

Understanding the Administration of Justice in Indian Country

Tribal Sovereignty and Tribal Courts

Minnesota State Law Library CLE

Joseph F. Halloran, Shareholder

Michael L. Murphy, Associate

The Jacobson Law Group

March 9, 2016

Overview

I. Tribal Sovereignty

A. The Third Sovereign

Historical Context: Pre-Constitutional sovereign Nations with government-to-government relationships with the U.S. and the States.

B. Tribal Governmental Authority and Powers

1. Sovereign Immunity
2. Criminal Jurisdiction
3. Civil Jurisdiction

II. Working in Tribal Courts

A. Minnesota's 11 federally-recognized tribes

B. What to Expect and Practical Pointers

Tribal Sovereignty: Historical Context

From Cohen's Handbook of Federal Indian Law:

- Historical perspective is of central importance in the field of federal Indian law and tribal law.
- The centuries-old relationship between the United States and Indian nations is founded upon historic government-to-government dealings and long-held recognition of Indians' unique legal status.
- Contemporary rights and obligations, unique to Indian law, derive from this historic legal status.

Tribal Sovereignty: Historical Context

The United States' system of federalism recognizes three sovereigns: Indian nations, the States, and the federal government.

- U.S. Constitution authorizes Congress “to regulate Commerce with foreign Nations, among the several States, and with the Indian Tribes.” U.S. Const. art. I, s. 8, cl. 3.
- The treaty clause played a vital role in structuring a government-to-government relationship between tribes and the U.S. *Id.* at art. II, s. 2, cl 2.
- By excluding “Indians not taxed” from the population count for apportioning representatives to Congress, the original apportionment clauses indicate the separate status of tribes as sovereign entities. *Id.* at art. 1, s 2, cl 3, superseded by amend. XIV, s. 2.

Tribal Sovereignty: Historical Context

Rooted in Relationship that Predates the Constitution

- Tribe's status is rooted in their unique relationship between the United States Government and Tribes, whose sovereignty substantially predates the Constitution. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980); *Worcester v. Georgia*, 31 U.S. 515, 559-62 (1832); *Cherokee Nation v. Georgia*, 30 U.S. 1, 15-18 (1831).
- Absent governing acts of Congress, Tribes possess the inherent authority "to make their own laws and to be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959).

Tribal Sovereignty: Historical Context

Powers of a Sovereign – Inherent NOT delegated

- Tribes' powers are not delegated, they are 'inherent powers of a limited sovereignty which has never been extinguished.' *United States v. Wheeler*, 435 U.S. 313, 322 (1978). Sovereign powers preserved unless Congress' intent to the contrary is clear and unambiguous.
- Although no longer possessed of the full attributes of sovereignty, Tribes remain a separate people with the power of regulating their internal and social relations, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), over its members and territory, *U.S. v. Mazurie*, 419 U.S. 544 (1975), and to take actions necessary to protect the health, welfare, political integrity and economic security of its people and its territory. *Montana v. U.S.*, 450 U.S. 544 (1981).

Tribal Sovereignty: Historical Context

Limitations on Sovereign Authority.

Tribal sovereign authority found to be diminished or abrogated by necessary implication of the domestic dependent status have been specifically identified by the Supreme Court as (1) the conduct of foreign relations (*Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)); (2) the alienation of tribal trust lands to non-Indians (*Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-68 (1974)); (3) the exercise of criminal jurisdiction over non-Indians (*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978)); and (4) the exercise of civil jurisdiction over non-Indian activities on fee land within a reservation absent some consensual relationship or direct effect upon tribal health, welfare, political integrity or economic security (*Montana v. U.S.*, 450 U.S. 544, 565-66 (1981)).

Tribal Sovereign's Powers

Sovereign Immunity

Civil Jurisdiction

Criminal Jurisdiction

Powers: Sovereign Immunity

- “Among the core aspects of sovereignty that tribes possess . . . is the common-law immunity from suit traditionally enjoyed by sovereign powers.” *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014).
- U.S. Congress may waive tribal immunity, and a tribe may consent to suit, but such waivers must be clear and unequivocal. *Id.*
- Waivers come in a variety of forms, *e.g.*:
 - Tribes may waive their immunity for certain causes of action as a matter of tribal law (by ordinance or statute).
 - Tribes may consent to suit by contract.

