A faint, light-colored illustration of the Wisconsin State Capitol building, showing its iconic dome and classical architectural details like columns and a pediment. The illustration is centered in the background of the page.

WISCONSIN LEGISLATOR BRIEFING BOOK 2015-16

CHAPTER 26 – STATE- TRIBAL RELATIONS

The relationship of the 11 federally-recognized American Indian tribes and bands in Wisconsin to the state is not always well understood. This relationship, however, has been an important part of the fabric of the state for as long as the state has existed and has become increasingly important as tribal governments have grown in scope and sophistication. This chapter provides general background information on tribal governments in Wisconsin and their relationships with the state government.

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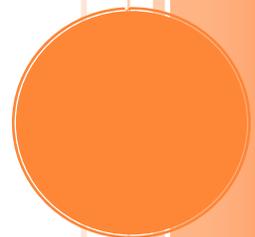


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INTRODUCTION

The 11 federally-recognized American Indian tribes and bands in Wisconsin have a unique relationship with the state. As entities that enjoy sovereign status under federal law, the tribes' relations with the state are governed by an evolving and intertwining patchwork of federal, tribal, and state law.

The tribes' sovereign status means that they enjoy a certain amount of autonomy and are empowered to govern themselves and promote their own cultural and economic development. The sovereignty of American Indian tribes, however, is not the same as the sovereignty of a nation-state or of a U.S. state. Members of American Indian tribes are also citizens of the United States and residents of the various states, entitled to the same rights and responsibilities as all other U.S. citizens.

Each tribe and band in Wisconsin has a distinct history. The Menominee Tribe traces its origins in these lands back thousands of years to the people of the Old Copper Culture. The Potawatomi and the various bands of Chippewa (also called Ojibwe) living in Wisconsin originated in other areas of the country, but migrated here prior to European settlement. The Oneida Nation and the Stockbridge-Munsee Band of Mohican Indians inhabited areas in the northeast and mid-Atlantic United States until after the Revolutionary War, but settled in Wisconsin after being displaced from their historical homelands. Ancestors of members of the Ho-Chunk Nation occupied land now in the State of Wisconsin prior to European settlement, were displaced from Wisconsin, but later voluntarily returned despite having to repurchase tribal lands they once owned.

The history of American Indian tribes and bands in Wisconsin, while rich and varied, has also been fraught with the consequences of government policies that deprived Native Americans of their lands, marginalized their culture, and relegated them to reservations that often lacked the resources to sustain them. The present-day relationship of the tribes and the state, then, is informed both by the legacies of these policies as well as by the mutual respect implicit in the relationship of one sovereign government to another.

AMERICAN INDIAN TRIBES IN WISCONSIN

There are 11 federally-recognized American Indian tribes¹ in Wisconsin. Each has its own government, land base, and membership. The following table indicates the name of each tribe, the county or counties in which its land base is located, the approximate number of acres of land the tribe owns, and the approximate number of enrolled members.

¹ The statutes typically refer to “federally recognized Indian tribes or bands in this state.” In this chapter, references to “American Indian tribes” or “tribes” refer to all of the federally-recognized tribes and bands.

Name of Tribe	Approximate Number of Enrolled Members (As of July 2011)	Wisconsin Counties in Which Reservation or Off-Reservation Trust Land is Located
Bad River Band of Lake Superior Chippewa Indians	6,945	Ashland, Iron
Forest County Potawatomi Community	1,400	Forest, Marinette, Milwaukee, Oconto
Ho-Chunk Nation	6,563	Adams, Clark, Crawford, Dane, Eau Claire, Jackson, Juneau, La Crosse, Marathon, Monroe, Sauk, Shawano, Vernon, Wood
Lac Courte Oreilles Band of Lake Superior Chippewa Indians	7,275	Burnett, Sawyer, Washburn
Lac du Flambeau Band of Lake Superior Chippewa Indians	3,415	Iron, Oneida, Vilas
Menominee Indian Tribe of Wisconsin	8,720	Menominee, Shawano
Stockbridge-Munsee Band of Mohican Indians	1,565	Shawano
Oneida Tribe of Indians of Wisconsin	16,567	Brown, Outagamie
Red Cliff Band of Lake Superior Chippewa Indians	5,312	Bayfield
St. Croix Chippewa Indians of Wisconsin	1,054	Barron, Burnett, Polk
Sokaogon Chippewa Community (Mole Lake)	1,377	Forest

Sources: Membership data is taken from “Tribes of Wisconsin,” prepared by the Department of Administration (DOA) (July 2011), and reflects information provided by each tribe.

Tribal Government

Every tribe in Wisconsin has a constitution that establishes the structure of its government. Each tribe has an elected legislative body, variously called a tribal council, tribal governing board, or business committee. Some tribal constitutions provide that certain issues must be voted on by the general membership of the tribe, rather than the elected governing body. Every tribe also has an elected executive, termed a chair or

Information about the tribal courts in Wisconsin, including the subject matter jurisdiction of each court, is available at:

<http://www.wtja.org>

president. In some tribes, the executive is elected by the tribe's general membership; in other tribes, the executive is elected by the tribal council. Each tribe also has a tribal court. The subject matter over which a tribal court has jurisdiction varies from tribe to tribe.

