

KEWEENAW BAY INDIAN COMMUNITY

Keweenaw Bay Tribal Center
16429 Beartown Road
Baraga, Michigan 49908
Phone (906) 353-6623
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2017 TRIBAL COUNCIL

WARREN C. SWARTZ, JR., President
JENNIFER MISEGAN, Vice President
SUSAN J. LAFERNIER, Secretary
TONI J. MINTON, Assistant Secretary
DOREEN G. BLAKER, Treasurer

ROBERT "R.D." CURTIS, JR.
FRED DAKOTA
RANDALL R. HAATAJA
MICHAEL F. LAFERNIER, SR.
GARY F. LOONSFOOT, JR.
RODNEY LOONSFOOT
ELIZABETH D. MAYO

MINUTES
KEWEENAW BAY INDIAN COMMUNITY
REGULAR COUNCIL MEETING
OJIBWA CASINO RESORT CONFERENCE ROOM
SATURDAY – JUNE 3, 2017 – 9:00 A.M.

APPROVED
6-15-17

- A. Date: June 3, 2017
- B. Call to Order: President Swartz called the meeting to order at 9:07 a.m.
- C. Invocation: Lord's Prayer and prayers for community members in need
- D. Roll Call: Present: Warren C. Swartz, Jr., President
Jennifer Misegan, Vice President
Susan J. LaFernier, Secretary
Toni J. Minton, Assistant Secretary
Doreen G. Blaker, Treasurer
Robert R.D. Curtis, Jr.
Fred Dakota (left at 10:42 a.m.)
Randall R. Haataja
Michael F. LaFernier, Sr.
Gary F. Loonsfoot, Jr.
Rodney Loonsfoot
- Absent: Elizabeth D. Mayo
- E. Declaration of Quorum: President Swartz declared a quorum present and proceeded with the order of business.
- F. Approval of Agenda: June 3, 2017

Move Old Business 1. Gary Loonsfoot, Jr., Director of Cultural Resources – b) Ojibwa Language Instructor Acquisition/Development Plan to FYI 9.

MOTION MADE BY JENNIFER MISEGAN TO APPROVE THE AGENDA WITH THE CHANGE. SUPPORTED BY MICHAEL F. LAFERNIER, SR. TEN IN FAVOR (Jennifer Misegan, Susan J. LaFernier, Toni J. Minton, Doreen G. Blaker, Robert R.D. Curtis, Jr., Fred Dakota, Randall R. Haataja, Michael F. LaFernier, Sr., Gary F. Loonsfoot, Jr., Rodney Loonsfoot), OPPOSED - 0, ABSTAINING - 0, ONE ABSENT (Elizabeth D. Mayo), MOTION CARRIED.

G. For Your Information:

1. A "Thank you" from the Marquette Regional History Center for a donation
2. A "Thank you" from Jacklyn Lenten for a 2017 Education in Excellence scholarship sponsorship (Marquette)
3. A "Thank you" from Carla Champagne, Camp New Day U.P. Board Member for a donation
4. A "Thank you" from Sonja Welch for a donation for her Medlife trip to Peru
5. Marquette Casino Project KBIC Town Hall Meeting at the Chocoday Township Hall on June 13, 2017 from 6:00 to 9:00 p.m.
6. Casino Projects Design Review with Sam Olbekson of Cuningham on June 28, 2017 in the Ojibwa Casino Resort Conference Room at 9:00 a.m.
7. Voigt Intertribal Task Force Meeting Minutes April 6, 2017 Lac du Flambeau, Wisconsin
8. Immediate Family: Funeral and Sick Leave Sections – Personnel Policy Manual and Casinos/Enterprises Manual (Final copy)
9. Ojibwa Language Instructor Acquisition/Development Plan (Gary Loonsfoot, Jr. will bring this back during budgets)

H. President's Report/May 2017 – available for your review

MOTION MADE BY MICHAEL F. LAFERNIER, SR. TO APPROVE THE MAY 2017 PRESIDENT'S REPORT. SUPPORTED BY RANDALL R. HAATAJA. TEN IN FAVOR (Jennifer Misegan, Susan J. LaFernier, Toni J. Minton, Doreen G. Blaker, Robert R.D. Curtis, Jr., Fred Dakota, Randall R. Haataja, Michael F. LaFernier, Sr., Gary F. Loonsfoot, Jr., Rodney Loonsfoot), OPPOSED - 0, ABSTAINING - 0, ONE ABSENT (Elizabeth D. Mayo), MOTION CARRIED.

I. Vice President's Report/May 2017 – Verbal Report

MOTION MADE BY MICHAEL F. LAFERNIER, SR. TO APPROVE THE MAY 2017 VICE PRESIDENT'S REPORT. SUPPORTED BY TONI J. MINTON. TEN IN FAVOR (Jennifer Misegan, Susan J. LaFernier, Toni J. Minton, Doreen G. Blaker, Robert R.D. Curtis, Jr., Fred Dakota, Randall R. Haataja, Michael F. LaFernier, Sr., Gary F. Loonsfoot, Jr., Rodney Loonsfoot), OPPOSED - 0, ABSTAINING - 0, ONE ABSENT (Elizabeth D. Mayo), MOTION CARRIED.