Powers: Civil Jurisdiction

- **General Rule:** Tribes possess *exclusive* civil regulatory and adjudicatory jurisdiction over their own members and within their own territories.
- Examples:
 - Internal Political Affairs (elections)
 - Membership/Citizenship
 - Domestic Affairs (family matters)
 - Probate
 - Traffic

Powers: Civil Jurisdiction

- **General Rule:** Tribes *lack* civil authority over non-member conduct on fee lands within their territories, unless:
 - 1) nonmember enters into a consensual relationship with the tribe that subjects them to the tribe's jurisdiction (e.g. contracts); or
 - 2) conduct of nonmember threaten the political integrity, economic security, or health/welfare of the tribe. *Montana v. U.S.*, 450 U.S. 544 (1981).

Powers: Criminal Jurisdiction

General Rule: Tribes exercise *concurrent* criminal jurisdiction with the federal government, the state, or both, over conduct that occurs within their territories.

Tribes have jurisdiction over crimes committed by member and non-member Indians within their own territory.

Subject to some new exceptions under VAWA, tribes do not have jurisdiction over non-Indians.

Powers: Criminal Jurisdiction

Limitations on Tribal criminal jurisdiction:

- Major Crimes Act. 18 U.S.C. s. 1153.
- Indian Civil Rights Act.
- *Oliphant v. Suquamish*, 425 U.S. 191 (1978).
- Public Law 280. 18 U.S.C. s. 1162.

Laws that partially restore criminal jurisdiction:

- Tribal Law and Order Act.
- Violence Against Women Act.

Powers: Criminal Jurisdiction

Criminal jurisdiction subject to Indian Civil Rights Act (“ICRA”):

- As Pre-Constitutional sovereigns, tribes are not subject to limitations imposed by Constitution.
- ICRA subjects tribal authority to some of the Constitutional limitations on gov. power:
 - Prohibitions on search and seizure, takings without compensation, due process, equal protection, jury.
- Also, historically tribes have had sentencing authority limited to 6 months, \$500.

Impact of limits on tribal criminal jurisdiction

- American Indians experienced violence at a rate (101 violent crimes per 1,000 American Indians) more than twice the rate for the Nation (41 per 1,000 persons), 1992-2001.
- On average, American Indians experienced an estimated 1 violent crime for every 10 residents age 12 or older.
- Nearly 4 in 5 American Indian victims of rape/sexual assault described the offender as white.

Powers: “Expanded” Criminal Jurisdiction as a Remedy

- Tribal Law and Order Act:
Amended ICRA to enhance sentencing authority to 1-3 years imprisonment, \$15,000, or both.
- In order to exercise expanded jurisdiction, tribe must provide:
 1. Licensed/law trained judges;
 2. Licensed counsel for indigent defendants;
 3. Record of criminal proceeding;
 4. Laws, procedures, rules of evidence to public.

Powers: “Expanded” Criminal Jurisdiction as a Remedy

- Violence Against Women Act (2014)
Restores tribe’s criminal jurisdiction over certain non-Indian defendants for certain criminal conduct.
- Subject to certain limitations:
 1. Non-Indian defendant must have “significant ties” to community.
 2. Criminal conduct:
 - occurs in Indian country
 - committed against Indian
 - domestic or dating violence.
 3. Trial before jury that represents “fair cross-section of community.”
 4. TLOA limitations (licensed judges, right to counsel).