In addition to these decision-making bodies, each tribe has various administrative departments that deal with particular issues, including human services, child welfare, education, environment, business development, health, and transportation. Some tribal governments have law enforcement departments.

Tribal Membership

Each tribe has the authority to determine its own membership (typically called enrollment). Examples of criteria for membership include blood quantum requirements, ancestors on a specific roll, and patrilineal or matrilineal descent rules. Some individuals of Indian descent may not be eligible for membership in any tribe and some may be eligible for membership in more than one tribe.

Not all American Indians in Wisconsin are members of Wisconsin tribes. Some are enrolled in tribes outside the state and some are not enrolled in any tribe. Who is considered an American Indian depends on the circumstance for which the definition is employed. In some circumstances, such as the U.S. Census, American Indian status is based on self-identification. For the purposes of many state and federal programs, however, whether someone is an American Indian generally depends on whether the individual has: (1) a particular degree of Indian blood; and (2) is recognized by a tribe as a member.

According to data from the 2010 Census, 81,852 people in Wisconsin identify themselves as American Indian or Alaskan Native, either as one race or in combination with one or more other races. This represents 1.5% of the Wisconsin population. The majority of people who identify themselves as American Indian in Wisconsin do not live on reservations.

Tribal Consortia

GLITC

The Great Lakes Inter-Tribal Council (GLITC) is a consortium of the 11 federally-recognized tribes in Wisconsin plus the Lac Vieux Desert Tribe of Michigan. The GLITC Board of Directors is comprised of the tribal chair of each member tribe or the chair's designated representative. GLITC was originally devoted to delivering services and programs (such as health, aging, and economic development programs) to member tribes and to the rural Indian communities of Wisconsin. However, as many tribes have become increasingly capable of providing services to their own communities, GLITC's role has largely changed from direct delivery of services to assisting member tribes with the delivery of services and with supplementing member tribes' service capacities. GLITC's functions also include advocating for its member tribes and communicating with the state government about issues of concern to the tribes.

GLIFWC

The Great Lakes Indian Fish and Wildlife Commission (GLIFWC) represents 11 Chippewa bands in Minnesota, Wisconsin, and Michigan, including all six Wisconsin Chippewa bands. As will be discussed later in this chapter, when various Chippewa bands ceded territory in Wisconsin to the United States by treaty in 1837 and 1842, they reserved the right to hunt, fish, and gather on off-reservation public lands and territories throughout the ceded territories. In the 1980s, a series of federal court decisions approved the Chippewa bands' proposal to adopt an off-reservation code governing their members' exercise of those rights and to form an inter-tribal agency to enforce that code. GLIFWC is the agency the Chippewa bands created for this purpose.

In addition to developing and enforcing the off-reservation conservation code, GLIFWC also provides resource management expertise, legal and policy analysis, and education services. Further, GLIFWC wardens are included within the definition of "peace officer" and have many of the same responsibilities and protections that apply to other state peace officers. GLIFWC wardens may also make arrests for violations of state laws and render aid and assistance to Wisconsin peace officers under certain circumstances.

Other Consortia

In addition to the GLITC and GLIFWC, Wisconsin tribes have created various other inter-tribal groups that work on particular issues and may work in coordination with the GLITC. One example is the Tribal Aging Directors Association, which meets regularly to discuss issues related to the services the tribes provide to their elders.

INDIAN LANDS IN WISCONSIN

Most of the federally-recognized tribes in Wisconsin have a reservation; that is, land that the federal government has set aside for the use of the tribe. However, land within the

boundaries of these reservations may or may not belong to the tribe or tribal members. This is because the federal General Allotment Act of 1887 authorized the President to allot portions of reservations to individual Indians. Under the Act, the United States would hold the allotments in trust for 25 years; after that period, the land would be conveyed to the Indian in fee. For a variety of reasons, many of these allotments were sold once they were converted to fee status. This resulted in a substantial diminution of Indian-held land, and reservations being disaggregated into a “checkerboard” of jurisdictions.

Trust Land Versus Fee Land

As relevant here, trust land is land to which the United States holds title for the benefit of a tribe or individual American Indian. Trust land cannot be sold without the approval of the Secretary of the Interior, and is exempt from taxation by state and local government. By contrast, fee land is land to which a tribe, individual, or other entity holds title without restriction.² In general, fee land is subject to taxation by state and local government.

If a tribe or American Indian purchases land and holds the title in fee simple, the tribe or American Indian may petition the Secretary of the Interior to take the land into trust. An individual American Indian may only petition to convert fee land to trust land if the land is on or adjacent to a reservation or land that is already in trust or restricted status. A tribe, however, may petition to have any land it owns in fee converted to trust land. Federal regulations set forth the procedure and criteria the Secretary must use when determining whether to take land in trust.