J. Secretary's Report/May 2017 – available for your review

MOTION MADE BY TONI J. MINTON TO APPROVE THE MAY 2017 SECRETARY'S REPORT. SUPPORTED BY JENNIFER MISEGAN. TEN IN FAVOR (Jennifer Misegan, Susan J. LaFernier, Toni J. Minton, Doreen G. Blaker, Robert R.D. Curtis, Jr., Fred Dakota, Randall R. Haataja, Michael F. LaFernier, Sr., Gary F. Loonsfoot, Jr., Rodney Loonsfoot), OPPOSED - 0, ABSTAINING - 0, ONE ABSENT (Elizabeth D. Mayo), MOTION CARRIED.

K. Department Head Reports/April 2017

MOTION MADE BY SUSAN J. LAFERNIER TO APPROVE THE APRIL 2017 DEPARTMENT HEAD REPORTS. SUPPORTED BY TONI J. MINTON. NINE IN FAVOR (Jennifer Misegan, Susan J. LaFernier, Toni J. Minton, Doreen G. Blaker, Robert R.D. Curtis, Jr., Fred Dakota, Randall R. Haataja, Gary F. Loonsfoot, Jr., Rodney Loonsfoot), OPPOSED - 0, ONE ABSTAINING (Michael F. LaFernier, Sr.), ONE ABSENT (Elizabeth D. Mayo), MOTION CARRIED.

L. Recognize Scheduled Delegation/Individuals:

1. Joe Derocha, Democratic State Representative Candidate for the 109th Michigan State House District (Seat of Representative John Kivela) Election – August 8, 2017

[The Council had a photo shoot with Mr. Derocha]

Break: 10:07 – 10:19 a.m.

M. Old Business:

1. Gary Loonsfoot, Jr., Director of Cultural Resources – Vehicle Purchase Bids (4)

MOTION MADE BY MICHAEL F. LAFERNIER, SR. TO APPROVE THE BID FROM FOX NEGAUNEE FOR A 2017 CHEVY SILVERADO 2500HD IN THE AMOUNT OF \$35,232.44. SUPPORTED BY RODNEY LOONSFOOT. NINE IN FAVOR (Jennifer Misegan, Susan J. LaFernier, Toni J. Minton, Doreen G. Blaker, Robert R.D. Curtis, Jr., Fred Dakota, Randall R. Haataja, Michael F. LaFernier, Sr., Rodney Loonsfoot), OPPOSED - 0, ONE ABSTAINING (Gary F. Loonsfoot, Jr.), ONE ABSENT (Elizabeth D. Mayo), MOTION CARRIED.

Gary will submit a THPO budget modification for the vehicle purchase.

N. New Business:

1. Doreen Blaker, Treasurer – Donations/June 2017 (includes a Marquette Hardship Fund and 2% approval)

Fred Dakota left at 10:42 a.m.

MOTION MADE BY RODNEY LOONSFOOT TO APPROVE THE JUNE 2017 DONATIONS AS THE FOLLOWING: \$150.00 FOR THE ENTRY FEE TO THE 21ST ANNUAL MATT AHONEN MEMORIAL SOFTBALL TOURNAMENT, \$250.00 TOWARDS THE GIRL SCOUTS TRIP TO NEW YORK CITY REQUESTED BY TAYLOR KEMPPAINEN, \$500.00 TO THE NATIVE AMERICAN RIGHTS FUND, \$1,000.00 TO THE TRILLIUM (HOSPICE) HOUSE, \$500.00 TO THE U.P. DIABETES OUTREACH NETWORK, \$1,321.00 TOWARDS THE PURCHASE OF A VIDEO MAGNIFIER FROM ESCHENBACH FOR GLENDA HAMALAINEN TO BE PAID FROM THE MARQUETTE HARDSHIP FUND, \$1,000.00 TO THE JOE DEROGA FOR STATE REPRESENTATIVE CAMPAIGN, AND \$2,500.00 TO THE TRAIL RIDERS ENTHUSIAST ALLIANCE OF MARQUETTE COUNTY (T.E.A.M.) FOR THE PURCHASE OF A UTILITY TRAILER TO BE PAID FROM ADVANCE 2% FUNDING PENDING A GOVERNMENT PASS-THROUGH. SUPPORTED BY TONI J. MINTON. EIGHT IN FAVOR (Jennifer Misegan, Susan J. LaFernier, Toni J. Minton, Doreen G. Blaker, Robert R.D. Curtis, Jr., Randall R. Haataja, Michael F. LaFernier, Sr., Rodney Loonsfoot), OPPOSED - 0, ONE ABSTAINING (Gary F. Loonsfoot, Jr.), TWO ABSENT (Fred Dakota, Elizabeth D. Mayo), MOTION CARRIED.

