



## WISCONSIN LEGISLATIVE COUNCIL INFORMATION MEMORANDUM

### Law Enforcement in Indian Country: Sovereignty and Jurisdiction

Some of the most complex issues in Indian law concern questions of jurisdiction; that is, whether a state, federal, or tribal government has the authority to enforce a law in a given context. This complexity arises because jurisdiction in Indian country may vary depending on whether either the perpetrator or victim is an Indian and the location of the crime. This Information Memorandum, the first in a series of three on the subject of law enforcement in Indian country, provides background on sovereignty and jurisdiction in Indian country.<sup>1</sup>

#### **TRIBAL SOVEREIGNTY**

In very general terms, sovereignty refers to the inherent 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 differs from that of nation states because it is not absolute. In the first of the Cherokee cases—two seminal U.S. Supreme Court cases, which arose out of the state of Georgia’s interference with the Cherokee Nation’s title and control over land within its reservation—Chief Justice John Marshall described this aspect of the tribes’ sovereignty, terming the tribes “domestic dependent nations”:

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.<sup>2</sup>

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.”

<sup>1</sup> The others in the series are IM-2013-10, concerning state laws and programs to facilitate law enforcement in Indian country, and IM-2013-11, concerning the law enforcement institutions of the tribes located in Wisconsin.

<sup>2</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

### ***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.<sup>3</sup> 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 the power to make treaties, including Indian treaties, with the advice and consent of the Senate.<sup>4</sup>

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 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.<sup>5</sup>

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 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 something 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.

For a description of the state’s interaction with tribes in the law enforcement arena, see the next Information Memorandum in this series.

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<sup>3</sup> William C. Canby, Jr., *American Indian Law in a Nutshell*, 13 (West Publishing Co. 2009).

<sup>4</sup> U.S. Const. art. I, s. 8, and art. II, s. 2.

<sup>5</sup> *United States v. Kagama*, 118 U.S. 375, 384-85 (1886).

## **CRIMINAL JURISDICTION IN INDIAN COUNTRY**

Because the tribes' unique political status flows from the federal government, federal law determines who may exercise criminal jurisdiction 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.<sup>6</sup> Depending on the circumstances, jurisdiction may be tribal, federal, state, or concurrent between two of these entities.

### ***TRIBAL JURISDICTION***

In the first of the Cherokee cases, the Supreme Court affirmed that the Cherokee Nation was a "distinct political society...capable of managing its own affairs and governing itself."<sup>7</sup> In line with this view, federal law has historically recognized tribes' authority to exercise criminal jurisdiction over Indians with respect to crimes committed in Indian country.

Tribes may therefore enact tribal criminal laws and prosecute Indians in tribal court for violating those laws on their reservation or off-reservation trust land. However, a tribe may only exercise these powers to the extent it has not been restricted by federal law. For example, Congress has limited the punishment that can be meted out by a tribe that exercises criminal jurisdiction; conviction for any one offense cannot result in imprisonment for a term greater than one year or a fine greater than \$5,000, or both. Further, federal case law has established that tribes may not exercise criminal jurisdiction over non-Indians.

### ***FEDERAL JURISDICTION***

As discussed above, the relationship between the tribes and the federal government has been interpreted to mean that the federal government both owes the tribes duties and possesses the authority to carry those duties out. To that end, Congress has enacted legislation establishing federal jurisdiction over certain crimes in Indian country. 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 applies to Indian country the general criminal laws of the United States that apply on federal enclaves, such as federal military installations or national parks. Specifically, it provides for federal jurisdiction over certain crimes committed in Indian country when:
  - (1) The perpetrator is non-Indian and the victim is Indian; or
  - (2) 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 a treaty did not give the tribe exclusive jurisdiction over the crime involved.

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<sup>6</sup> 18 U.S.C. s. 1151.

<sup>7</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (U.S. 1831).

- ***Assimilative Crimes Act.*** The Assimilative Crimes Act does not directly address jurisdiction in Indian country but does affect it. This Act incorporates many state criminal laws into the federal criminal laws that apply on federal enclaves. State law defines the elements of the crime, but the crime itself is a federal crime and is prosecuted 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.

The above statutes apply when jurisdiction has not been transferred to the state (as will be discussed below). Additionally, they only apply to crimes in which an Indian was either the victim or the perpetrator.

In addition to enforcing laws that apply specifically to crimes committed in Indian country, 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.

### ***STATE JURISDICTION***

Historically, state jurisdiction over Indians in Indian country has been limited. The Supreme Court underscored this principle in the second of the Cherokee cases, holding that “the laws of Georgia [could] have no force” within the boundaries of the territory occupied by the Cherokee Nation because intercourse between the Cherokee Nation and the States was a matter of federal law.<sup>8</sup>

Over time, the notion that a state law “could have no force” in Indian country was tempered. This was partially due to the development of a body of law establishing certain jurisdictional principles. One such tenet is that states may exercise jurisdiction over non-Indians for crimes committed by non-Indians against non-Indians in Indian country.<sup>9</sup>

### ***P.L. 280 Jurisdiction***

The notion that states generally lacked jurisdiction in Indian country was most significantly modified by Congress’s enactment, in 1953, of Public Law 83-280 (P.L. 280). P.L. 280 transferred criminal jurisdiction and certain civil jurisdiction over Indians in Indian country from the federal government to six states,<sup>10</sup> with exceptions for certain reservations, and authorized other states to assume jurisdiction in Indian country as well.

Wisconsin is a mandatory P.L. 280 state. Therefore, in Wisconsin the state has criminal jurisdiction over all land in Indian country, except the Menominee Reservation. Federal recognition of the Menominee Tribe and Reservation was terminated in 1953; when recognition was restored in 1973, the Menominee Reservation was not subjected to P.L. 280.

