WISCONSIN LEGISLATIVE COUNCIL
STAFF MEMORANDUM

Memo No. 3

TO: MEMBERS OF THE SPECIAL COMMITTEE ON STATE-TRIBAL RELATIONS

FROM: Joyce L. Kiel, Senior Staff Attorney

RE: Criminal Jurisdiction in Indian Country

DATE: December 10, 2004

This Memo provides general background information about criminal jurisdiction in "Indian country."[1] It was prepared for the Special Committee on State-Tribal Relations in connection with the staff briefing and committee discussion of "Law Enforcement in Indian Country" that will occur at the committee meeting scheduled for December 17, 2004. (Additional materials relating to law enforcement authority will be provided to the committee at that meeting.) This Memo discusses: (1) state jurisdiction; (2) federal jurisdiction; (3) tribal jurisdiction; and (4) concurrent jurisdiction. It then provides tables summarizing criminal jurisdiction in Indian country in Wisconsin. This Memo does not discuss civil jurisdiction or civil regulatory jurisdiction in Indian country.

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[1] "Indian country" is defined in 18 U.S.C. s. 1151 as meaning:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

In Wisconsin, this appears to include all land on reservations and all off-reservation trust land.

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STATE JURISDICTION

As a general principle, states do not have criminal jurisdiction in Indian country unless: (1) authorized by Congress; or (2) in accordance with common law as established by the courts.[2]

Congressional Action--Public Law 280

One of the most significant Congressional actions with respect to criminal jurisdiction in Indian country was the enactment in 1953 of Public Law 280 (P.L. 280),[3] which mandated the transfer of criminal and civil jurisdiction[4] from the federal government to certain states with exceptions made for certain reservations. In addition, P.L. 280 established conditions and procedures under which the remaining states had the option of assuming jurisdiction.[5] (Since the enactment of the Indian Civil Rights Act in 1968, a tribe must consent to any future assumption by a state of jurisdiction under P.L. 280.)

Wisconsin was one of the five (later six) states to which this transfer of federal jurisdiction was mandated. However, an exception applies for the Menominee Reservation.[6] Thus, all reservations and off-reservation trust land in Wisconsin, except the Menominee Reservation, are subject to P.L. 280 (and are commonly referred to as P.L. 280 reservations); the state has criminal jurisdiction on them. The state is not authorized by P.L. 280 to exercise criminal jurisdiction on the Menominee Reservation (which is commonly referred to as a non-P.L. 280 reservation).

As amended, P.L. 280 authorizes the United States to accept a retrocession by any state of all or any part of the criminal or civil jurisdiction, or both, assumed by the state under P.L. 280.

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[2] However, if a violation of state criminal law occurs in the state ***outside Indian country***, state courts have exclusive jurisdiction to try the person, regardless of whether the perpetrator or victim is an American Indian (Indian). [*Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962).]

[3] Act of August 15, 1953, ch. 505, 67 Stat. 588 (s. 7 repealed and reenacted as amended 1968) (codified, as amended, at 18 U.S.C. s. 1162, 25 U.S.C. ss. 1321-1326 and 28 U.S.C. s. 1360).

[4] The U.S. Supreme Court has made clear that P.L. 280 did not transfer "civil regulatory" jurisdiction to the states. [*Bryan v. Itasca County*, 426 U.S. 373 (1976).] The U.S. Supreme Court set forth a test to determine if a state law is civil regulatory (not enforceable by the state under P.L. 280) versus criminal prohibitory (enforceable by the state under P.L. 280). The test looks to whether the state law intends to regulate conduct otherwise permitted or to prohibit the conduct because it violates state public policy. [*California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).] Applying this test to the facts of a particular state law does not provide a clear answer in every situation. Moreover, if the state law is deemed to be civil regulatory, court decisions (rather than a congressional enactment) generally determine whether and to whom the state civil regulatory law applies in Indian country.

[5] Congress also has passed statutes authorizing state criminal jurisdiction other than under P.L. 280, typically in connection with enactments relating to a specific tribe or state. None of these statutes applies in Wisconsin.

[6] Shortly after enactment of P.L. 280, Congress eliminated the Menominee Reservation exception and then, in 1954, enacted the Menominee Termination Act, thus making the issue irrelevant. In 1973, Congress repealed the Menominee Termination Act and enacted the Menominee Restoration Act. Wisconsin retroceded state jurisdiction over the Menominee Reservation to the federal government effective March 1, 1976. [See *Wisconsin v. Webste*r, 338 N.W.2d 474, 476-77 (Wis. 1983).]