O. Adjournment:

MOTION MADE BY MICHAEL F. LAFERNIER, SR. TO ADJOURN AT 10:54 A.M. SUPPORTED BY ROBERT R.D. CURTIS, JR. NINE IN FAVOR (Jennifer Misegan, Susan J. LaFernier, Toni J. Minton, Doreen G. Blaker, Robert R.D. Curtis, Jr., Randall R. Haataja, Michael F. LaFernier, Sr., Gary F. Loonsfoot, Jr., Rodney Loonsfoot), OPPOSED - 0, ABSTAINING - 0, TWO ABSENT (Fred Dakota, Elizabeth D. Mayo), MOTION CARRIED.

Respectfully submitted,



Peggy Loonsfoot
Administrative Specialist

AGENDA
KEWEENAW BAY INDIAN COMMUNITY
REGULAR COUNCIL MEETING
OJIBWA CASINO RESORT CONFERENCE ROOM
SATURDAY – JUNE 3, 2017 – 9:00 A.M.

A. Date: June 3, 2017

B. Call to Order:

C. Invocation: Lord's Prayer

D. Roll Call:

- ___ Warren C. Swartz, Jr., President
- ___ Jennifer Misegan, Vice President
- ___ Susan J. LaFernier, Secretary
- ___ Toni J. Minton, Assistant Secretary
- ___ Doreen G. Blaker, Treasurer
- ___ Robert R.D. Curtis, Jr.
- ___ Fred Dakota
- ___ Randall R. Haataja
- ___ Michael F. LaFernier, Sr.
- ___ Gary F. Loonsfoot, Jr.
- ___ Rodney Loonsfoot
- ___ Elizabeth D. Mayo

E. Declaration of Quorum:

F. Approval of Agenda: June 3, 2017

G. For Your Information:

1. A "Thank you" from the Marquette Regional History Center
2. A "Thank you" from Jacklyn Lenten
3. A "Thank you" from Carla Champagne, Camp New Day U.P. Board Member
4. A "Thank you" from Sonja Welch
5. Marquette Casino Project KBIC Town Hall Meeting at the Chocolay Township Hall on June 13, 2017 from 6:00 to 9:00 p.m.
6. Casino Projects Design Review with Sam Olbekson of Cuningham on June 28, 2017 in the Ojibwa Casino Resort Conference Room at 9:00 a.m.
7. Voigt Intertribal Task Force Meeting Minutes April 6, 2017 Lac du Flambeau, Wisconsin
8. Immediate Family: Funeral and Sick Leave Sections – Personnel Policy Manual and Casinos/Enterprises Manual (Final copy)

H. President's Report/May 2017

I. Vice President's Report/May 2017

J. Secretary's Report/May 2017

K. Department Head Reports/April 2017

L. Recognize Scheduled Delegation/Individuals:

1. Joe Derocha, Democratic State Representative Candidate for the 109th Michigan State House District

M. Old Business:

1. Gary Loonsfoot, Jr., Director of Cultural Resources –
 - a) Vehicle Purchase Request/Budget Modification
 - b) Ojibwa Language Instructor Acquisition/Development Plan

N. New Business:

1. Doreen Blaker, Treasurer – Donations/June 2017

O. Adjournment:

President Report

May 2017

The following activities occurred within the office of the President for the month of May 2017.

- We've been notified by GLIFWC that we were contacted by Trevor Vandyke the Tribal Coordinator for the Michigan Department of Natural Resources (MDNR) regarding a Michigan Commercial Fishing Statute presentation. The presentation overviews a process the MDNR has begun to review, rewrite, improve and find common ground for the regulatory structure of the State Commercial fishing industry. Apparently, they would like to provide a presentation on their proposed commercial fishing statute changes to the Lakes Committee organized under GLIFWC. At the proposed meeting MDNR will be made aware that presenting to the Lake Committee would be to complement what individual tribes would like to do and is not intended to, nor should it be construed as, precluding communicating directly with individual tribes that would want to meet face to face with the MDNR regarding this initiative pursuant to the tribes sovereign prerogatives. I asked around about how the CORA feel about their meeting with the state and an attorney from Bay Mills responded by saying that nothing has been introduced as a bill in the Michigan legislature and all they were provided with was a copy of a PowerPoint prepared by MDNR.
- We continue to meet with the Lac Vieux Desert conservation committee regarding ongoing discussions about Indians exercising their treaty rights here in Michigan's portion of the 1842 Treaty. At the last meeting I attended, a discussion took place about jurisdictional authority, a definition of close economic ties and residency. The next meeting is scheduled for June 12.
- I provided a letter, as requested by councilor Rodney Loonsfoot, to the Michigan Veteran's Affairs Agency. The purpose of the letter is to nominate him to serve as a veteran representative under the U.S. Department of Veterans Affairs accreditation program and to project that he would serve a minimum of 1000 hours per year.
- It was an honor to be able to speak at the Keweenaw Bay Ojibwa Community College's Graduation ceremony, this year 10 diplomas were handed out and about 17 correctional certificates.
- Earlier in the month, I attended a United Tribes Meeting in Sault Ste. Marie, MI. One of the guests was the Honorable Jack Bergman, Congressman MI District One. He advised that he is willing to work with the Indian Tribes in his district.
 - In addition, we approved a resolution condemning the use of the term "redskins" in Michigan schools, and supports the Michigan State Board of Education Superintendent authority to discipline any Michigan school that uses race-based sports names and associated imagery and activities in a manner harmful to Native American Students. The derogatory term "redskins" degrades and diminishes Native people throughout the history of the United States as documented in study after study and related by personal experiences of Native people in Indian Country and beyond. The negative effects on our children and our Native communities are long-lasting and detrimental to the positive self-esteem necessary to maintain the high quality of life that is the goal of thoughtful people everywhere. There are 45 high schools in Michigan using mascots, logos, or