Land tenure patterns on reservations in Wisconsin and around the United States vary greatly. For example, almost all of the Menominee Reservation is tribal trust land. By contrast, the vast majority of the Oneida Reservation is fee land, much of which is owned by non-Indians.

Off-Reservation Trust Land

Federal law permits a tribe to apply to have the United States take into trust land that it owns, even if the land is outside the boundaries of the tribe’s reservation. One reason tribes place off-reservation land into trust is because Indian gaming may only be conducted on a reservation or on trust land; however, a tribe may also petition to have off-reservation land placed in trust for other purposes.

The Secretary of the Interior has discretion in deciding whether to hold land in trust. Under federal regulations, the criteria the Secretary must use when making this decision vary depending on whether the land is within the boundaries of or contiguous to a tribe’s reservation or whether it is outside the boundaries of and noncontiguous to a reservation. The Secretary’s analysis also varies depending on whether the tribe intends to use the land

² There is another category of land status that is unique to American Indians. Restricted fee land is land which the tribe or tribal member holds title to in fee, subject to a federal patent that restricts alienation. For most purposes, such land is treated the same as trust land.

for gaming purposes. The process for placing off-reservation land trust for gaming purposes is discussed on pages 13-14 of this chapter.

TRIBAL SOVEREIGNTY

In very general terms, sovereignty refers to the right or power to govern, including the authority of a political entity to make its own laws and enforce those laws within its territory. The sovereign status of tribes is a matter of federal law.

The sovereignty of American Indian tribes is unique because it is not absolute. In an early U.S. Supreme Court case, Chief Justice John Marshall described the tribes' sovereignty as different from that of a foreign nation-state, terming the tribes "domestic dependent nations," a phrase courts have used frequently when discussing the tribes' sovereignty. Chief Justice Marshall wrote:

Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations.³

Under federal law, tribes retain those attributes of their original sovereignty that have not been: (1) given up in a treaty; (2) divested by an act of Congress; or (3) divested by implication as a result of their status as "domestic dependent nations." In general, the third category consists of areas in which federal courts have held that a particular aspect of sovereignty does not apply to a tribe. For example, in 1978 the U.S. Supreme Court held that a tribe, as a domestic dependent nation, could not impose a criminal penalty against a non-Indian for an alleged crime against an Indian on the tribe's reservation.⁴

Relation to Federal Government

The unique political status of American Indian tribes flows from their special relationship with the federal government. The genesis of this special relationship stems from federal policy extending back to the founding of the United States to treat Indian tribes as sovereign nations.⁵ This policy is expressed in two provisions of the U.S. Constitution: the first grants to Congress "the power...[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes"; the second grants to the President

³ *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

⁴ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

⁵ William C. Canby, Jr., *American Indian Law in a Nutshell*, 13 (West Publishing Co. 2009).

the power to make treaties, including Indian treaties, with the advice and consent of the Senate.⁶

The tribes' relationship with the federal government is most often described as a trust relationship. Chief Justice Marshall articulated this view when he wrote that as domestic dependent nations the tribes' relationship to the United States "resembles that of a ward to his guardian." Over time, this paradigm evolved into a framework that also justified the federal government's authority to exercise power over the tribes. For example, in 1886, the U.S. Supreme Court explained that because of the federal government's "course of dealing" with the tribes and the treaty promises it had made, the federal government owes the tribes "the duty of protection," and this obligation is accompanied by the concomitant power to carry out that duty.⁷

The parameters of the federal government's trust responsibility to the tribes are not well defined. The Supreme Court has held that this responsibility, in some of its aspects, establishes legally enforceable duties, particularly with regard to the Executive Branch. With regard to Congress, however, this responsibility is largely considered a moral or political obligation.

Relation to State Government

A tribe is not a political subdivision of a state. Therefore, unless Congress, a treaty, or a court decision specifies to the contrary, a state generally does not have jurisdiction over a tribe or over American Indians in Indian country. This means that a state may not enact legislation requiring a tribe to do anything unless Congress, a treaty, or court decision explicitly grants such power to a state. A state may, however, enact legislation permitting a tribe to do certain things if the tribe so chooses (for example, to administer a state program) or conditioning the receipt of state funds on certain actions by a tribe.

In Wisconsin, the state interacts extensively with the tribes located here. For example, state-mandated social services are administered by the counties in Wisconsin. As residents of the state, American Indians residing on reservations are eligible for these services. Tribes administer many of these programs for the residents of Indian reservations, using state funds and operating under state supervision.

Sovereign Immunity

Sovereign immunity refers to the principle that a government may not be sued without its consent. Courts have held that sovereign immunity applies to tribes and tribal business organizations just as it does to the federal and state governments. Like the federal and state governments, a tribe may also waive sovereign immunity.

In Wisconsin, the doctrine of sovereign immunity was most recently asserted by a tribe in *Koscielak v. Stockbridge-Munsee Community, D/B/A Pine Hills Golf Course & Supper Club*

⁶ U.S. Const. art. I, s. 8, and art. II, s. 2.

⁷ *United States v. Kagama*, 118 U.S. 375, 384-85 (1886).

