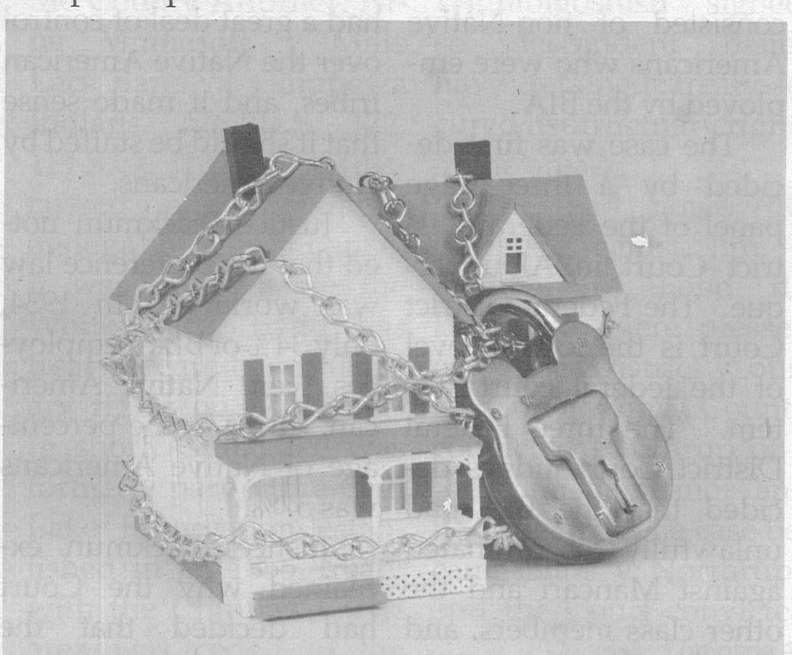
By: Nicole Cayko
Staff Attorney

The federal Coronavirus Aid, Relief, and Economic Security (CARES) Act § 4024 provides for a temporary moratorium on evictions for certain residential rental properties. The federal act is in addition to the Minnesota Governor's Executive Order 20-14, which suspends residential evictions in Minnesota during the COVID-19 peacetime emergency, except in limited circumstances. Under the CARES Act, landlords of affected properties **may not file new eviction actions for non-payment of rent and may not charge late fees** for non-payment of rent during the moratorium. The federal eviction moratorium expires July 25, 2020.

For the federal moratorium to apply to a rental property, the rental property must be a "covered property," which is defined as a property that participates in a covered housing program as defined by the Violence Against Women Act, participates in the rural housing voucher program, has a federally backed mortgage loan, or has a federally backed multifamily mortgage loan.

An affected landlord may not initiate a legal action to recover possession of the property for non-payment of rent or fees until after July 25, 2020. An affected landlord may not issue a notice to vacate until after July 25, 2020. An affected landlord may not charge late fees that accrue during the moratorium.

The CARES Act also requires an affected landlord to provide a 30-day notice to vacate the premises. The 30-day notice may not be issued until after July 25, 2020. If you need help with landlord tenant matter, please call our main office to see if we can provide services.



Native American Preference

Continued from page 3

give preference to Native Americans in promotions and transfers. The BIA began implementing the new policy immediately.

Mancari sued, claiming employment discrimination and deprivation of property without due process. He argued that the part of the 1934 law that required Indian preference had effectively been repealed by the Equal Employment Opportunity Act (EEOA) because the EEOA forbids racial discrimination. The "property" was the opportunity to transfer into a different BIA job. Deprivation of property without due process is a violation of Constitutional rights.

The case was brought as a class action. A class action is a special kind of lawsuit in which one person or a small group of people, called the plaintiff or plaintiffs, sue not only for themselves but on behalf of everyone who is in the same situation. This group is called the class. A class can have hundreds or even thousands of members. A win or loss for the plaintiffs is a win or loss for the whole class. The class in this case consisted of non-Native Americans who were employed by the BIA.

The case was first decided by a three-judge panel of the Federal District Court in Albuquerque. The Federal District Court is the lowest level of the federal court system. The three Federal District Court judges decided that the BIA had unlawfully discriminated against Mancari and the other class members, and Mancari appealed to the Supreme Court.