Powers: Criminal Jurisdiction – Public Law 280

- Public Law 280 P.L. 83-280 (1953)
 - A Termination Era statute that ceded criminal jurisdiction of the State to Indian Country.
 - Not all states are P.L. 280 states (AK, CA, MN, NE, OR, WI are).
 - P.L. 280 was a grant of criminal jurisdiction in Indian Country to the states, but not an extinguishment of tribal criminal jurisdiction. Tribes in P.L. 280 states retain inherent criminal jurisdiction subject to the limitations of the ICRA.
 - TLOA authorizes the U.S. to re-assume concurrent jurisdiction in P.L. 280 states upon tribal request.
-

Powers: P.L. 280 as interpreted by the U.S. Supreme Court

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

- PL 280 authorize state to enforce its laws against an Indian within Indian country only if the law is “criminal/prohibitory;” state cannot enforce “civil/regulatory” laws.
 - If law generally prohibits conduct, state has jurisdiction because law is criminal/prohibitory.
 - If law generally permits conduct, subject to regulation, state has no jurisdiction because law is civil/regulatory.

Powers: PL 280 as interpreted by MN's Courts

State v. Stone, 572 N.W.2d 725 (Minn. 1997).

- 1) What conduct is the subject of the law? “Broad” conduct will be the focus, unless the “narrow” conduct presents heightened public policy concern.
Example: Broad = driving; Narrow = driving with a license revoked due to DUI.
- 2) Apply *Cabazon*: is the conduct generally prohibited or generally permitted?

Stone's first step permits courts to set broad conduct that is generally permitted aside and rely on “public policy” to narrow the issue's scope to conduct that is prohibited.

Tribal Courts

“Sovereignty begins at home.”

- Hon. Cheryl Demmert Fairbanks (Tlingit-Tsimpshian)

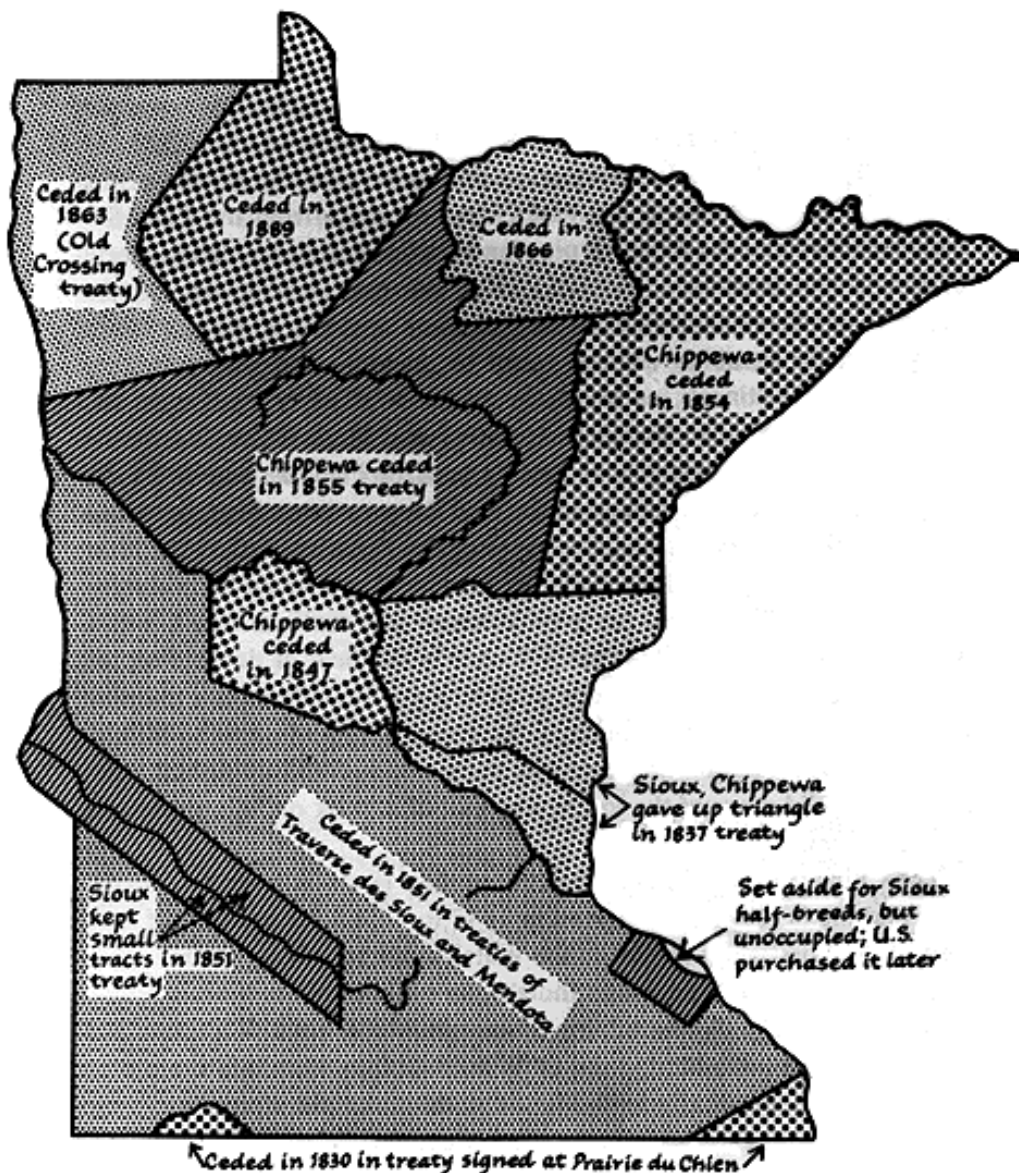
“Tribal Courts and our indigenous concepts of justice shall be the guardians of our people, our communities and our tribal sovereignty.”