Common Law Regarding Non-Indians

One significant development in case law relating to criminal jurisdiction in Indian country is a line of cases handed down by the U.S. Supreme Court which essentially provides that the ***state*** has jurisdiction for crimes committed on a reservation within the state when the crime is committed by a ***non-Indian against a non-Indian***.[7] [*United States v. McBratney*, 104 U.S. 621 (1881); *Draper v. United States*, 164 U.S. 240 (1896); *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946).] The so-called *McBratney* rule (providing state jurisdiction) is also generally considered to apply to victimless crimes when the perpetrator is a non-Indian.[8]

Thus, even in the absence of a congressional delegation of authority, such as P.L. 280, state courts have jurisdiction over a non-Indian for violation of a state criminal law in Indian country, ***including the Menominee Reservation***, if the victim is a non-Indian or if the crime is victimless.

Summary

In summary, the state has criminal jurisdiction: (1) in all Indian country in Wisconsin, except the Menominee Reservation; and (2) on the Menominee Reservation when only non-Indians are involved.

FEDERAL JURISDICTION

Federal officials may enforce violations of general federal criminal law (for example, treason or mail fraud) anywhere in the United States, including in Indian country. Such cases are prosecuted by federal prosecutors in federal courts.

Congress has created statutes establishing federal jurisdiction over certain crimes in Indian country that apply in certain circumstances, depending on the nature of the crime, the race of the perpetrator, and the race of the victim.[9] These statutes apply when jurisdiction has ***not*** been transferred to the state, for example, by P.L. 280. In Wisconsin, they apply only on the Menominee Reservation. The following statutes provide for such federal jurisdiction:

- ***Major Crimes Act.*** The Major Crimes Act provides for federal jurisdiction if an Indian commits any of the following crimes in Indian country: murder, manslaughter, kidnapping, maiming, felony sexual abuse, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, assault against an individual under 16 years of age, arson, burglary, robbery, and felony theft.

- ***General Crimes Act.*** The General Crimes Act (sometimes known as the Indian Country Crimes Act or the Federal Enclaves Act) provides for federal jurisdiction over certain "interracial crimes" occurring in Indian country, that is:

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[7] Although "non-Indian" is admittedly a less than elegant term, it is commonly used in court decisions and legal literature to refer to individuals who are not American Indian.

[8] If there is an impact on an individual Indian or tribal interest, this result is less clear. (However, if P.L. 280 applies, the state has jurisdiction.)

[9] Specialized federal criminal statutes relating specifically to Indians or tribal land, such as criminal enforcement of the Indian Gaming Regulatory Act, are beyond the scope of this Memo.

(1) When the perpetrator is non-Indian and the victim is Indian; and

(2) When the perpetrator is Indian and the victim is non-Indian--but only if the Indian perpetrator has not already been prosecuted under tribal law and only if a treaty did not provide that the tribe had exclusive jurisdiction over the crime involved. (If either of these two conditions exists, the tribe has exclusive jurisdiction.) (If the crime is listed under the Major Crimes Act, federal jurisdiction is under the Major Crimes Act, rather than the General Crimes Act.)

The General Crimes Act applies to Indian country the general criminal laws of the United States that apply on federal enclaves, for example, federal military installations or national parks. A component of those federal general criminal laws is the federal Assimilative Crimes Act which incorporates many state criminal laws into federal criminal law that applies on federal enclaves. State law is used to define the elements of the crime, but the crime itself is a federal crime, and prosecution is by federal prosecutors in federal courts. The application of the Assimilative Crimes Act to Indian country under the General Crimes Act is controversial but has generally been accepted by the federal courts.

TRIBAL JURISDICTION

Tribes have inherent power to enact tribal criminal laws and prosecute Indians in tribal court for violating those laws on its reservation or off-reservation trust land. A tribe may exercise this power unless it has been restricted by Congress, a treaty, or the courts. Some tribes have enacted tribal criminal laws, and other tribes may do so in the future or may expand their criminal code as they expand the capacity of their law enforcement agencies and courts.

Congressional and Case Law Limitations

Congress has limited the punishment that can be meted out by a tribe that exercises criminal jurisdiction, namely conviction for any one offense cannot result in imprisonment for a term greater than one year or a fine of $5,000, or both. [25 U.S.C. s. 1302 (7).]

The U.S. Supreme Court has held that tribes do not have inherent criminal jurisdiction over ***non-Indians*** and cannot assert such jurisdiction unless specifically authorized in a treaty or by Congress (which has not occurred). [*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).]