Because it was going to take a long time for the Supreme Court to decide the case, Justice Thurgood Marshall issued an order preventing the Federal District Court's order from taking effect until the Supreme Court had made its decision. Lawyers for both sides argued the case before the nine Supreme Court justices. Then the justices met in private to discuss the case and make their decision. The justices decided unanimously that the Federal District Court had made the wrong decision. Justice Harry Blackmun, who was from Minnesota, wrote the Court's decision, or "opinion."

Justice Blackmun began his opinion by referring to the long history of Native American preference. He explained that the preference exists "... to give Indians a greater participation in their own self-government; to further the Government's trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life." The BIA had a great deal of control over the Native American tribes, and it made sense that it should be staffed by Native Americans.

Justice Blackmun noted that the preference law was working. In 1934, only 34% of BIA's employees were Native American. In 1972, the percentage of Native Americans was 57%.

Justice Blackmun explained why the Court had decided that the EEOA did not repeal the Native American preference law. 1.) The EEOA specifically exempted Indian preference. 2.) Two months after passing the EEOA, Congress passed a law giving preference in "government programs for training teachers of Indian children." This indicated that Congress intended to keep Indian preference. 3.) For many years, Native American preference had been allowed as an exception to anti-discrimination rules. 4.) There was no indication in the EEOA that Congress had meant to repeal the 1934 Native American preference law.

Next, Justice Blackmun dealt with the Constitutional issue. He explained that Native American preference was "...an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency." The preference is not a racial preference; it exists because Native Americans are "...members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." Justice Blackmun compared the appropriateness of hiring Native Americans to work for Native Americans to the need for an elected official to live in the place that he/she serves; for example, a city council member must be a resident of that city. In that sense, the law treats Native Americans as a political group rat
than as a racial group.

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Covid-19 and Parenting Time

By: Valerie Field
Staff Attorney

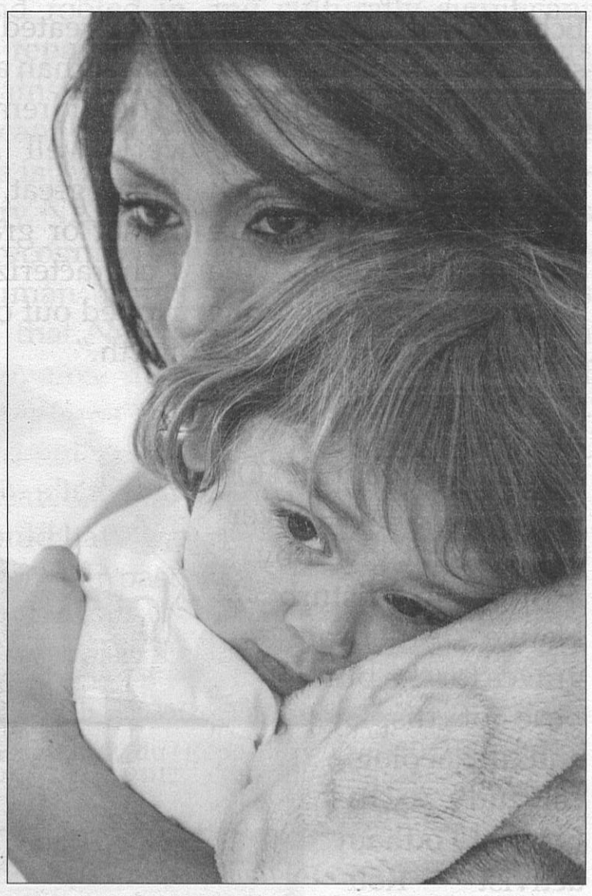
There has understandably been confusion regarding what is allowed and what is not allowed under the Minnesota Governor's Stay-At-Home Order. One area where there has been confusion is parenting time when the parents live in separate households. In those instances, parents should continue exchanging the children as they have previously. This is mentioned in the "exemptions" section of the Stay At Home Order 5f. It reads as follows:

"5. Exemptions - Activities. Minnesotans may leave their homes or residences to engage in the following activities, provided that all persons follow the guidelines set forth and maintained by the Minnesota Department of Health ("MDH" Guidelines), including but not limited to social distancing, to the maximum extent possible.

f. Care of others. Individuals may care for a family member, friend, or pet in another household, and may transport family members, friends, or pets as allowed by this Executive Order, including the transport of children pursuant to existing parenting time schedules or other visitation schedules pertaining to a child in need of protective services ("CHIPS") proceeding."

