# WISCONSIN LEGISLATIVE COUNCIL
# INFORMATION MEMORANDUM

# Legislative Proposals Affecting American Indians and Indian Tribes Enacted in the 2009-10 Session of the Wisconsin State Legislature

The Wisconsin State Legislature, in its 2009-10 Session, enacted a number of legislative proposals affecting American Indians and Indian tribes[1], in subjects including education, health and social services, law enforcement, courts and corrections, and taxation. This memorandum summarizes the most significant among these proposals. Some proposals enacted this session are not specific to tribal governments, affecting tribal governments in the same manner that they affect other entities, county governments in particular; other proposals are very specific, applying to only one tribe or tribal government. This memorandum does not address either of these types of proposals. Rather, it describes those acts, or parts of acts, that are specific to American Indians or Indian tribes, but not specific to one tribe only. This memorandum also does not address the use of funds received by the state from tribes under the terms of tribal gaming compacts ("tribal gaming revenues"), except where these revenues are used to fund a new initiative applicable to tribes.[2]

## *EDUCATION*

### *RACE-BASED SCHOOL NICKNAMES, LOGOS, MASCOTS, OR TEAM NAMES – 2009 WISCONSIN ACT 250*

Act 250 establishes a new procedure for challenging a school board's use of a race-based nickname, logo, mascot, or team name.

#### *Complaint*

Under the Act, a school district resident may object to the use of a race-based nickname, logo, mascot, or team name by a school board of that school district by filing a complaint with the State Superintendent of Public Instruction. A pupil attending a public school in a nonresident

[1] For convenience, this memorandum uses the word "tribe" to refer to federally recognized American Indian tribes and bands in this state.

[2] A summary of the allocation of tribal gaming revenues in the state budget is available at the Internet site of the Legislative Fiscal Bureau, at http://www.legis.state.wi.us/lfb/index.html.

district under the Open Enrollment Program may not file a complaint in which the pupil objects to the use of a race-based nickname, logo, mascot, or team name by the school board of the nonresident school district, however.

***Determination by State Superintendent***

If the complainant objects to the use of a ***nickname or team name***, the State Superintendent must immediately review the complaint and determine whether the use of the nickname or team name by the school board, alone or in conjunction with a logo or mascot, is ambiguous as to whether it is race-based. The State Superintendent must do all of the following:

1. Notify the school board of the receipt of the complaint and of the State Superintendent's determination regarding whether the use of the nickname or team name is ambiguous as to whether it is race-based and direct the school board to submit any applicable information, as described below.

2. Except as described below, schedule a contested case hearing within 45 days after the complaint is filed.

The State Superintendent may determine that a contested case hearing is ***not*** necessary or that a hearing date may be postponed for the purpose of obtaining additional information from the school board if, no later than 10 days after being notified of the receipt of the complaint, the school board submits evidence to the State Superintendent that demonstrates all of the following:

1. The nickname, logo, mascot, or team name that is used by the school board and that is the basis of the complaint is a reference to, depiction or portrayal of, or the name of a specific federally recognized American Indian tribe.

2. The federally recognized American Indian tribe has granted approval to the school board to refer to, depict, or portray the tribe in a nickname, logo, or mascot or to use the name of the tribe as a team name in the specific manner used by the school board and has not rescinded the approval.

3. The use of the nickname, logo, mascot, or team name that has been approved by the tribe is the use to which the school district resident objects in his or her complaint.

The Act provides that if the State Superintendent determines that a contested case hearing is not necessary or postpones the hearing date, he or she must notify the school district resident who filed the complaint and the school board of his or her decision in writing.

***Burden of Proof***

At the hearing, the school board generally has the burden of proving by clear and convincing evidence that the use of the race-based nickname, logo, mascot, or team name does not promote stereotyping, as defined by the State Superintendent, by rule.

However, if the State Superintendent has determined that the use of a nickname or a team name by a school board is ambiguous as to whether it is race-based, the use of the nickname or team name by the school board must be presumed to be not race-based and, at the hearing, the school district resident has the burden of proving by clear and convincing evidence that the use of the nickname or team name by the school board promotes discrimination, pupil harassment, or stereotyping, as defined by the State Superintendent, by rule.