CONCURRENT JURISDICTION

State and Tribal

Concurrent criminal jurisdiction refers to the situation in which more than one government may exercise jurisdiction with respect to the same criminal behavior. A question not yet considered by the U.S. Supreme Court and for which there is not a definitive answer is whether there is concurrent tribal and state criminal jurisdiction on a P.L. 280 reservation, that is, whether P.L. 280 divested tribes of their inherent criminal jurisdiction over Indians. Many commentators believe that P.L. 280 did not do so and, thus, does not preclude concurrent tribal and state jurisdiction. This would mean that a tribe may exercise criminal jurisdiction for a violation of tribal criminal law with respect to an Indian who also

may be prosecuted by the state for a violation of state criminal law. [F. Cohen, *Handbook of Federal Indian Law*, 344-45 (1982); Jimenez and Song, *Concurrent Tribal and State Jurisdiction under Public Law 280*, Am. U.L. Rev 1627 (1998).][10]

Federal and Tribal

As for concurrent tribal and federal jurisdiction on non-P.L. 280 reservations (that is, on the Menominee Reservation), the U.S. Supreme Court has held that it is not a violation of the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution if a tribe prosecutes an Indian for violating a tribal criminal law and the same behavior has already resulted in a prosecution by the United States as a violation of federal criminal law. The rationale is that the tribe and the United States are separate sovereigns. [*United States v. Wheeler*, 453 U.S. 313 (1978); *United States v. Lara*, 541 U.S. 193 (2004).]

SUMMARY

The following two tables summarize criminal jurisdiction in Indian country in Wisconsin. The first applies to reservations and off-reservation trust lands, other than the Menominee Reservation; the second applies to the Menominee Reservation.

Table 1. Criminal Jurisdiction in Indian Country in Wisconsin Subject to P.L. 280 (That is, Reservations and Off-Reservation Trust Lands, Other Than the Menominee Reservation)

Perpetrator	Victim	Jurisdiction
Non-Indian	Non-Indian	Exclusive state jurisdiction.
Non-Indian	Indian	Exclusive state jurisdiction.
Non-Indian	Victimless	Exclusive state jurisdiction.
Indian	Non-Indian	State jurisdiction; possible concurrent tribal jurisdiction.

[10] Wisconsin has enacted s. 939.71, Stats., which provides that: "If an act forms the basis for a crime punishable under . . . a statutory provision of this state and the laws of ***another jurisdiction***, a conviction or acquittal on the merits under one provision bars a subsequent prosecution under the other provision unless each provision requires proof of a fact for conviction which the other does not require." (Emphasis added.) "Another jurisdiction" is not defined for purposes of this statute. It arguably would include a conviction in tribal court if the tribe were exercising concurrent criminal jurisdiction. Under this interpretation, if the tribal conviction occurred first and if the elements of the crimes were the same, the state could not prosecute the case. (Section 961.45, Stats., provides that if a violation of ch. 961, Stats. (Uniform Controlled Substances Act), is also a violation of a federal law or the law of another state and the person has been convicted or acquitted under federal law or the law of the other state, the person cannot be prosecuted by the State of Wisconsin. In contrast to s. 939.71, Stats., s. 961.45, Stats., clearly would not include a conviction in tribal court.)

Perpetrator	Victim	Jurisdiction
Indian	Indian	State jurisdiction; possible concurrent tribal jurisdiction.
Indian	Victimless	State jurisdiction; possible concurrent tribal jurisdiction.

Table 2. Criminal Jurisdiction on the Menominee Reservation

Perpetrator	Victim	Jurisdiction
Non-Indian	Non-Indian	Exclusive state jurisdiction.
Non-Indian	Indian	Exclusive federal jurisdiction under the General Crimes Act.
Non-Indian	Victimless	State jurisdiction; possible federal jurisdiction if there is a clear impact on an individual Indian or tribal interest.
Indian	Non-Indian	For major crimes, federal jurisdiction under the Major Crimes Act; possible concurrent tribal jurisdiction. For other crimes, tribal jurisdiction; federal jurisdiction under the General Crimes Act unless the perpetrator has already been prosecuted under tribal law or unless a treaty provides for exclusive tribal jurisdiction.
Indian	Indian	For major crimes, federal jurisdiction under the Major Crimes Act; concurrent tribal jurisdiction. For other crimes, exclusive tribal jurisdiction.
Indian	Victimless	Tribal jurisdiction (except if specific federal law, such as the Indian Gaming Regulatory Act, specifies otherwise); unresolved whether federal jurisdiction exists if a non-Indian is directly involved.

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