nicknames including six in the Upper Peninsula. What can we do to support Native people and their efforts to change attitudes and the use of stereotypes?

1. Consult with your Student Government representatives.
 2. Write your Principal.
 3. Write your Superintendent.
 4. Write your Board of Education.
- We discussed the Supreme Court's Decision in Lewis v. Clarke and the future of Tribal Sovereign Immunity. The document was provided by Brian Pierson of Godfrey & Kahn, S.C. and is included for Tribal Council review. Brian also gave an overview of the Winter's Doctrine and how GLIFWC could use this theory to reserve water for flow, use and quality especially in rice beds.
 - Stacey Tadgerson recognized the work and accomplishments of Joanne Racette; in addition, on behalf of the department she offered her condolences to the family. We also discussed tribal access issues with the Michigan Department of Health and Human services (MDHHS) regarding Indian children. When brought to the attention of MDHHS they responded by saying the applicability of 25 USC 3205 does not apply to further information sharing than is already occurring in Michigan. We'll continue to monitor this for the benefit of children and families we serve.
 - We requested again with the Michigan Department of Civil Rights Commission full funding for the Indian tuition program here in Michigan including the KBOCC.
- I also participated in an Inter-Tribal Council of Michigan meeting via teleconference. Election of officers took place and I was re-elected to the position of Vice-Chair. A number of items were discussed including a discussion of opioids and what we can do to help addicts. I learned that the State of Michigan has set aside some money for tribes and the funds can be integrated into the ATR program. This money would help to keep funding in place for ATR for another year and it may extend for another six months. An opioid summit was also discussed possibly occurring later this year.
 - In the middle of the month, I attended an informational meeting related to the Eagle Mine at Humboldt township hall. Some of the questions posed to the staff of Lundin mining were about adequate financial resources, carrying capacity of the mill, cumulative impacts and Eagle east mining permit.
 - I attended training on the National Environmental Policy Act (NEPA) at the Chippewa conference room here at the Casino. This was a 2-day training event and included information of when an Environmental Assessment (EA) or and Environmental Impact Assessment (EIS) and who determines when it's required.
 - The assistant CEO is working on a new process in selecting potential awards of Indian Health Services in regards to water and sewer projects. The new process would be based on qualifications rather than price.
 - I participated in an employee survey and received the results of the survey for the Office of the President. Based on the results of the survey the Office of the President needs to work on keeping politics out of the day to day affairs of the people I supervise. I will work on it.
 - This concludes my report.

United Tribes of Michigan
May 11, 2017, Sault Sainte Marie, Michigan
Kewadin Casino Conference Center

**The Supreme Court's Decision in Lewis v. Clarke and the
Future of Tribal Sovereign Immunity**

Brian Pierson
Godfrey & Kahn, S.C.
833 E. Michigan Street
Milwaukee, WI 53202
bpierston@gklaw.com
414 287 9456

I. THE FACTS

Clarke, an employee of the Mohegan Tribal Gaming Authority (Tribe), was engaged in his professional duties as a limousine driver for the Tribe when he allegedly caused a motor vehicle accident on Interstate 95 in Connecticut, injuring the Lewises. Normally, a plaintiff would sue the employer under a respondeat superior theory but the Lewises' lawyer, realizing the Tribe is immune, didn't do that. Instead, the Lewises sued Clarke individually in Connecticut state court, seeking money damages from him personally.

Clarke argued that he was protected by the Tribe's immunity, arguing that he was acting within the scope of his employment and that the Tribe was the real party in interest since, under Tribal law, the Tribe was required to indemnify any officer or employee "from financial loss ... arising out of any claim ... by reason of his or her negligence...if the Officer or Employee is found to have been acting in the discharge of his or her duties or within the scope of his or her employment." The Connecticut Supreme Court accepted Clarke's argument and dismissed, holding that Clarke shared the Tribe's immunity: "the plaintiffs cannot circumvent tribal immunity by merely naming the defendant, an employee of the tribe, when the complaint concerns actions taken within the scope of his duties and the complaint does not allege, nor have the plaintiffs offered any other evidence, that he acted outside the scope of his authority." The court expressly declined to follow the Ninth Circuit Court of Appeals decision in *Maxwell v. San Diego*, 708 F.3d 1075 (9th Cir.2013).