(Wis. Ct. App. 2012). The issue in that case was whether a golf course and supper club the Stockbridge-Munsee Community operates could claim immunity against a tort claim brought by a patron of the business.

In *Koscielak*, the Wisconsin Court of Appeals observed that the sovereign immunity of Indian tribes generally extends to the tribe’s business arms and is a matter of federal law that cannot be abrogated by the states. Therefore, the court held that the tribe’s sovereign immunity extended to its golf course and supper club. [2012 WI App. 30, ¶¶7-9.]

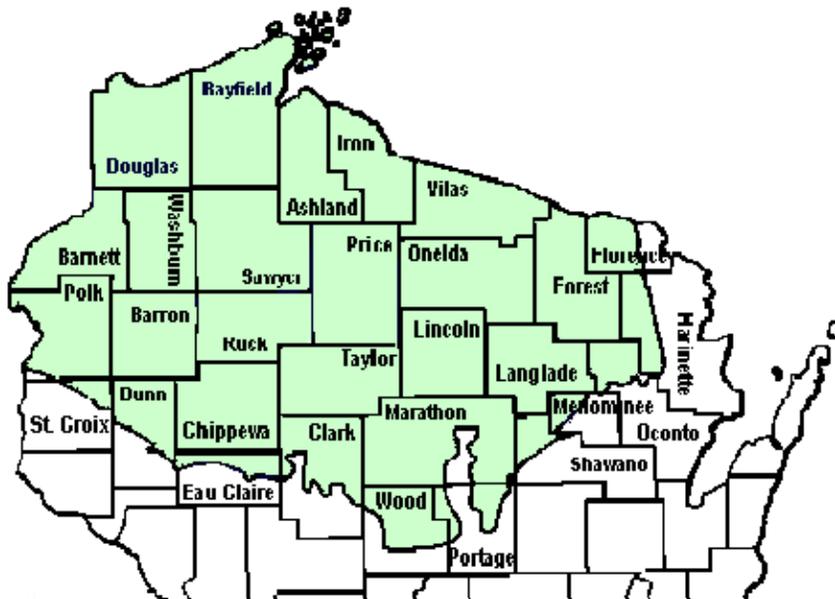
Treaties

Most tribes in the United States have entered into one or more treaties with the United States. In 1871, Congress effectively terminated the President’s authority to enter into future treaties with tribes. A treaty, however, remains in force until Congress abrogates it. Therefore, the terms of treaties made prior to 1871 generally remain relevant to analyzing the issues these treaties address. In Wisconsin, as will be discussed below, terms of treaties the Chippewa made with the United States in the mid-19th Century continue to impact contemporary state-tribal relations.

Chippewa Treaties

In 1836, 1837, 1842, and 1854, the Chippewa entered into treaties with the United States covering land in what is now northern Michigan, Minnesota, and Wisconsin. In the 1837 and 1842 treaties, the Chippewa reserved specified lands (“reservations”) but ceded other land to the federal government. In Wisconsin, this ceded territory covers approximately 22,400 square miles in the northern third of the state.

Territory in Wisconsin Ceded by Chippewas in 1837 and 1842 Treaties



Source: Wisconsin Department of Natural Resources (DNR).

In the treaties, the Chippewa reserved use rights, also called usufructuary rights, to hunt, fish, and gather within the ceded territory.

With the exception of Lake Superior fishing rights, the treaty rights were generally not exercised in Wisconsin until 1983, when the U.S. Court of Appeals for the Seventh Circuit, in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 (7th Cir.), affirmed the rights reserved in the treaties for Chippewa to hunt, fish, and gather in all public land within the ceded territory. Following the decision, 11 Chippewa bands, including six bands located in Wisconsin, established GLIFWC to help the member bands manage and enforce their treaty rights.

A series of subsequent federal judicial rulings further clarified the parameters of the treaty rights and the extent to which the state may regulate tribal hunting, fishing, and gathering in the ceded territory. The U.S. District Court for the Western District of Wisconsin held that the treaty rights include “rights to those forms of animal life, fish, vegetation and so on that [the Chippewa] utilized at treaty time” and that tribal members have the right to “use all of the methods of harvesting employed in treaty times and those developed since.” However, the court held that the rights “have been terminated as to all portions of the ceded territory that are privately owned as of the time of the contemplated or actual use of those rights.” For the purpose of its holding, the court clarified that “private lands” include lands that are privately held and that are not enrolled in the forest cropland or in the managed forest lands program (and not designated as closed).

With regard to state regulation of tribal members’ activities, the district court held that the state may regulate such activities in the interest of conservation and in the interest of public health and safety. The court also outlined rules governing the regulation of several specific resources, including walleye, muskellunge, and deer.

Over time, GLIFWC and member Chippewa bands have negotiated memoranda of understanding with the Wisconsin Department of Natural Resources (DNR) to coordinate the regulation of hunting, fishing, and gathering by tribal members in the ceded territory.