If the State Superintendent has determined that the use of a nickname or a team name by a school board is ambiguous as to whether it is race-based but that the use of the nickname or team name ***in connection with a logo or mascot*** is race-based, at the hearing the school board has the burden of proving by clear and convincing evidence that the use of the nickname or team name in connection with the logo or mascot does not promote discrimination, pupil harassment, or stereotyping.

***Decision and Order***

The State Superintendent must issue a decision and order within 45 days after the hearing. If the State Superintendent finds that the use of the race-based nickname, logo, mascot, or team name does not promote discrimination, pupil harassment, or stereotyping, the State Superintendent must dismiss the complaint. If the State Superintendent finds that the use of the race-based nickname, logo, mascot, or team name promotes discrimination, pupil harassment, or stereotyping, the State Superintendent must order the school board to terminate its use of the race-based nickname, logo, mascot, or team name within 12 months after the issuance of the order.

***Extensions for Compliance***

If, at the hearing or after a decision and order to terminate the use of a race-based nickname, logo, mascot, or team name, the school board presents evidence to the State Superintendent that extenuating circumstances render full compliance with the decision and order within 12 months after the issuance of that decision and order impossible or impracticable, the State Superintendent may issue an order to extend the time within which the school board must terminate its use of the race-based nickname, logo, mascot, or team name. In general, the extension may not exceed 24 months and must apply only to those portions of the decision and order to which extenuating circumstances apply. The Act defines "extenuating circumstances" to include circumstances in which the costs of compliance with an order pose an undue financial burden on the school district and circumstances in which the work or the requirements for bidding a contract to complete the work required to bring the school district into compliance with the order cannot be completed within 12 months after the order is issued.

The State Superintendent may further extend the time granted to a school board to terminate its use of the race-based nickname, logo, mascot, or team name if the school board presents evidence to the State Superintendent that compliance with a portion of the decision and order issued may be accomplished through a regularly scheduled maintenance program and that the cost of compliance with that portion of the decision and order exceeds $5,000. The extension granted under this provision may not exceed 96 months and applies only to that portion of the decision and order with which compliance will be accomplished through the regularly scheduled maintenance program and that costs more than $5,000.

Decisions of the State Superintendent relating to race-based nicknames, logos, mascots, or team names are subject to judicial appeal under ch. 227, Stats.

### *Penalty for Failure to Comply with Order*

Any school board that uses a race-based nickname, logo, mascot, or team name in violation of an order must forfeit not less than $100 nor more than $1,000. Each day of use of the race-based nickname, logo, mascot, or team name constitutes a separate violation.

### *Rule-Making*

The Act requires the State Superintendent to promulgate rules necessary to implement the provisions created by the Act. The State Superintendent must submit its proposed rules to the Legislative Council no later than November 1, 2010. The Department of Public Instruction (DPI) is authorized under the Act to promulgate emergency rules to implement the provisions of the Act. The emergency rules would remain in effect until the permanent rules take effect.

## *TRIBAL SCHOOLS – 2009 WISCONSIN ACT 302*

Act 302 applies a wide array of state statutes to tribal schools and tribal school pupils and staff in largely the same manner in which these statutes apply to private schools and private school pupils and staff. The statutes affected relate to: (1) regulatory or administrative matters (e.g., the administration of the annual pupil count and enforcement of truancy statutes); (2) protection of pupils and staff (e.g., access to HIV test results for persons who have been exposed to bodily fluids); (3) services available to schools (e.g., assistance from the DPI in development of suicide prevention, AODA, and protective behavior programs); and (4) benefits available to schools or their pupils and staff (e.g., authority of certain pupils to serve as inspectors at polling stations and eligibility of schools to receive trees from the Department of Natural Resources (DNR) for planting on Arbor Day).

Due to the sovereignty of the tribes that operate tribal schools, the Act does not impose any direct requirements on those schools. However, it does make certain benefits subject to compliance with requirements that apply to private schools that receive the particular benefits. For example, the Act authorizes law enforcement and social service agencies to release certain confidential information to tribal schools, but only on the condition that the tribe has enforceable protections in place to keep the information confidential in the same manner as is required of public and private schools.