II. THE DECISION

In a unanimous decision handed down April 25th, 2017 WL 1447161 (U.S. 2017), the U.S. Supreme Court reversed the Connecticut Supreme Court, holding that Clarke was not protected by the Tribe's sovereign immunity:

Our cases establish that, in the context of lawsuits against state and federal employees or entities, courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit. ...If, for example, an action is in essence against a State even if the State is not a named party, then the State is the real party in interest and is entitled to invoke the Eleventh Amendment's protection. For this reason, an arm or instrumentality of the State generally enjoys the same immunity as the sovereign itself. ...Similarly, lawsuits brought against employees in their official capacity "represent only another way of pleading an action against an entity of which an officer is an agent," and they may also be barred by sovereign immunity.

The distinction between individual- and official-capacity suits is paramount here. In an official-capacity claim, the relief

sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself. ... "Personal-capacity suits, on the other hand, seek to impose individual liability upon a government officer for actions taken under color of state law." *Hafer*, 502 U.S., at 25, 112 S.Ct. 358 (emphasis added); see also *id.*, at 27–31, 112 S.Ct. 358 (discharged employees entitled to bring personal damages action against state auditor general); cf. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). "[O]fficers sued in their personal capacity come to court as individuals," *Hafer*, 502 U.S., at 27, 112 S.Ct. 358 and the real party in interest is the individual, not the sovereign.

...

In ruling that Clarke was immune from this suit solely because he was acting within the scope of his employment, the court extended sovereign immunity for tribal employees beyond what common-law sovereign immunity principles would recognize for either state or federal employees. See, e.g., *Graham*, 473 U.S., at 167–168, 105 S.Ct. 3099. The protection offered by tribal sovereign immunity here is no broader than the protection offered by state or federal sovereign immunity.

...

Indeed, we have applied these same principles to a different question before—whether a state instrumentality may invoke the State's immunity from suit even when the Federal Government has agreed to indemnify that instrumentality against adverse judgments. In *Regents of Univ. of Cal.*, an individual brought suit against the University of California, a public university of the State of California, for breach of contract related to his employment at a laboratory operated by the university pursuant to a contract with the Federal Government. We held that the indemnification provision did not divest the state instrumentality of Eleventh Amendment immunity. 519 U.S., at 426, 117 S.Ct. 900. Our analysis turned on where the potential legal liability lay, not from whence the money to pay the damages award ultimately came. Because the lawsuit bound the university, we held, the Eleventh Amendment applied to the litigation even though the damages award would ultimately be paid by the federal Department of Energy. ... Our reasoning remains the same. The critical inquiry is who may be legally bound by the

court's adverse judgment, not who will ultimately pick up the tab. It is well established in our precedent that a suit against an arm or instrumentality of the State is treated as one against the State itself. See *Regents of Univ. of Cal.*, 519 U.S., at 429, 117 S.Ct. 900. We have not before treated a lawsuit against an individual employee as one against a state instrumentality, and Clarke offers no persuasive reason to do so now.

...

[footnote] There are, of course, personal immunity defenses distinct from sovereign immunity. E.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 811–815, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Clarke argues for the first time before this Court that one particular form of personal immunity is available to him here—official immunity. See *Westfall v. Erwin*, 484 U.S. 292, 295–297, 108 S.Ct. 580, 98 L.Ed.2d 619 (1988). That defense is not properly before us now, however, given that Clarke's motion to dismiss was based solely on tribal sovereign immunity. See *Travelers Casualty & Surety Co. of America v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 455, 127 S.Ct. 1199, 167 L.Ed.2d 178 (2007).

III. SOVEREIGN IMMUNITY POST-LEWIS V. CLARKE

A. *Official Immunity is Still Potentially Available as a Defense*

The US Solicitor's Office had filed an amicus brief arguing that sovereign immunity does not apply to suits brought against tribal officials and employees seeking no damages from the Tribe but that those defendants should be protected under federal common law by the doctrine of official immunity:

- Absolute immunity for officials acting in a legislative, judicial, prosecutorial or adjudicative capacity.
- "In the absence of an Act of Congress granting a broader immunity, the scope of official immunity for tribal employees should be governed by the federal common law of official immunity, reflecting the balance recognized by this court in its *Westfall* decision between benefits and costs of immunity." (p. 28)
- The existence of that waiver of sovereign immunity in tribal court cannot expand the scope of a generally applicable official-immunity defense for all tribal employees acting within the scope of their employment.
- Cases interpreting that exception have generally treated the choices involved in driving a motor vehicle as not "discretionary" in the operative sense. See, e.g., *United States v. Gaubert*, 499 U.S. 315, 325 n.7 (1991); *Dalehite*, 346 U.S. at 57-