To date, courts have primarily interpreted Chippewa treaty rights in the context of direct restrictions on tribal members’ hunting, fishing, and gathering rights. In upholding such rights, the U.S. Supreme Court has noted that tribal treaty rights are “not inconsistent with state sovereignty over natural resources.”⁸ However, questions regarding whether treaty rights prevent the state from authorizing activities with potential environmental impacts on fish, wildlife, or wild rice generally have not been addressed by the courts.

JURISDICTION

Some of the most complex issues in Indian law concern questions of jurisdiction; that is, whether a particular government--federal, state, or tribal--has the authority to enforce a law in a given context against a particular person. This complexity arises because

⁸ *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 208 (1999).

jurisdiction in Indian country may vary depending on whether either party is an Indian and the location of the crime.

Criminal Jurisdiction

In Wisconsin, with one exception, the state has **criminal** jurisdiction over all land in Indian country. Under federal law, “Indian country” includes: (1) all lands within the limits of a reservation; (2) all dependent Indian communities; and (3) all Indian allotments.⁹

The exception to the general rule that the state has criminal jurisdiction over all land in Indian country is the Menominee Reservation. This is because all Wisconsin tribes except the Menominee are subject to Public Law 83-280, commonly referred to as P.L. 280. Passed by Congress in 1953, P.L. 280 transferred criminal jurisdiction in Indian country from the federal government to five states (later six states when Alaska was admitted to the Union), with exceptions for certain reservations. Wisconsin is one of the five states in which Congress transferred criminal jurisdiction to the states via P.L. 280. Federal recognition of the Menominee Tribe and Reservation was terminated in 1953; when the recognition was restored in 1973, the Menominee Reservation was not subjected to P.L. 280.

On the Menominee Reservation, criminal jurisdiction depends on the nature of the crime and the status of the perpetrator and victim. The following table illustrates the general scope of criminal jurisdiction on Indian land, such as the Menominee Reservation, that is not subject to P.L. 280.

**Criminal Jurisdiction on Non-P.L. 280 Reservations
(Menominee, in Wisconsin)**

	“Major” Crime (As defined by the Major Crimes Act)	All Other Crimes
Indian perpetrator, Indian victim	Federal jurisdiction (under Major Crimes Act) & tribal jurisdiction	Tribal jurisdiction
Indian perpetrator, Non-Indian victim	Federal jurisdiction (under Major Crimes Act) & tribal jurisdiction	Federal jurisdiction (under General Crimes Act) & tribal jurisdiction
Non-Indian perpetrator, Indian victim	Federal jurisdiction (under General Crimes Act)	Federal jurisdiction (under General Crimes Act)
Non-Indian perpetrator, non-Indian victim	State jurisdiction	State jurisdiction

Source: This table was prepared by the Tribal Law and Policy Institute (available at: <http://www.tribal-institute.org/lists/jurisdiction.htm>). A more detailed summary is available from the United States Department of Justice at: (http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00689.htm).

Civil Jurisdiction

With exceptions, the state also has **civil** jurisdiction over all land in Indian country. This is because in addition to transferring criminal jurisdiction to the state, P.L. 280 also transferred civil jurisdiction to the state, except with respect to the Menominee Reservation.

⁹ 18 U.S.C. s. 1151.

P.L. 280's grant of civil jurisdiction, however, is more limited than its grant of criminal jurisdiction. First, the civil jurisdiction conferred by P.L. 280 is adjudicatory, meaning that it pertains to civil actions involving the resolution of disputes, not civil actions involving the regulation of activities. Second, even where the state has civil adjudicatory jurisdiction, tribes may also often exercise concurrent jurisdiction.

On the Menominee Reservation, jurisdiction in civil cases depends on: (1) whether the claim arose on trust land or fee land; and (2) whether any of the parties belong to the Menominee Tribe.

On all reservations there may also be federal jurisdiction in some cases, for example because the plaintiff and defendant are not from the same jurisdiction or because a federal question is involved. In these cases, a tribal court might also have concurrent jurisdiction.

Civil Regulatory Jurisdiction

Greatly simplified, civil regulatory laws are laws that regulate conduct or activities that are not contrary to state public policy. Examples of civil regulatory laws are laws relating to taxation, and employment and workplace regulations.

Because civil regulatory laws, like criminal laws, regulate conduct, it is not always clear whether a particular law is a civil regulatory or criminal prohibitory law. There is no bright line test to resolve this question. Imposing a criminal penalty does not necessarily mean that a law is criminal prohibitory for purposes of analyzing jurisdiction under P.L. 280. Rather, courts generally look to whether a state prohibits certain conduct or permits it subject to regulation. "The shorthand test is whether the conduct at issue violates public policy."¹⁰

Applicability of State Civil Regulatory Laws. Absent an express federal law to the contrary, activities of American Indians and tribes outside of Indian country are subject to a state's nondiscriminatory civil regulatory laws. An example of an express law to the contrary is a treaty reserving off-reservation rights to hunt, fish, and gather. Generally, however, a state's civil regulatory laws do not apply to tribes or tribal members in Indian country.