Federally recognized American Indian Tribes in Minnesota, which includes the Leech Lake, Red Lake, White Earth Bands of Ojibwe, have made their own Stay At Home orders which are similar to the Governor's Order. Again, even if the Order is signed by a tribal court judge, the parenting time needs to be followed.

If you have any questions regarding the law and issues brought up as a result of covid-19, feel free to contact Anishinabe Legal Services or another legal service organization.



This case seems fishy: on usufructuary treaty rights of the Anishinabe

By: Andrea Szabo
Staff Attorney

Summary from full article:

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] In the end, they got the test case they were hoping for but it wasn't for ricing. Todd Thompson and Jim Northrup were cited by MNDNR for setting a gill net out on nearby Gull Lake without a state-issued permit, which is a gross misdemeanor.[3]

Ultimately, 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;[4] and Todd, as member of the White Earth Band, had his charges dropped by the County Attorney. After Minnesota v Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 119 S.Ct. 1187 (1999) (discussed online at http://alslegal.blogspot.com/) it was unavoidable the White Earth Band has treaty-secured usufructuary rights on Gull Lake. In short, Gull Lake was formerly part of the Gull Lake Reservation established in an 1855 Treaty with the Chippewa. The area was ceded to the United States by an 1864 Treaty where the Chippewa of the Mississippi, Leech Lake, and Lake Winnibigoshish signed, so descendent Bands have retained treaty-secured usufructuary rights in the area.[5]

The bad news: the charges against Jim, a member of Fond du Lac Band, were pressed on.[6] The District Court in Crow Wing County convicted Northrup of a gross misdemeanor and he appealed. The case became State v Northrup,[1] and the Court convicted

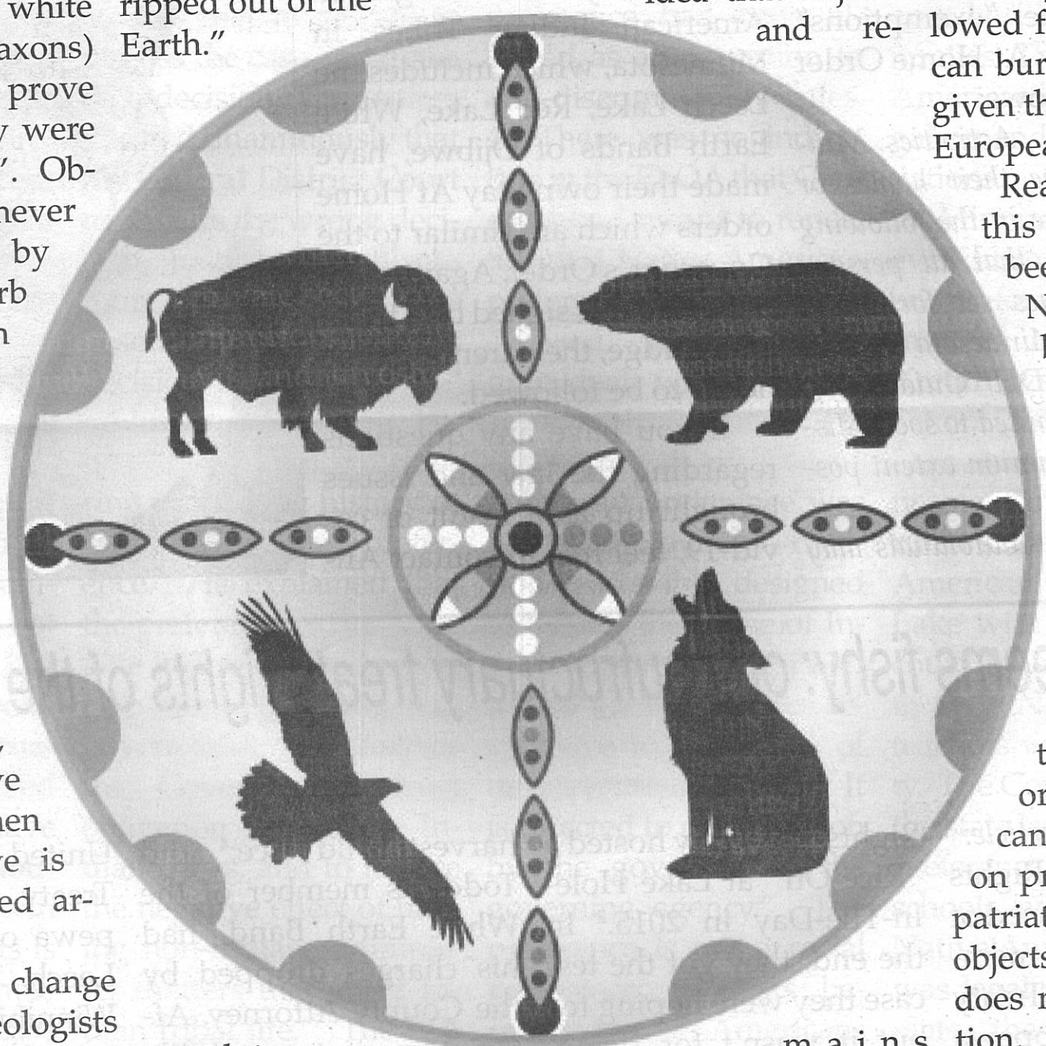
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Respect for the Past