58. And yet, some types of driving decisions may be sufficiently imbued with policy decisions so as to trigger the purposes of common-law immunity. The Virginia Supreme Court, for example, has concluded as a matter of state law that a driver may be entitled to immunity when taking on “special risks” while driving, “to effectuate a governmental purpose.” *McBride v. Bennett*, 764 S.E.2d 44, 47 (Va. 2014); see *id.* at 48 (holding that, under Virginia law, state officers who hit and killed a bicyclist while responding to a domestic-violence call were immune from suit). (p. 32-33)

B. Tribes May Need to Indemnify Officials and Employees from Liability for Suits Brought Against them for Acts within the Scope of their Duties

It has always been the case that plaintiffs could sue employees individually for their acts of negligence but it has also always been the case that suits are normally brought instead against the employer under the doctrine of *respondeat superior*. The Court’s decision may change this dynamic, exposing employees to greater liability which, in turn may impact tribes’ ability to recruit and retain a workforce and raise risk management and insurance issues. It may be necessary to indemnify employees for damages against them personally.

C. Plaintiffs Will Use *Lewis v. Clarke* to Attack Actions by Tribal Governments Officials

The district court’s decision in *Rabang v. Kelly*, 2017 WL 1496415 (W.D. Wash. 2017), handed down one day after *Lewis v. Clarke*, may be an indicator of the changed sovereign immunity landscape:

Defendants Kelly, George, Smith, Solomon, Johnson, and Canete are members of the Nooksack Indian Tribal Council that Plaintiffs classify as the “holdover council” as of March 24, 2016.... Defendants Dodge, King George, Romero, Edwards, and Armstrong are other actors within Nooksack tribal leadership and agencies. ...

Plaintiffs allege “Defendants’ scheme to defraud Plaintiffs and the federal government began with fraudulently preventing elections for over half of the eight” Nooksack Indian Tribal Council seats. ... The Nooksack Indian Tribal Council carries out tribal governance and consists of eight positions. ...

Plaintiffs allege the holdover council Defendants took these actions to preserve their ability to “carry out their scheme to defraud Plaintiffs of money, property, and benefits by depriving Plaintiffs of their Tribal membership, and to personally enrich themselves with hundreds of thousands of

dollars in salaries, stipends, and other benefits through federal contracts and grants.” ...

On March 28, 2016, the holdover council Defendants terminated Nooksack Tribal Court Chief Judge Susan Alexander “as she was in the final stage of preparing a ruling to compel [Defendants] to call the election for the four now expired and vacant [Nooksack Indian Tribal Council] seats.” (Id. at ¶ 39.) Plaintiffs allege she was “fraudulently replaced” by Defendant Dodge, previously the Nooksack Tribal Attorney. (Id.)

...

On February 2, 2017, Plaintiffs filed their amended complaint, alleging violations of the ***Racketeer Influenced and Corrupt Organizations Act (RICO)***. (Dkt. No. 7.) Defendants Kelly, George, Smith, Solomon, Johnson, Canete, King George, Romero, Edwards, and Armstrong filed this motion to dismiss for lack of subject matter jurisdiction and failure to state a claim. (Emphasis added.)

...

Defendants also argue that sovereign immunity bars Plaintiffs’ claims. Tribal sovereign immunity extends to individual tribal officers who are acting in their representative capacity and within the scope of their authority. ... However, the Supreme Court’s recent decision on this issue is dispositive. The Court held “when a suit is brought against a tribal employee in his individual capacity, the employee, not the tribe, is the real party in interest and the tribe’s sovereign immunity is not implicated.” *Lewis v. Clarke*, No. 15-1500, 581 U.S. — (April 25, 2017). Plaintiffs bring these allegations against Defendants in their personal capacities. (Dkt. No. 7 at ¶ 22.) Therefore, sovereign immunity is not a jurisdictional bar in this case.

D. Plaintiffs Will Rely on *Lewis v. Clarke* to Challenge the Immunity of Tribal Subsidiary Corporations

The U.S. Supreme Court has never addressed whether tribes’ subsidiary corporate entities share sovereign immunity. Lower courts have typically applied multifactor tests to determine whether the corporate entity is an arm of the tribe that should share its immunity. In *Cook v. Avi Casino Enterprises, Inc., et al.*, 548 F.3d 718 (9th Cir. 2008), for example, the Ninth Circuit Court of Appeals, for example, accorded immunity to a tribal corporation on the grounds that:

- (1) the corporation was created pursuant to a tribal ordinance and intergovernmental agreement;
- (2) the corporation was wholly owned and managed by the tribe;
- (3) the articles of incorporation require that all of the corporation's surplus revenue flow into the tribal treasury;
- (4) a majority of the corporation's board must be tribal members; and
- (5) the tribal council exercises shareholder rights.

Similar factors were cited in a recent Tenth Circuit decision acknowledging the sovereign immunity of tribal subsidiary entities. *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010). See also, *Memphis Biofuels LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917 (6th Cir. 2009). Several state courts have adopted similar tests.