States may assert civil regulatory jurisdiction over non-Indians on a reservation under certain circumstances, but they may assert jurisdiction over the activities of Indians for on-reservation activities only in exceptional circumstances.¹¹ A state must generally overcome two independent but related barriers to show that a state civil regulatory law applies to Indians in Indian country. First, the law must not be preempted by federal law. Second,

¹⁰ See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987) ("[I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation.").

¹¹ *Cabazon*, at 215 [citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983)].

the law may not “unlawfully infringe ‘on the right of reservation Indians to make their own laws and be ruled by them.’”¹²

Applicability of Tribal Civil Regulatory Laws. A tribe may exercise civil regulatory jurisdiction over its members on the tribe’s reservation or on off-reservation trust land. Tribes also have regulatory authority over the conduct of nonmembers on tribal lands.¹³

In very limited circumstances, a tribe may also regulate nonmembers on nonmember fee lands. These circumstances include regulation, “through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” Courts have also stated that a tribe may “exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”¹⁴ However, courts have construed these circumstances very narrowly.

INDIAN GAMING

In response to the growth of gaming on Indian lands in the 1980s, Congress passed the Indian Gaming Regulatory Act (IGRA) in 1988, which provides a framework for regulating gaming on Indian lands. For the purposes of IGRA, “Indian lands” means: (1) all lands within the exterior boundaries of an Indian reservation; (2) any lands that the United States holds in trust for the benefit of a tribe (tribal trust land) or individual American Indian; and (3) all lands held by a tribe or individual American Indian subject to restriction by the United States against alienation and over which a tribe exercises governmental power.¹⁵

IGRA divides Indian gaming into three classes, each of which is subject to different regulatory oversight. Class I gaming consists of social games for prizes of minimal value or traditional forms of gaming engaged in by individuals as part of, or in connection with, tribal ceremonies or celebrations. Class I gaming is not regulated by IGRA; tribes themselves may regulate Class I gaming.

Class II gaming consists of bingo, certain games similar to bingo if played at the same location as bingo, and certain card games if played under particular circumstances. Class II gaming is regulated by the National Indian Gaming Commission, which was established by IGRA.

Class III gaming consists of “all forms of gaming that are not Class I gaming or Class II gaming.”¹⁶ Generally, this includes the types of gaming typically associated with casinos, such as slot machines, roulette, and banked card games such as blackjack. A tribe may

¹² *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) [quoting *Williams v. Lee*, 217, 220 (1959)].

¹³ *Montana v. United States*, 450 U.S. 544, 564 (1981).

¹⁴ *Id.*, at 566.

¹⁵ 25 U.S.C. s. 2703 (4).

¹⁶ 25 U.S.C. s. 2703 (8).

conduct Class III gaming on Indian lands if: (1) it is located in a state that permits such gaming for any purpose by any person, organization, or entity; and (2) the gaming is conducted in accordance with a tribal-state compact.

Gaming Compacts

Governor Negotiates. Wisconsin statutes authorize the Governor to enter into compacts with tribes under IGRA.¹⁷ The Office of Indian Gaming, within the DOA, assists the Governor and the Secretary of Administration with gaming compact issues.

Each of the tribes in Wisconsin has entered into a compact with the state that permits the tribe to conduct Class III gaming. Among other details, the compacts outline the games that may be played and how they shall be conducted. Generally, the original compacts permitted electronic games of chance with video facsimile or mechanical displays, blackjack, and pull-tabs or break-open tickets when not played at the same location as bingo. The 2003 compact amendments authorized additional games, including craps, keno, and pari-mutuel wagering on live simulcast horse, harness, and dog racing events. In *Panzer v. Doyle*, the Wisconsin Supreme Court held that the Governor lacked the authority to permit these additional games. However, the Court later held -- in *Dairyland Greyhound Park, Inc. v. Doyle* -- that “gaming can be expanded to the extent that the State and Tribes negotiate for additional Class III games.”

Duration of Compacts. All of the original gaming compacts -- which were entered into on various dates in 1991 and 1992 -- were for terms of seven years. In 1998 and 1999, the compacts were amended and renewed for additional five-year terms. Compacts with 10 of the 11 tribes were amended and renewed again in 2003. (The 11th compact, with the Lac du Flambeau Band of Lake Superior Chippewa Indians, was automatically extended for five years from July 1, 2004 because neither the state nor the tribe sent a notice of nonrenewal.)

In the 2003 amendments, the provision in each compact that had permitted the state to give timely notice of nonrenewal at five-year intervals was deleted. Instead, the 2003 amendments specified that a compact remains in effect until terminated by mutual agreement of the tribe and the state or by the tribe revoking its own authority to conduct casino gaming.¹⁸

The compacts and compact amendments are available on the DOA Division of Gaming website, here:

<http://www.doa.state.wi.us/division/s/gaming/indian-gaming>

In *Panzer v. Doyle*, the Wisconsin Supreme Court invalidated the indefinite duration provision of the state’s compact with the Forest County Potawatomi Community, holding that the Governor lacked the authority to agree to a “perpetual contract.” In 2005, the state and the Forest County Potawatomi Community entered into a compact amendment

¹⁷ Section 14.035, Stats.