By: Samir Grover
Paralegal

"There are approximately 120,000 dead natives that remain in museums today" (Walter Echo-Hawk). Let that sink in for a minute… 120,000. For hundreds of years Native American burial remains, such as human skulls, have wrongfully been the source of study for white people (Anglo-Saxons) to unsuccessfully prove the belief that they were "racially superior". Obviously, there was never any consent given by a tribe to disturb Native American graves for the purpose of display and archaeological study. As Tohono O'odham activist Robert Cruz said in 1986 "When a white man's grave is dug up, it's called grave robbing, but when an Indian's grave is dug up, it's called archaeology."

Until a recent change in attitude, archaeologists claimed that the codes of ethical behavior that governed European burials did not pertain to "others." For instance, during the 1800s and 1900s there were remains in museums throughout the country unethically displayed as objects of curiosity. This practice was irrefutably wrong. Native American remains should be treated the same way as European remains, meaning ized as sacred and protected. As tribal official Pete Coffey states, "All too often here we have been treated as curiosities rather than a people here. (These remains) could very well be my own great, great, great grandfather or grandmother… I characterize it as being ripped out of the Earth."



This practice of disturbing Native American remains and putting them on display was not truly addressed until 1990 when Congress passed the Native American Graves Protection and Repatriation Act (NAGPRA). It offers some correction to this practice by stating that Native American culturally significant objects or burial remains land or tribal land must be given back to the tribe with the closest cultural affiliation. It also forced museums to take an inventory of Native American sacred objects and burial remains by identifying their geographical and cultural affiliation. This act supported the idea that objects and remains should be returned to a tribe if evidence is shown that a known lineal descendant of a tribe requested the return.

NAGPRA definitely has been somewhat effective, as it has led to the return of 57,000 burial remains, 1.7 million grave goods, and 15,000 sacred objects back to tribes. For instance, the Fowler Mu-

returned "nearly 98% its human remains der NAGPRA. It has been an exercise of t sovereignty and its forcement is in the ha of a 7 person commi 3 of which are ch from nominations mitted by tribes. A tionally, its legal crea has "symbolically" lowed for Native Am can burial remains t given the same respe European burial rem

Realistically tho this has not alw been the case NAGPRA has been met plenty of cism. For e ple, fede unrecogn tribes canno tition for re ation of re or objects. thermore, if tive burial re or culturally s cant objects are on private lands t patriation/return o objects back to does not apply. In tion, NAGPRA st lows people to keep private collections tive American rema also lets museums Native American it they have been "d necessary" for the pletion of a sc study. Lastly, if re are discovered off al lands the exca of these remains re only consultation true consent from