Thus far, the tribal "arm of tribe" jurisprudence has not depended on the extensive "are of the state" body of law that addresses which instrumentalities share the immunity of the states. That will likely change. The "arm of the state" jurisprudence is varied but seems generally less favorable to sovereign immunity than the prevailing "arm of the tribe" jurisprudence:

- In *Town of Smyrna, Tenn. v. Municipal Gas Authority of Georgia*, 723 F.3d 640, 650-651 (6th Cir. 2013), the Sixth Circuit upheld the district court's conclusion that the Municipal Gas Authority of Georgia was not an arm of the state. Factors cited were that the Authority was responsible for its own expenses and judgments, selected its own leadership, and engages in a commercial activity rather than a state-mandated function.
- In *Raj v. Louisiana State University*, 714 F.3d 322, 328-329 (5th Cir. 2013), the Fifth Circuit held that the Governing board of Louisiana State University was an arm of the state on the grounds that State law characterized it as such, it is part of the executive branch of state government, receives funding from the state, it must dispense donations pursuant to state law, it pays judgments from state funds, it is directly controlled by executive branch officials, it has a state-wide purpose and has the right to sue and be sued and to hold property in its own name.
- In *Tucker v. Williams*, 682 F.3d 654, 659 (7th Cir. 2012), the Seventh Circuit held: "To determine if a particular entity is a state agency, i.e., an arm of the state, courts look at: (1) the extent of the entity's financial autonomy from the state; and (2) the 'general legal status' of the entity. Of the two, the entity's financial autonomy is the 'most salient factor.'"

KEWEENAW BAY INDIAN COMMUNITY
TRIBAL COUNCIL

*May 2017 Report from the Secretary to the Council/Community
(for the June 3, 2017 Regular Meeting)*

ANIN! We honor the greatness in you

Remember: "Indian Country Counts"

"Our People, Our Nations, Our Future"

We continue to recognize the richness of Native American contributions, accomplishments, and sacrifices to the political, cultural, and economic life of Michigan and the United States

Remember to continue to pray for each other, our police officers, military, firefighters, and all emergency personnel. Also remember those who are ill, those with economic struggles, and all those who have lost loved ones.

*Happy Father's Day to all of our fathers here on Earth
and in Heaven!*

Thanks to everyone who cleaned the cemeteries for Memorial Day
and to our Veteran's for the programs.

Enjoy the Summer!

Mino-Bimaadizin "Live Well"

Respectfully, Susan J. LaFernier

During May, the Tribal Council held the Regular Saturday Meeting on May 6, and also (4) Special Council meetings. Following are the May 1, 6, 11, 18, 26, 2017 approved minutes. This report will be published in the KBIC "Wiikwedong Dazhi-Ojibwa" newsletter and the approved minutes can also be found on the Keweenaw Bay Indian Community Website.

May 1, 2017 Special (Work Session) Council Meeting (approved):

- Approved Chapter 135 Tribal Police In-Car Personal Digital Video In-Car Cameras and Body Worn Cameras Policy (to enhance safety and reporting accuracy)

- Approved the Tribal Police “Carrying/Administering Intranasal Naloxone (Narcan)” Policy and Procedure (to reduce fatal opioid overdoses)
- Approved the Adult Sea Lamprey Assessments at the Silver River, the Lake Trout and Fishery Resource Assessments in Lake Superior, the Judicial Services, and Tribal Permit Registration Station Services subcontracts with Great Lakes Indian Fish and Wildlife Commission
- Approved the business license renewal with Diana and Jason Chaudier for Woodland Firearms and Supply, LLC
May 15, 2017-May 14, 2018
- Approved the UpToDate on-line one year subscription contract addendum for authorization to use licensed materials for the management of clinical issues May 1, 2017 – April 30, 2018 for \$8,000.00
- Approved the Registered Dietitian Services Agreement for the Hannahville Indian Community WIC Program July 1, 2017 – June 30, 2018
- Approved the Proposal from Joseph Eve for professional services for the KBIC Gaming Commission and the Non-Disclosure Agreement
- Approved to continue with the Defined Benefit Plan changes as presented

May 6, 2017 Regular Council Meeting (approved):

- Approved the Tribal Council President’s Report for April 2017 (Warren C. Swartz, Jr.)
- Approved the Tribal Council Vice President’s Report for April 2017 (Jennifer Misegan)
- Approved the Tribal Council Secretary’s Report April 2017 (Susan J. LaFernier)
- Approved the CEO’s Report for April 2017 (Larry J. Denomie III)
- Approved the March 2017 Department Head Reports
- Approved the April 7, 13, 17, 18, 20, 27, 2017 Tribal Council meeting minutes