¹⁸ Three of the compacts were also amended to specify that if the provision allowing for indefinite compact terms were to be invalidated by a court, the compact term would be 99 years.

which substituted a 25-year term for the indefinite duration provision, specifying that renewal would occur automatically unless a notice of nonrenewal was served. Similar provisions were later added to the state's compacts with the Ho-Chunk Nation and the Lac du Flambeau Band of Lake Superior Chippewa Indians.

Off-Reservation Gaming

IGRA generally prohibits Type III gaming on land acquired in trust by the U.S. Secretary of the Interior (Secretary) after October 17, 1988 (the general effective date of IGRA), unless that land is located within or contiguous to the boundaries of the reservation of a tribe as those boundaries existed on October 17, 1988.¹⁹ Gaming may, however, be conducted on newly acquired off-reservation trust land if the Secretary, after consulting with appropriate state and local officials (including officials of nearby tribes) determines that gaming on the location would be in the best interest of the tribe and would not be detrimental to the surrounding community. Additionally, the Governor of the state in which the gaming is to be conducted must concur in the Secretary's determination. As with all Class III Indian gaming, Class III gaming authorized under this process must be conducted in accordance with the tribe's gaming compact with the state.

Information on the amounts tribes have paid to the states under the compact amendments, and how this revenue is spent, is available in the Legislative Fiscal Bureau's 2013 Informational Paper #88, *Tribal Gaming in Wisconsin* at:

<http://legis.wisconsin.gov/lfb>

More information on Indian Gaming is available in the Legislative Audit Bureau's Report 12-15, *An Evaluation, Division of Gaming, Department of Administration*, available at: <http://legis.wisconsin.gov/lab>

Payments to the State. In the initial compacts, the tribes agreed to collectively reimburse the state \$350,000 a year for the cost of regulating Indian gaming. Beginning in the 1998 and 1999 compacts, each tribe also agreed to make additional payments to the state. The payment amounts varied by tribe; however, in the first four years of payments, tribal payments averaged \$23.5 million annually. The 2003 amendments significantly increased tribal payments for those tribes with larger casino operations.

TRIBAL-STATE RELATIONS IN WISCONSIN

Executive Branch

On February 27, 2004, Governor Doyle issued Executive Order #39, affirming the government-to-government relationship between the state and the tribes in Wisconsin. This order requires Wisconsin's cabinet agencies, whenever feasible and appropriate, to consult the government of a tribe that is anticipated to be directly affected by an action of

¹⁹ 25 U.S.C. s. 2719 (a) (1).

the state agency. All of Wisconsin's cabinet agencies have implemented measures to comply with the order's directive. The Department of Transportation (DOT), for example, entered into a tribal partnership agreement with the 11 federally-recognized tribes, which is designed to facilitate communication between the tribes and the agency on issues of mutual importance.

In addition to this consultation process, Indian gaming serves as a significant point of contact for the executive branch and the tribes. As discussed in the previous section, Wisconsin law delegates to the Governor the responsibility to negotiate gaming compacts with the tribes. Also as discussed in the previous section, the Governor must concur in the Secretary of the Interior's determination before a tribe's off-reservation land may be taken into trust for gaming purposes.

Legislative Branch

Wisconsin law requires the Joint Legislative Council to establish the Special Committee on State-Tribal Relations (formerly known as the American Indian Study Committee) each biennium to study issues relating to American Indians and tribes in Wisconsin and to develop specific recommendations and legislative proposals relating to these issues. By statute, the Special Committee must be comprised of public members, who are recommended by the tribes and GLITC, and legislators.

In recent years the Legislature has invited the tribes each year to present a State of the Tribes address to the Legislature. In 2014, the State of the Tribes address was delivered by Laurie Boivin, Chair of the Menominee Indian Tribe of Wisconsin.

The Special Committee on State-Tribal Relations provides three important functions with respect to the Legislature's relationship with the tribes. First, it serves as a forum within the Legislature in which tribes can raise issues of concern to them.

Second, by utilizing the Joint Legislative Council's study committee process, it provides a mechanism for developing legislative proposals on issues around which the tribes and legislators can together build consensus. Third, the Special Committee provides an environment in which legislators and representatives of the tribes can build working relationships with each other.

The Special Committee developed the legislation mentioned earlier in this chapter that expanded the authority of GLIFWC conservation wardens. In addition to this legislation, the committee's work has led to legislation on numerous other topics, including the following:

- The creation of a county-tribal cooperative law enforcement program.
- The protection of human burial sites.
- Granting full faith and credit in state courts for the actions of tribal courts and legislatures.

- Economic development on Indian reservations.
- Indian health issues.
- The enforcement of state laws by tribal law enforcement officers.
- Mutual assistance between tribal and state, county, or municipal law enforcement agencies.