The Act does ***not*** address four sets of statutes that apply to private schools. These statutes relate to: (1) funding for special education; (2) funding for pupil transportation; (3) bonding through the Wisconsin Housing and Economic Development Authority; and (4) private schools in the City of Milwaukee.

## *CHARTER SCHOOLS – 2009 WISCONSIN ACT 28*

A school board may establish a charter school and contract with another entity, including a tribe, to administer the school. In general, the school must be located in the school district. Act 28, the 2009-11 Biennial Budget Act, specifies that, if a school board contracts with a tribe

for administration of a charter school, the school may be located either in the school district or on the reservation of the tribe. The Act specifies that the school board is responsible for determining whether the charter school is an instrumentality of the district for the following purposes:

1. Administering the Wisconsin knowledge and concepts examinations to pupils enrolled in the charter school.

2. Specifying criteria for grade promotion and high school graduation for pupils enrolled in the charter school.

3. Distributing copies of the current school performance report to parents or guardians if requested.

4. Ensuring that all instructional staff of the charter school hold a license or permit to teach issued by the DPI.

### *TRIBAL LANGUAGE REVITALIZATION GRANTS – 2009 WISCONSIN ACT 28*

Act 28 creates a new tribal language revitalization program. Under this program, a school board or a cooperative educational services agency (CESA) may, in conjunction with a tribal education authority, apply to DPI for a grant for the purpose of supporting innovative, effective instruction in one or more American Indian languages. The Act appropriates $247,500 annually for this program, from tribal gaming revenues. The Act directs DPI to promulgate rules to implement and administer the program.

## *HEALTH AND SOCIAL SERVICES*

### *FEDERAL INDIAN CHILD WELFARE ACT – 2009 WISCONSIN ACT 94*

Act 94 incorporates the Federal Indian Child Welfare Act (ICWA) into the Children's Code [ch. 48, Stats.] and the Juvenile Justice Code [ch. 938, Stats.]. ICWA was enacted in 1978.

In very general terms, ICWA: applies to certain child custody proceedings involving an Indian child; requires certain notices, findings, and placement preferences in child custody proceedings under certain circumstances; and provides grounds for collateral attack of certain decrees. ICWA provides for tribal court jurisdiction in some circumstances and also provides a process for a tribe to reassume exclusive jurisdiction in child custody proceedings under certain circumstances. In addition, ICWA provides that a foster care placement or termination of parental rights case may be transferred from state court to tribal court under certain circumstances and that a tribe may intervene in certain child custody proceedings in state court under specified circumstances.

### *COORDINATED SERVICES TEAM INITIATIVES – 2009 WISCONSIN ACT 334*

In Wisconsin, there are a number of initiatives to provide collaborative services to children. Integrated Services Projects (ISPs) were implemented in 1989 to provide wraparound services

to children with severe disabilities. The Department of Health Services (DHS) provided funding, in the form of grants, for a portion of the cost of implementing the programs.

Act 334 makes several changes to the statute governing ISPs, including expanding their coverage to children who are involved with multiple systems of care, as well as their families, and changing the name of the program to the Coordinated Services Team (CST) Initiative. Also, and of pertinence to this memorandum, it authorizes tribes, as well as counties, to administer the CST initiative. In general, the Act treats tribes the same as counties, including making them eligible for funding from DHS.[3]

### *DIABETES PREVENTION AND CONTROL – 2009 WISCONSIN ACT 28*

The Wisconsin Diabetes Prevention and Control Program (DPCP) performs several functions, including designing population-based community interventions and health communications, engaging in outreach to high-risk populations, conducting surveillance and evaluation of the burden of diabetes, and coordinating efforts through the Wisconsin diabetes advisory group. Act 28 appropriates $25,000 annually, from tribal gaming revenues, to support activities in the DPCP that are specifically targeted to Native American populations. The Act makes a corresponding reduction in tribal gaming revenue funding to the interagency and intra-agency local assistance program in the Department of Children and Families.