- Approved the Letter of Intent to enter into an Agreement for Power Supply Facilities (upgrade) with the Village of Baraga for the Ojibwa Casino Project
- Approved the Letter of Intent to enter into a Special Customer Electric Service Agreement for Power Supply Facilities (upgrade) with the Alger Delta Cooperative Electric Association, Inc. for the Marquette Casino Project
- Approved to table the Sick Leave Policies until the next meeting on May 11, 2017
- Approved the modification addendum to the Thomson Reuters for the Westlaw Research Account Agreement adding Kevin Carlisle to the tribal attorney account
- Approved the bid from the L'Anse Furniture Mart for \$12,629.00 for carpet and tile replacement for the New Day Substance Abuse Services Facility
- Approved the use of the roads requested by the Baraga County Community Foundation for the annual Denise Marth Memorial Fun Run on June 24, 2017
- Approved the May 2017 Donations: \$1,000.00 for travel expenses for Serene Smith if she attends the 41st Annual National Indian Timber Symposium in Washington and one gift basket for the event; \$150.00 to the Baraga Educational Support Team for the Family Fun Walk-Run Event; \$500.00 to each Tribal member and \$250.00 for each Tribal direct descendent attending the Baraga High School Physics class trip to Chicago on May 12th

May 11, 2017 Special Council Meeting (approved):

- Approved the Emergent Foster Care Fund Policy for unlicensed caregivers for children typically in a relative placement
- Approved the Social Services Specialist job description, to post the position, and the budget modification request
- Approved to change the Dental Hygienist wage to a Grade 10 which will be the same as the nurses
- Approved the food service and restaurant business license renewal for the Lucky 7's Restaurant with John Gervais
- Approved the TD Safe Haven Horse Rescue and Therapy business license renewal with Crystal Geroux

- Approved the Tier III Services Agreement with the L'Anse Furniture Mart for the carpet and tile replacement at the New Day Substance Abuse Services Facility for \$12,629.00
- Approved Resolution KB 020-2017 which cancels a residential lease with Suzanne L. BATTERY-JONDREAU and grants to Alisha L. Swartz
- Approved Resolution KB 021-2017 which cancels a residential lease with Clyde D. Swartz, Barbara J. Swartz, her four adult children, her adult grandson and grants to Damian C. Swartz
- Approved Resolution KB 022-2017 ICDBG Solar Energy Solutions Project grant application for the KB Natural Resources Department \$600,000.00 HUD and \$200,000.00 in-kind match
- Approved Resolution KB 023-2017 which modifies a residential lease with Leonard W. Cardinal and Julia A. Cardinal and grants a split residential lease with Lynelle S. Bolo
- Defeated a motion to approve the 11.0 Sick Leave/12.0 Request for Leave/12.2 Leave Sharing Policies as presented (tabled from the May 6, 2017 meeting)
- Approved the amended 11.0 Sick Leave/12.0 Request for Leave/12.2 Leave Sharing Policies but to allow the employees to donate their accrued sick leave time in excess of 480 hours (proposal was 720)

May 18, 2017 Special Council Meeting (approved):

- Approved the May 6 and May 11, 2017 Tribal Council meeting minutes
- Approved the Treaty Rights Farming License renewal for "Ma Hog Farm" with Brenda Turunen for five years
- Approved a new business license with Troy LaFERNIER for "Troy's Tires and Repair"
- Approved Resolution KB 024-2017 Estate of Martha M. Dakota residential lease transfer to identified heirs
- Approved Resolution KB 025-2017 G. Walter Leinonen Recreational Lease in L'Anse Township
- Approved Resolution KB 026-2017 Betsey A. Leinonen Recreational Lease in L'Anse Township

- Approved Resolution KB 027-2017 Anthony P. Loonsfoot Recreational Lease in L'Anse Township
- Approved Resolution KB 028-2017 Dale F. Goodreau Recreational Lease in L'Anse Township
- Approved Resolution KB 029-2017 Anthony M. LaBeau Recreational Lease in L'Anse Township
- Approved Resolution KB 030-2017 Ryan K. Szymanski Recreational Lease in L'Anse Township
- Approved a donation of \$8,000.00 to the Baraga County Lumberjack Days Committee for the Fourth of July fireworks

May 26, 2017 Special Council Meeting (approved):

- Approved the May 1, 2017 Tribal Council meeting minutes
- Approved Resolution KB 031-2017 Baraga 2% \$114,829.34
- Approved Resolution KB 032-2017 Marquette 2% \$138,419.72 pending the Superior Watershed Partnership pass through acceptance
- Approved a donation of \$1,000.00 and a gift basket for the spaghetti dinner fundraiser at the L'Anse High School on June 7th for Ariane Yoder's medical expenses
- Approved the Memorandum of Understanding with the Michigan Department of Health and Human Services regarding use of American Indian/Alaskan Native Behavioral Risk Factor Survey Data and to include the names of enrolled Tribal members 18 years of age and over and their telephone numbers
- Approved the renewal licenses for the Pines Convenience Center: Business license, Alcoholic Beverage License, and the License to Purchase and Sell Tobacco Products
- Approved the Law 360 Subscription Annual Contract for one year for the Tribal Attorney's Office
- Approved Resolution KB 033-2017 Amendment of Qualified Retirement Plan (401K) effective July 1, 2017