- Rae Nell Vaugh, Form Chief Justice, Mississippi Band of Choctaw.

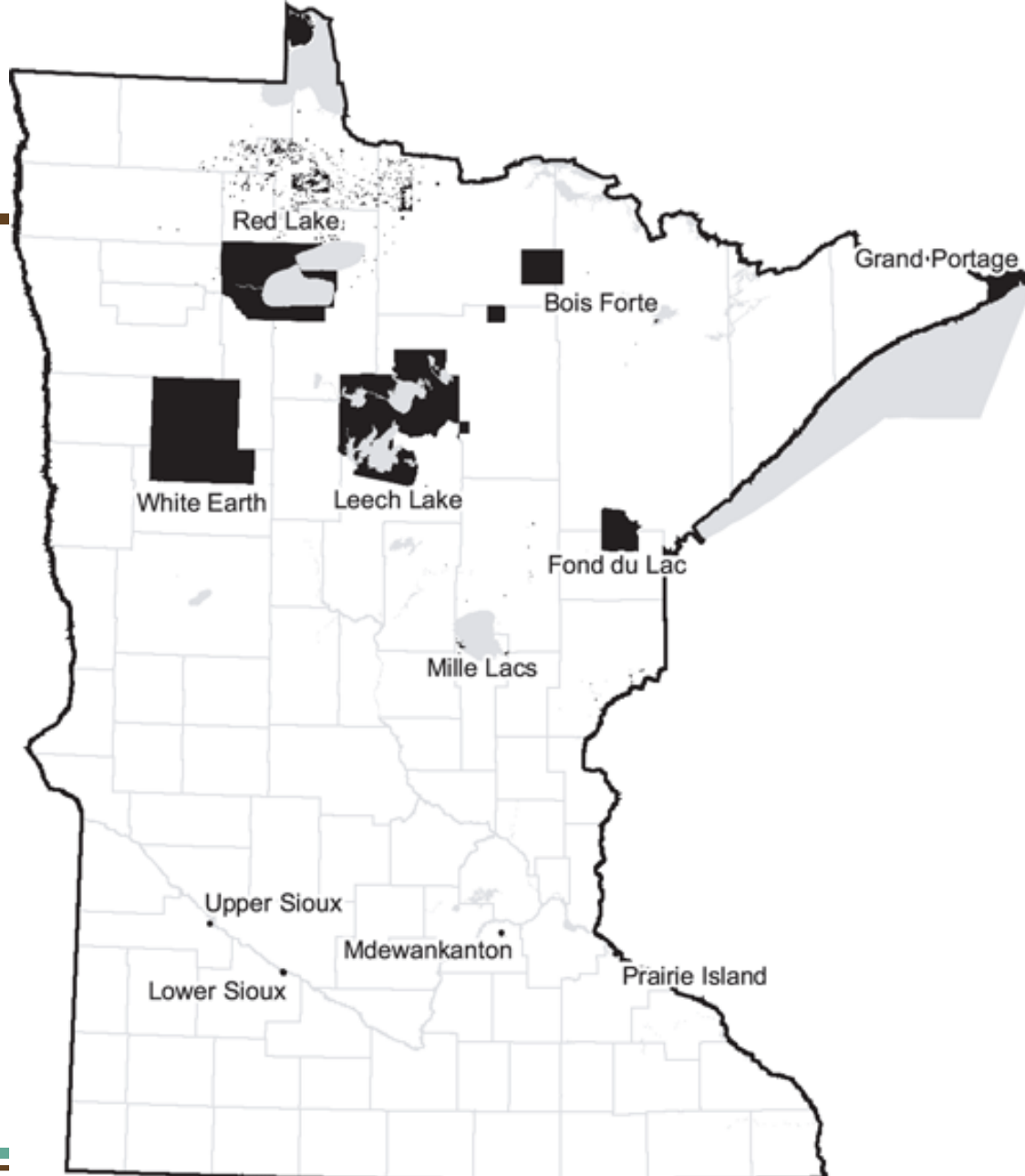
Tribal Courts in Minnesota

Overview

- Tribal Courts in Minnesota.
- What the Courts Do.
- Practical Pointers.



The land cessions by the Indians in Minnesota (adapted from Poatgieter and Dunn's *Gopher Reader*)



THE JACOBSON LAW GROUP
JACOBSON · MAGNUSON
ANDERSON & HALLORAN P.C.

Tribes in Minnesota

- 7 Ojibwe/Anishinaabe/Chippewa Tribes:
 - 6 Minnesota Chippewa Tribe (“MCT”) Member Bands:
 - Bois Forte Band of Chippewa
 - Fond du Lac Band of Lake Superior Chippewa
 - Grand Portage Band of Lake Superior Chippewa
 - Leech Lake Band of Ojibwe
 - Mille Lacs Band of Ojibwe
 - White Earth Band of Ojibwe
 - Red Lake Band of Ojibwe

Tribes in Minnesota

- 4 Sioux Tribes:
 - Lower Sioux Indian Community
 - Prairie Island Indian Community
 - Shakopee Mdewakanton Sioux Community
 - Upper Sioux Community

11+1 Tribal Courts in MN

Each of the 11 federally recognized tribes
has established their own court.

+

1854 Authority

Tribal Courts in Minnesota



**White Earth Nation
Tribal Court**



**Leech Lake
Band Tribal
Court**



**Fond du Lac
Band Tribal
Court**

What Tribal Courts Do

Each court has subject matter jurisdiction as defined by its Tribe's body of laws:

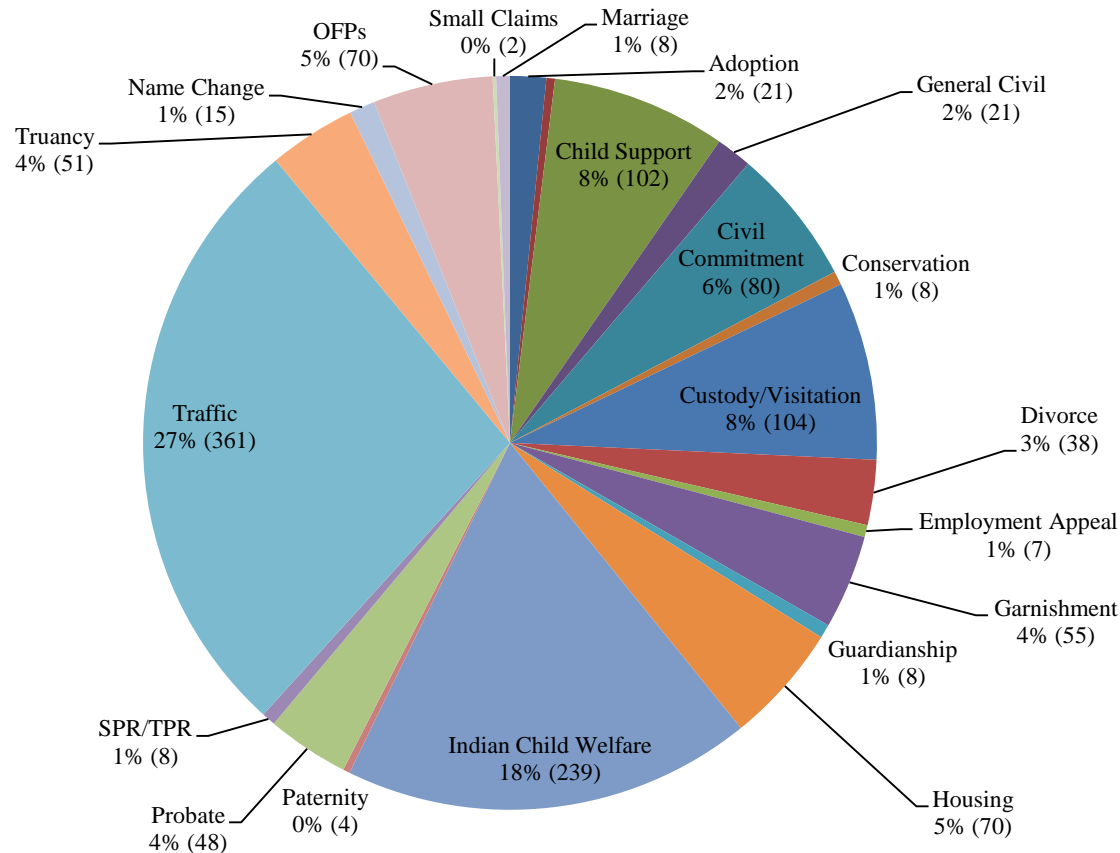
- 9 exercise only civil jurisdiction.
 - Despite P.L. 280, tribes retained criminal jurisdiction, but do not (yet) exercise it.
- 2—Red Lake and Bois Forte—exercise civil *and* criminal jurisdiction.
- **1854 Authority:** Enforces treaty rights (defined by code) in ceded territories against members of certain MN tribes.

What Tribal Courts Do

- Tribal Courts are (usually) Tiered:
 - Trial Court
 - Appellate Court
- Tribes establish “Alternative” Courts, including:
 - Juvenile Healing to Wellness
 - DUI Healing to Wellness
 - Peacemaking Circles and/or Mediation
- Inter-tribal:
 - 1854 Authority

What Tribal Courts Do

1 Tribal Court in 2013: 1,325 cases (3,408 hearings)



Practical Pointers

- Gain Admission to practice before the Court.
 - Often like waiving into another state...but not always!
 - **Call the clerk.**
- Learn about the tribe and the Court.
 - Are the tribal judges law-trained? Do private attorneys appear before the Court?
 - **Call the clerk.**
- Read tribal procedure and substantive law.
 - Some are on-line (*E.g.* Mille Lacs, Red Lake).
 - Some are available in hard copy only (*E.g.* Shakopee).
 - Some are available by contacting the Court directly.
 - **Call the clerk!!**

What to Expect and Practical Pointers

- What laws govern the case?
 - Most subject-matters are controlled by tribal law. **Read the Tribe's laws.**
 - Some subject-matters are controlled by federal law, *e.g.*, Indian Child Welfare Act.
 - For some subject-matters, the Tribe has adopted state-law provisions. **Read the Tribe's laws!**
 - Does the Constitutional right you're thinking of apply? (Freedom of Press?) How does tribal law contemplate the application of the right?

What to Expect and Practical Pointers

Handy Link to Tribal Web pages:

- <http://mn.gov/portal/government/tribal/mn-indian-tribes/>

Handy Link to Tribal Court web-pages:

- <http://www.maiba.org/tribal-courts/>

Questions?

Joseph Halloran, Shareholder

Jacobson, Magnuson, Anderson & Halloran

jhalloran@thejacobsonlawgroup.com

(651) 644-4710

Michael L. Murphy, Associate

mmurphy@thejacobsonlawgroup.com

(651) 644-4710