### ***Retrocession of P.L. 280 Jurisdiction***

Many tribes view P.L. 280 as a significant infringement of their sovereignty and their ability to govern themselves because the law imposed many aspects of state law on tribes without the

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<sup>8</sup> *Worcester v. Georgia*, 31 U.S. 515, 561 (U.S. 1832).

<sup>9</sup> *United States v. McBratney*, 104 U.S. 621 (1881).

<sup>10</sup> The original five mandatory P.L. 280 states are: California, Minnesota, Nebraska, Oregon and Wisconsin. Alaska was added as a mandatory P.L. 280 state when it was admitted to the Union.

tribes' consent. The law has also been criticized by state governments, which "resented the fact that they were given the duty of law enforcement without the means to pay for it."<sup>11</sup>

In part due to these criticisms, and in part due to a shift in federal policy, which embraced tribal self-determination and autonomy, Congress passed the Indian Civil Rights Act of 1968 (ICRA). Among other provisions, ICRA amended P.L. 280 to prohibit states from assuming jurisdiction over a tribe absent the tribe's consent and to authorize states that had acquired jurisdiction under P.L. 280 to retrocede this jurisdiction back to the federal government. Since 1968, states have fully or partially retroceded jurisdiction acquired under P.L. 280 with respect to approximately 30 tribes.<sup>12</sup> Wisconsin has not retroceded the jurisdiction it acquired under P.L. 280.

### **CONCURRENT JURISDICTION**

Concurrent jurisdiction exists when more than one government has authority to prosecute a person for the same criminal behavior. On non-P.L. 280 reservations, the federal government and tribal governments have concurrent jurisdiction over crimes committed by Indians. On P.L. 280 reservations, the question of whether a tribe may exercise jurisdiction over crimes committed by Indians concurrently with a state is less clear because it has not been squarely addressed by the Supreme Court. However, several commentators have argued that both a tribe and the state may exercise jurisdiction over crimes committed by Indians on P.L. 280 reservations because P.L. 280 did not divest tribes of criminal jurisdiction over Indians.<sup>13</sup>

### **OVERVIEW OF CRIMINAL JURISDICTION**

As discussed above, on P.L. 280 reservations, the state has criminal jurisdiction. Tribes may also have concurrent jurisdiction over crimes committed by Indians.

On non-P.L. 280 reservations, which in Wisconsin is only 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 these reservations.

**Criminal Jurisdiction on Non-P.L. 280 Reservations  
(Menominee, in Wisconsin)<sup>14</sup>**

	<b>"Major" Crime (As defined by the Major Crimes Act)</b>	<b>All Other Crimes</b>
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

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<sup>11</sup> Canby, 258.

<sup>12</sup>Robert T. Anderson, "Negotiating Jurisdiction: Retroceding State Authority Over Indian Country Granted by Public Law 280," 87 *Wash. L. Rev.* 915, 946 (2012).

<sup>13</sup> See, for example, Jimenez and Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 *Am. U.L. Rev.* 1627 (1998).

<sup>14</sup> 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 U.S. Department of Justice at: ([http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00689.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00689.htm)).

## **CIVIL JURISDICTION IN INDIAN COUNTRY**

Law enforcement is not limited to the sphere of criminal law. Rather, law enforcement is also concerned with ensuring compliance with civil laws. For the purposes of evaluating which government has jurisdiction to enforce civil laws in Indian country, it is necessary to distinguish between two types of civil jurisdiction: civil adjudicatory jurisdiction and civil regulatory jurisdiction.

Generally, civil adjudicatory jurisdiction pertains to civil actions involving the resolution of disputes between two parties. When P.L. 280 transferred criminal jurisdiction to certain states, it also transferred civil adjudicatory jurisdiction to these states.

Civil regulatory jurisdiction refers to civil actions involving activities that are not outlawed, but are regulated by the government, such as hunting and fishing. This is the type of civil jurisdiction, generally, that is relevant to law enforcement. P.L. 280 did not transfer civil regulatory jurisdiction to the states. However, 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. Accordingly, jurisdictional questions that may involve civil regulatory laws can be more complicated on P.L. 280 reservations because determining who has jurisdiction requires first determining whether the law is a civil regulatory law or a criminal 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.<sup>15</sup>

### ***TRIBAL JURISDICTION***

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.<sup>16</sup>

A tribe may also regulate nonmembers on nonmember fee lands<sup>17</sup> in two limited circumstances. First, a "tribe may regulate, 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." Second, 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."<sup>18</sup> Courts have construed these circumstances narrowly.

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<sup>15</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1983).

<sup>16</sup> *Montana v. United States*, 450 U.S. 544, 564 (1981).

<sup>17</sup> On Indian reservations, land may be either trust land or fee land. Generally, trust land is land the United States holds in trust for the benefit of an individual American Indian or tribe. 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. In general, fee land is subject to taxation by state and local government. As a result of federal policy in the late 19<sup>th</sup> century that parceled reservations into "allotments"—a policy subsequently abrogated—many reservations include parcels of fee land owned by nonmembers.

<sup>18</sup> *Id.*, at 566.

## ***STATE JURISDICTION***

Absent an express federal law to the contrary, the activities of American Indians and tribes outside of Indian country are subject to a state's civil regulatory laws. On a reservation, states may assert civil regulatory jurisdiction over non-Indians under certain circumstances. However, they may assert jurisdiction over the activities of Indians for on-reservation activities only in exceptional circumstances.<sup>19</sup> 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, the law may not "unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.'"<sup>20</sup>

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

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<sup>19</sup> *Cabazon*, at 215 [citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983)].

<sup>20</sup> *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) [quoting *Williams v. Lee*, 217, 220 (1959)].