## *LAW ENFORCEMENT*

### *MUTUAL ASSISTANCE – 2009 WISCONSIN ACT 264*

Under the law enforcement mutual assistance statute, one law enforcement agency may respond to a request for assistance from another law enforcement agency. [s. 66.0313, Stats.] The requesting agency is responsible for defending a responding officer in a civil action arising out of the officer's response and for indemnifying the officer for the amount of any civil penalties imposed or damages awarded in such an action. The responding agency is responsible for personnel costs (such as the salary and benefits of the responding officer) and other costs (such as damage to equipment), but may bill the requesting agency for these costs. Under prior law, the law enforcement mutual assistance statute did not apply to tribal law enforcement agencies.

Act 264 authorizes tribal law enforcement agencies to both request assistance from state, county, or municipal law enforcement agencies and to respond to requests for assistance from such agencies. It assigns responsibility for defending and indemnifying officers in civil actions arising out of a response and responsibility for the costs associated with a response in the same manner as current law. That is to say, when requesting assistance, the tribe is responsible for the cost of defending and indemnifying the responding state, county, or municipal officers in any civil action arising from the response and may be responsible for any costs incurred by the

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[3] For information concerning other provisions of this Act, see the Legislative Council Staff Act Memo describing it, available at http://www.legis.state.wi.us/lc/.

responding agency; when the tribe is responding to a request for assistance, the responsibilities are reversed.

To ensure that a tribe's responsibility for the costs of a law enforcement agency that responds to its request for assistance can be enforced, the Act limits the authority of a state, county, or municipal law enforcement agency to respond to a request for assistance from a tribal law enforcement agency to cases in which one of the following applies:

1. The tribe has adopted a resolution waiving its sovereign immunity to the extent required to allow enforcement of this responsibility in state courts or a resolution that the Department of Justice (DOJ) determines has the same effect.

2. The tribe maintains liability insurance that does all of the following:

    a. Covers the tribe and tribal law enforcement officers for liability due to the acts or omissions of the tribe and officers.

    b. Has a limit of coverage not less than $2,000,000 for any occurrence.

    c. Provides that the insurer, in defending a claim against the policy, may not raise the defense of sovereign immunity of the insured up to the limits of the policy.

3. The responding law enforcement agency has an agreement with the tribal law enforcement agency under which the responding law enforcement agency accepts the responsibility for these costs.

The Act requires that, for one of the foregoing actions to have the effect of allowing a nontribal law enforcement agency to respond to a request for assistance from a tribal law enforcement agency, the tribal law enforcement agency must have provided a copy of the resolution, insurance policy, or agreement to DOJ, and DOJ must have posted the document or a notice of the document on the Internet site that it maintains for exchanging information with law enforcement agencies.

### *TRIBAL POLICE OFFICERS – 2009 WISCONSIN ACT 232*

A tribal law enforcement officer may enforce state law on the reservation and trust lands of the tribe that employs the officer if the officer meets state training standards and has accepted the duties of a law enforcement officer specified in state law. [s. 165.92, Stats.] The tribe that employs the officer is liable for the actions of the officer taken under this authority, and an officer may not act under this authority unless the employing tribe has adopted a resolution waiving its sovereign immunity to the extent necessary to enforce this liability in state courts, or has adopted another resolution that DOJ determines has the same effect.

Act 232 allows a tribe, as an alternative to waiving its sovereign immunity, to maintain liability insurance that does all of the following:

1. Covers the tribe and tribal law enforcement officers for liability due to the acts or omissions of the tribe and officers.

2. Has a limit of coverage not less than $2,000,000 for any occurrence.

3. Provides that the insurer, in defending a claim against the policy, may not raise the defense of sovereign immunity of the insured up to the limits of the policy.

As additional conditions of exercising law enforcement powers under s. 165.92, the Act specifies that the tribe must provide to the DOJ either a copy of its resolution waiving sovereign immunity or evidence of the liability insurance, depending on the option taken by the tribe, and that DOJ must post either a copy or notice of the document on the Internet site it maintains for exchanging information with law enforcement agencies.

### *COUNTY-TRIBAL COOPERATIVE LAW ENFORCEMENT GRANTS – 2009 WISCONSIN ACT 74*

The County-Tribal Cooperative Law Enforcement Program, administered by DOJ, provides grants to improve law enforcement on Indian reservations by improving cooperation between county and tribal governments, including their law enforcement agencies. [s. 165.90, Stats.] To be eligible for a grant, a county and a tribe located within that county must prepare a joint program plan that describes the proposed cooperative law enforcement program.