Judicial Branch

Like the Legislative Branch, the Judicial Branch has also created an entity to address issues involving the Wisconsin tribes. The State-Tribal Justice Forum was reestablished in 2006, following the Walking on Common Ground conference, a national gathering of state, federal, and tribal courts, sponsored by the U.S. Department of Justice. The committee's general charge is "to promote and sustain communication, education and cooperation among tribal and state court systems and [to] work to promote initiatives outlined in the final report of the Walking on Common Ground conference." The committee is comprised of various state and tribal judges and other attorneys and officials.

One of the most significant issues the committee has addressed concerns concurrent jurisdiction and the transfer of cases between state and tribal courts. A significant impetus for resolution of this issue was a series of opinions, arising from litigation between a non-tribal member and the Bad River Band,²⁰ addressing the obligations of circuit courts to confer with tribal courts when the courts have concurrent jurisdiction and the cases are pending in both courts. These decisions prompted two judicial administrative districts of Wisconsin to sign protocols with tribes for allocating jurisdiction when both the tribal court and the state court have jurisdiction and the same issue is pending in both courts.

The text of the rule and its 2009 amendment, and the state-tribal protocols are available on the Wisconsin Court System website at:

<http://www.wicourts.gov/courts/committees/tribal.htm>

for resolution of this issue was a series of opinions, arising from litigation between a non-tribal member and the Bad River Band,²⁰ addressing the obligations of circuit courts to confer with tribal courts when the courts have concurrent jurisdiction and the cases are pending in both courts. These decisions prompted two judicial administrative districts of Wisconsin to sign protocols with tribes for allocating jurisdiction when both the tribal court and the state court have jurisdiction and the same issue is pending in both

In 2007, the Director of State Courts, on behalf of the State-Tribal Justice Forum, petitioned the Wisconsin Supreme Court to create a rule, under the court's statutory rulemaking authority, governing the discretionary transfer of cases to tribal court. On July 31, 2008, the court created s. 801.54, Stats., authorizing a circuit court on its own motion or the motion of any party to transfer an action to a tribal court if it determines that the tribal court has concurrent jurisdiction. The rule directs the circuit court, unless all parties agree to the transfer, to consider a number of factors, such as whether issues in the action require interpretation of the tribe's laws, when determining whether transfer is appropriate.²¹

²⁰ *Teague v. Bad River Band of Lake Superior Chippewa Indians* (229 Wis. 2d 581 (Ct. App. 1999) (Teague I); 2000 WI 79 (Teague II); and 2003 WI 118 (Teague III)).

²¹ The court amended this rule in July 2009.

ADDITIONAL REFERENCES

1. Wisconsin Legislative Council:
 - Information Memorandum 2013-09, *Law Enforcement in Indian Country: Sovereignty and Jurisdiction*, <http://www.legis.wisconsin.gov/lc>.
 - Information Memorandum 2013-10, *Law Enforcement in Indian Country: State Laws and Programs*, <http://www.legis.wisconsin.gov/lc>.
 - Information Memorandum 2013-11, *Law Enforcement in Indian Country: Tribal Institutions*, <http://www.legis.wisconsin.gov/lc>.
 - Legislative Council Committee webpage for the Special Committee on State-Tribal Relations <http://www.legis.wisconsin.gov/lc> (select “Study Committees” followed by “2014 Interim”).
2. Website of the Division of Intergovernmental Relations, DOA, providing information about the Wisconsin State-Tribal Relations Initiative and other information about tribes in Wisconsin: <http://witribes.wi.gov/>.
3. Website of GLITC. This website provides links to the websites of all of the tribes in Wisconsin: <http://www.glitc.org>.
4. Website of GLIFWC: <http://www.glifwc.org>.
5. Website of Wisconsin Judicare, Indian Law Office. This website provides links to tribal websites, including information about tribal courts in Wisconsin: <http://www.judicare.org/content.cfm?PageID=33>.
6. Website of the National Conference of State Legislatures (NCSL) relating to state-tribal relations, including links to various NCSL publications and resources: <http://www.ncsl.org/programs/statetribe/statetribe.htm>.
7. Website of the National Congress of American Indians: <http://www.ncai.org/>.

GLOSSARY

BIA: Bureau of Indian Affairs. Agency in the U.S. Department of Interior primarily responsible for Indian Affairs.

GLIFWC: Great Lakes Indian Fish and Wildlife Commission. Organization composed of six Chippewa bands in Wisconsin and five Chippewa bands in Michigan and Minnesota which concentrates on Chippewa treaty-guaranteed rights to hunt, fish, and gather.

GLITC: Great Lakes Inter-Tribal Council. Consortium of federally-recognized tribes in Wisconsin (currently not including the Ho-Chunk Nation) and one Michigan tribe.

IGRA: The Indian Gaming Regulatory Act.

Indian country: Generally, all land on reservations, all dependent Indian communities, and all Indian allotments.

P.L. 280: Public Law 280. 1953 federal law transferring federal criminal and civil jurisdiction (but not civil regulatory jurisdiction) to several states (including Wisconsin, other than on the Menominee Reservation) and providing other states the option of assuming such jurisdiction.

Trust land: Land the title to which is held by the United States in trust for a tribe or American Indian.

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