

A photograph of a woman with dark hair, wearing a green long-sleeved shirt, carrying a young child on her back. The child is wearing a bright orange knit hat and is wrapped in a vibrant, multi-colored striped blanket (red, green, blue, yellow). The woman is looking down and to the right, and the child is looking towards the camera. The background is a dark, textured wall.

The History of Indian Legal Services

By James A. Keedy

Since 1966, Indian Legal Services programs have shaped the development of Indian law in state and federal courts and the advancement of tribal justice systems using limited resources. These programs primarily provide civil legal assistance to members of Indian tribes, focusing on the special and complex legal problems that arise in Indian country.

The inception of Indian Legal Services

The early history of Indian Legal Services is entwined with the history of the Office of Economic Opportunity (OEO) and the War on Poverty. The OEO was the agency responsible for administering the War on Poverty programs created as part of President Lyndon B. Johnson's Great Society legislative agenda. Programs such as VISTA, Job Corps, Community Action Program, and Head Start (which was later transferred to the Department of Health, Education and Welfare) were all administered by the OEO.¹

One of the components of the War on Poverty was funding for programs that provided civil legal services to the poor. For the first time, legal-aid lawyers would be available on Indian reservations: "In 1966 the Office of Economic Opportunity (OEO) began to provide legal representation in civil matters... Before then, legal representation for Indians was virtually unavailable."² Legal representation was not available for many

reasons. First, there was pervasive poverty on Indian reservations, something that continues today. "Given the best available data from the U.S. Census...child poverty rates among American Indians and Alaska Natives have consistently exceeded 40% for almost the past 30 years."³ Second, Indian reservations are generally located in remote and large geographic areas. For example, "[t]he Navajo Nation extends into the states of Utah, Arizona and New Mexico, covering over 27,000 square miles of unparalleled beauty. Diné Bikéyah, or Navajoland, is larger than 10 of the 50 states in America."⁴

While Michigan Indian reservations are much smaller than reservations in the west, they are remote. For example, the reservation of the Lac Vieux Desert Band of Lake Superior Chippewa Indians is located near Watersmeet at the western end of the Upper Peninsula. Detroit is closer to Washington, D.C. (526 miles) than it is to Watersmeet (554 miles).⁵ Clients looking to retain an attorney may find it difficult. The Keweenaw Bay Indian Community is in Baraga County, where there are only six attorneys; three are employed by the Keweenaw Bay Indian Community, one is a judge, and one is the prosecuting attorney.⁶

Finally, there is the complexity caused by difficulties in determining jurisdiction. The first question usually asked is, which law applies? There is not always an easy answer, as criminal jurisdiction varies from state to state.⁷ Jurisdiction may

be determined by the membership status of the defendant and many other factors,⁸ including whether the outcome will interfere with the right to self-governance.⁹

During its first year, the OEO funded four Indian Legal Services programs as part of the initial effort to create local programs: the Cheyenne River and Rosebud programs in South Dakota, the Zuni program in New Mexico, and the DNA-People's Legal Services program serving the Navajo reservation in Arizona, New Mexico, and Utah. Three more programs were created in 1967—Leech Lake in Minnesota, Choctaw in Mississippi, and Papago in Arizona—and California Indian Legal Services was created in 1968. Two more were created in 1971: Wind River in Wyoming and Fort Berthold in North Dakota. The Indian Law Support Center, part of the Native American Rights Fund, was created in 1971 to provide backup support and research for ILS offices across the country.¹⁰

By 1973, funding from the OEO was endangered. “In January 1973, President Nixon proposed dismantling OEO and appointed Howard Phillips as the acting director of OEO to head the effort.... Phillips, a vocal critic of the War on Poverty in general and legal services in particular, was determined to destroy the legal services program.”¹¹ To replace the OEO legal services, President Nixon proposed creating a Legal Services Corporation (LSC), and negotiations began with members of the Senate that eventually resulted in the enactment of the Legal Services Corporation Act in 1974.¹² Congress ordered the new corporation to study whether special populations “have special difficulties of access to legal services or special legal problems which are not being met.”¹³ A study was conducted, which reported in part that “(e)ligible Native Americans have special access barriers created by distance to services, ethnic and cultural consideration and the special and complex nature of their legal need,” and that “(a)ll Native Americans have special legal problems and, to some extent, given their complexity and amount, they are unmet.”¹⁴

Michigan Indian Legal Services was founded in 1975. By 1999, there were 29 legal aid programs providing services to Indian country.¹⁵

As a result of the 1007(h) report, LSC committed resources to the Indian communities, though unevenly. Funding from the federal government peaked in 1980. Not all areas of the country with significant American Indian populations are served by an Indian Legal Services office. For example, both New York and Florida have significant American Indian populations but do not receive any Native American funding from LSC.