Prior law required that a joint program plan specify, among other things, "[t]he governmental unit that shall administer aid received and the method by which aid shall be disbursed." Prior law also directed DOJ to "distribute...to each eligible program the amount necessary to implement the plan...." Act 74 clarifies the quoted language to make explicit that the plan must specify that either the county or the tribe is to receive and administer the aid, or that they are each to receive and administer a portion of the aid. It further clarifies that the DOJ must distribute the funds to the county, the tribe, or both, as specified in the plan.

## *COURTS AND CORRECTIONS*

### *HIGH-COST TRIBAL COURT PLACEMENTS – 2009 WISCONSIN ACTS 28, 233, AND 318*

In the 2007-09 Biennium, the Legislature authorized the expenditure of $500,000 of tribal gaming revenues to reimburse tribes and counties for the cost of unexpected or unusually high-cost foster placements of Indian children ordered by tribal courts. In the 2009-11 Biennium, a series of acts, Acts 28, 233, and 318, make the following changes to this policy:

1. Expand the out-of-home placements covered to include placements of juveniles who have been adjudicated delinquent and mental health placements. The Acts sunset the reimbursement of the cost of mental health placements on June 30, 2011, but do not sunset the others.

2. Authorize the following expenditures, from tribal gaming revenues:

    a. Foster placements: $395,000 annually.

b. Juvenile placements: $75,000 annually.

c. Mental health placements: $250,000 annually.

3. Define "unusually high-cost" as the amount by which the cost to a tribe or a county of tribal court placements in any one of the categories exceeds $50,000 in a fiscal year. Note that the Acts do ***not*** define "unexpected" placements.

### *COMMUNITY REINTEGRATION PROGRAM – 2009 WISCONSIN ACT 28*

Act 28 directs the Office of Justice Assistance, in the Department of Administration, to establish a program to facilitate the reintegration of American Indians who have been incarcerated in a state prison into their American Indian tribal communities. The Act requires that the program provide each participant an integration plan that addresses the participant's needs and services that are customized for the participant. The program must "encourage confidence, responsibility, and independence among participants," and must incorporate tribal practices and traditions that meet the participant's community reintegration needs. The Act appropriates $50,000 for the first year of the program's operation, from tribal gaming revenues.

## ***TAXATION***

### *SALES AND USE TAXES – 2009 WISCONSIN ACT 28*

Purchases made by various entities, notably by state and federal governmental entities, are exempt from the state sales and use taxes. Act 28 specifies that tribal governments are also exempt from these taxes.

Also, the Act authorizes the Department of Revenue (DOR) to enter into an agreement with a tribe that collects a tribal sales or use tax on transactions occurring on the tribe's reservation or trust land to provide a credit against the state sales or use tax collected on the transactions. The credit may not be more than the amount of the tribal tax.

### *TAX REFUND AGREEMENTS – 2009 WISCONSIN ACT 28*

#### *Tobacco Taxes*

In general, transactions between two American Indians of the same tribe occurring on their tribe's reservation are not subject to state taxation. However, for some commodities, including cigarettes and other tobacco products, an excise tax is applied at the wholesale level. One result of this is that a tribal vendor on a reservation is not able to sell these products to other tribal members without the tax being collected.

Prior law authorized the DOR to enter into agreements with tribes whereby taxes on the on-reservation sale of cigarettes and other tobacco products are collected by the retail vendor and remitted to DOR, and a portion of the resulting revenues is refunded to the tribes by DOR. [ss. 139.325 and 139.805, Stats.] Under prior law, agreements were limited to sales occurring on land designated as a reservation or placed in trust before 1983. Act 28 specifies that

agreements apply to sales occurring on land designated as reservation or placed in trust before 1983 ***or a later date agreed to by DOR and the tribe***.