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ANISHINABE LEGAL SERVICES

Respect for the past

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One of the biggest limitations of NAGPRA is that it does not actually protect sacred sites. NAGPRA states that if there is a discovery of burial remains or culturally significant objects during activities like construction or mining, that activity shall stop and the remains should be protected before resuming. This may seem well and good; however, the resuming of a construction project can be obtained through certification by the US Government, even if a tribe disagrees. Therefore, the US Government can violate the protection of burial remains if they deem that construction project "valuable". This has occurred in recent years on the US-Mexico border from the construction of The Wall. It was reported in 2020 that the US Government is knowingly destroying Tohono O'odham sacred sites and uprooting human remains by using federal waivers to push the project ahead in violation of NAGPRA. Nevertheless, sometimes states officials will voluntarily abide by NAGPRA and decide to halt or move a construction site if it threatens a burial ground. This occurred during a road widening project in California.

Some archaeologists criticize NAGPRA and say that it limits their ability to research past cultures for the sake of knowledge and science. However, this ideology is erroneous and rooted in racism. The repatriation of burial remains and cultural significant objects back to tribes is a human right. In theory, NAGPRA attempts to recognize indigenous human rights and the idea that Native American remains, like other people-groups' remains, should not be the subject of research.

Tribes should have the right to "own" their past. Native American ancestral sites and their spiritual journeys should be regarded as sacred and taken care of by tribes themselves. The practice of museums, archaeologists, or collectors keeping culturally significant Native American objects or burial remains for personal gain or scientific benefit is a direct violation of human rights. As stated before, there are still 120,000 dead Natives in museums today. Even with the enforcement of NAGPRA, this number illustrates that there is significant work to be done.

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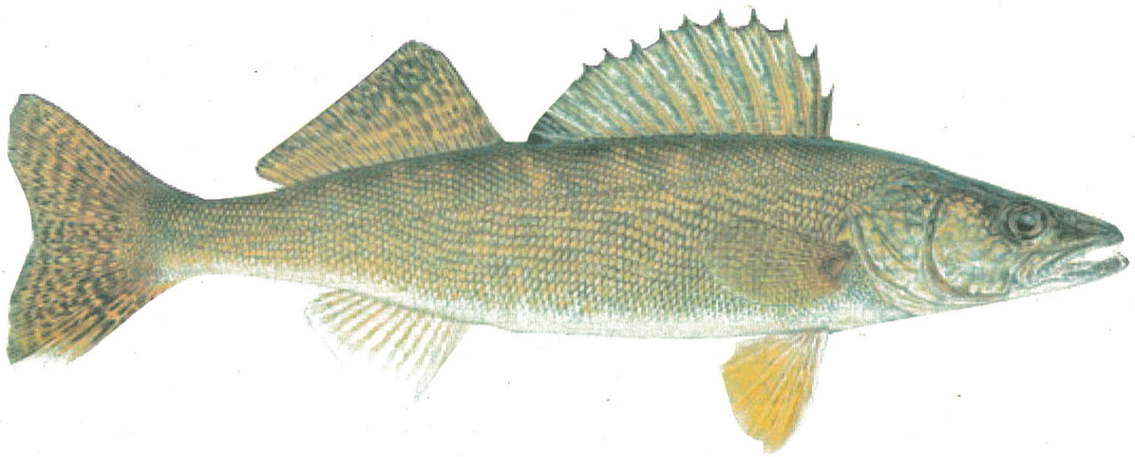
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Case Seems Fishy

Continued from page 9

Jim in December 2019. The Court found the Fond du Lac Band did not sign the treaties of 1855 and 1864, which cleared Todd, and determined the treaties the Fond du Lac Band's predecessors (Lake Superior Chippewa) did sign of 1795, 1825, and 1826 did not warrant the usual rules of Indian treaty interpretation, so usufructuary rights within those treaties did not receive the same guarantees of the 1855 and 1864 treaties. To understand how the court reasoned and more information on the legal background, please find the full version of this article online at: http://alslegal.blogspot.com/



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). See also ALS Newsletter Dec. 2017 "Right to Rice" at https://alslegal.org/pdfs/December%202017.pdf.

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