Indian Legal Services programs have become a vital part of the justice system in the various Indian communities they serve. The Senate Select Committee on Indian Affairs noted their importance as reported by Dahlstrom and Barnhouse: “[A]ttorneys working with Indian Legal Services programs

had become ‘...an integral part of the tribal and judicial processes...’ and ‘contributed greatly to the development of the on-reservation judicial systems.’”¹⁶ Congress found that Indian Legal Services programs have an established record of providing cost-effective legal assistance to Indian people in tribal forums, and also contribute significantly to the development of tribal courts and tribal jurisprudence.¹⁷

Accomplishments of Indian Legal Services

A few examples from the work of Indian Legal Services programs will demonstrate the reasons for the praise of the Senate Select Committee and Congress. They provide legal representation to defendants in child welfare and criminal cases in tribal court. In Michigan courts, low-income defendants in both types of cases are routinely appointed counsel at public expense. However, that is not always the case in tribal courts. The Indian Civil Rights Act imposed a number of rights derived from the U.S. Constitution on tribal governments, but not all:

No Indian tribe in exercising powers of self-government shall...deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witness against him, to have compulsory process for obtaining witnesses in his favor, and *at his own expense* to have the assistance of a counsel for his defense.¹⁸ (Emphasis added.)

Michigan Indian Legal Services and other similar programs provide legal representation to parents in child welfare proceedings and defendants in criminal cases in some of the tribal courts.

AT A GLANCE

Native Americans have special access barriers created by distance to services, ethnic and cultural consideration, and the special and complex nature of their legal needs.

Since the mid-1960s, specialized legal aid offices, located mostly in western states and a few states east of the Mississippi, have worked to provide legal help to families and tribes.

Indian Legal Services attorneys have defended treaty rights and fought many appellate battles against attacks on the Indian Child Welfare Act.

THIS STORY

Many Indian Legal Services programs have assisted tribes in obtaining federal recognition. The United States formally recognizes a government-to-government relation with Indian tribes, often referred to as federal recognition. Tribes recognized by the U.S. exercise governmental powers and to an extent receive benefits from treaties negotiated between the tribe and the U.S. through federal statutes and other means. The U.S. maintains a form of trust obligation to tribes and tribal resources. If a tribe does not have federal recognition, it does not have legal status as a tribe and cannot exercise self-government. California Indian Legal Services has helped many “Rancherias” gain federal recognition. The Native American Program, Oregon Legal Services helped two tribes obtain federal recognition, and Alaska Legal Services obtained federal recognition for Aroostook Band of Micmacs. Michigan Indian Legal Services helped five tribes gain federal recognition: the Grand Traverse Band of Ottawa and Chippewa Indians, Lac Vieux Desert Band of Lake Superior Chippewa Indians, Little River Band of Ottawa Indians, Little Traverse Bay Bands of Odawa Indians, and the Pokagon Band of Potawatomi Indians.

Indian Legal Services programs have also helped many tribes defend treaty rights, including Wisconsin Judicare helping to establish treaty hunting, fishing, and gathering rights in *Lac Courte Oreilles v Voight*;¹⁹ Leech Lake Reservation Project, now known as Anishinaabe Legal Services, in *Bryan v Itasca County*;²⁰ Dakota Plains Legal Services in *Hodel v Irving*;²¹ California Indian Legal Services in *Lyng v Northwest Indian Cemetery Protective Association*;²² and Native American Program, Oregon Legal Services in *Oregon Department of Employment v Smith*.²³

Indian Legal Services programs also put forth a great deal of time and resources defending and assuring the correct implementation of the Indian Child Welfare Act, which was enacted in 1978 after many years of effort by Indian tribes and Indian leaders to stem the loss of Indian children and culture due to the intervention of state child welfare authorities.²⁴ Congress found that “an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.”²⁵ Michigan Indian Legal Services has litigated a number of significant Indian Child Welfare Act cases. The Court of Appeals ruled that the act applied to a records case for an adoption that occurred before the effective date of the act.²⁶ Michigan will not adopt the judicially created Indian family exception to the act.²⁷ The Indian Child Welfare Act applies to guardianships where the parent cannot have the child returned upon demand.²⁸ The Michigan Indian Family Preservation Act applies to a removal from the respondent mother even if placed with the non-respondent father.²⁹

Indian Legal Services programs have become a vital part of tribal justice systems and accomplished many important benefits for Indian country with limited resources. ■

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ENDNOTES

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16. *Id.* at 15.
17. 25 USC 3651(10).
18. 25 USC 1302(a)(6).
19. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v Voight*, 700 F2d 341 (CA 7, 1983).
20. *Bryan v Itasca Co*, 426 US 373; 96 S Ct 2102; 48 L Ed 2d 710 (1976).
21. *Hodel v Irving*, 481 US 704; 107 S Ct 2076; 95 L Ed 2d 668 (1987).
22. *Lyng v Northwest Indian Cemetery Protective Assoc*, 485 US 439; 108 S Ct 1319; 99 L Ed 2d 534 (1988).
23. *Oregon Dept of Employment v Smith*, 494 US 872; 110 S Ct 1595; 108 L Ed 2d 876 (1990).
24. 25 USC 1901 *et seq.*
25. 25 USC 1901(4).
26. *In Re Hanson*, 188 Mich App 392; 470 NW2d 669 (1991).
27. *In re Elliott*, 218 Mich App 196; 554 NW2d 32 (1996).
28. *Empson-Lavolette v Crago*, 280 Mich App 620; 760 NW2d 793 (2008).
29. *In re Detmer/Beaudry*, 321 Mich App 49; 910 NW2d 318 (2017).