***Other Taxes***

Act 28 also gives DOR authority to enter into agreements with tribes regarding the refund to the tribes of several other taxes "for activities that occur on tribal lands or are undertaken by tribal members outside of tribal lands."[4] This new authority applies to the following taxes:

1. Income taxes.
2. Withholding taxes.
3. Sales and use taxes.
4. Motor vehicle fuel taxes.
5. Beer and liquor taxes.

The Act specifies that all tax and financial information disclosed during negotiations, or exchanged pursuant to a final agreement, between DOR and a tribe is subject to specified confidentiality provisions of prior law. It also directs DOR to submit a copy of each agreement to the Joint Committee on Finance no later than 30 days after the agreement is signed by DOR and the tribe.

## ***OTHER***

### *ELDERS TRANSPORTATION GRANTS – 2009 WISCONSIN ACT 28*

Act 28 directs the Department of Transportation (DOT) to award grants to American Indian tribes and bands to assist in providing transportation services for elderly persons. It directs DOT to prescribe the form, nature, and extent of the information that must be contained in grant applications and to establish criteria for evaluating applications and for awarding grants. The Act appropriates $247,500 annually to fund the grants, from tribal gaming revenues.

### *UNEMPLOYMENT INSURANCE – 2009 WISCONSIN ACT 287*

Most employers, including tribes, are required to participate in the state Unemployment Insurance (UI) program. [ch. 108, Stats.] Act 287 makes a number of changes to the statutes governing that program, two of which are specific to tribes.

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[4] These terms, "tribal lands" in particular, are not defined.

### *Definition of "Employment"*

The statutes exclude the following specific activities from the definition of "employment," and therefore from UI coverage, unless the employer chooses, with approval from the Department of Workforce Development, to include them:

1. Service as a member of an elective legislative body or the judiciary of a state or political subdivision.

2. Service in a position designated under the laws of this state as a major nontenured policy-making or advisory position or in a policy-making or advisory position the duties of which do not ordinarily require more than eight hours per week.

3. Service by an individual receiving work relief or work training as part of an unemployment work-relief or work-training program assisted or financed in whole or in part by a federal agency or an agency of a state or political subdivision of a state.

The Act clarifies that these exclusions apply to parallel positions in tribal government or under tribal law, as well.

### *Assurance of Reimbursement*

Most employers are required to make contribution payments to the UI program, referred to as "contribution financing." Some employers, including tribes, are permitted to elect to make payments into the program only as necessary to reimburse the program for claims made against the employer, referred to as "reimbursement financing." Prior law required that a tribe electing reimbursement financing file assurance of reimbursement, such as a surety bond. The Act removes this requirement.

## *TRANSFER OF A HIGHWAY TO A TRIBE – 2009 WISCONSIN ACT 231*

Act 231 authorizes a city, village, town, or county (political subdivision) or the DOT to transfer jurisdiction and ownership of, or other property interest in, a highway that is under the jurisdiction of the political subdivision or DOT to a tribe or an agency of the United States government acting on behalf of a tribe (agency). The Act requires that, in making the transfer, the political subdivision or DOT must enter into a jurisdictional transfer agreement with the tribe or agency that must contain all of the following:

1. A dispute resolution procedure.

2. A provision requiring that the highway remain open to vehicular traffic unless the tribe or agency conducts a highway discontinuation proceeding similar to the proceeding that would occur if the city, village, or town in which the highway is located were discontinuing the highway.

### *MANAGED FOREST LAW; WITHDRAWAL FROM PROGRAM – 2009 WISCONSIN ACT 28*

If a landowner withdraws land from the managed forest law (MFL) prior to the expiration of the MFL order applicable to that land, the owner is subject to a withdrawal fee or withdrawal tax. [s. 77.88, Stats.] Act 28 specifies that a tribe may withdraw land that it owns in fee title from an MFL order for the purpose of transferring the land to the United States government, to be held in trust for the tribe, without a withdrawal fee or withdrawal tax. In order for this provision to apply, both of the following conditions must be satisfied:

1. The tribe has provided the DNR the date of the order to transfer the land from the tribe to the United States.

2. The tribe and DNR have entered into a written intergovernmental agreement in which the tribe has agreed to comply with the existing forestry management plan and other MFL program requirements under the MFL order, including continuing to pay all fees associated with the order (acreage share fees, closed acreage fees, and yield taxes) until the date the order would have otherwise expired.

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

This memorandum was prepared by David L. Lovell, Senior Analyst, on August 2, 2010, revised on November 17, 2010.