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## WISCONSIN LEGISLATIVE COUNCIL INFORMATION MEMORANDUM

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### **Law Enforcement in Indian Country: Tribal Institutions**

Recent decades have seen a steady growth in the scope and sophistication of tribal governments in Wisconsin and elsewhere in the nation. Tribes are continually taking on more of the standard functions of governments and offering more services to their members. This is true in the area of law enforcement, as in other areas. This Information Memorandum, the third in a series of three on the subject of law enforcement in Indian country,<sup>1</sup> describes the institutions of the American Indian tribes and bands in Wisconsin that relate to law enforcement--police departments, conservation wardens, and courts--as they exist at the time of this writing. As background, it begins with a description of tribal governments and their relation to state government.

#### **BACKGROUND**

At the time of first European contact, American Indian tribes were self-governing societies. The form of government varied greatly between tribes, just as their culture and customs varied. European occupation of North America, particularly the westward expansion of the United States in the 19<sup>th</sup> century and the removal of tribes to reservations, caused great damage to the fabric of tribal societies. The integrity of tribes was further degraded by the federal policies of assimilation and termination, which were aimed at eliminating tribes as distinct political societies and assimilating tribal members into American society. The General Allotment Act of 1887, in particular, had a great impact on tribes. It substantially diminished Indian-held land, disaggregated reservations into a "checkerboard" of jurisdictions, and left most tribes without functioning governments.

In the 1930s and again beginning in the 1970s, Congress enacted a series of laws to reestablish the ability of Indian tribes to govern themselves. Two of these laws are of particular significance. The Indian Reorganization Act of 1934 established constitutional governments for most tribes. This act is substantially responsible for the form of contemporary tribal governments. The Indian Self-Determination Act of 1975 authorized the Departments of the Interior and of Health, Education, and Welfare to enter into contracts with tribes, referred to

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<sup>1</sup> The others in the series are IM-2013-09, concerning tribal sovereignty and criminal jurisdiction in Indian country, and IM-2013-10, concerning state laws and programs to facilitate law enforcement in Indian country.

as “self-governance contracts” or “638 contracts,”<sup>2</sup> under which tribes assume responsibility for implementing federal Indian programs.<sup>3</sup><sup>4</sup>

### **CONTEMPORARY TRIBAL GOVERNMENTS**

The Indian Reorganization Act did not attempt to resurrect the traditional forms of tribal government. Rather, it established a form of constitutional government similar to the American system of government, which most tribes adopted. It also retained a significant role for the federal government, requiring approval by the Secretary of the Interior (in which department the Bureau of Indian Affairs is located) of any changes to a tribal constitution.

A typical tribal constitution establishes a government consisting of an elected tribal council, which is the law-making body of the tribe; a tribal chairman, who presides over the tribal council and has such other functions as are assigned by the constitution or the tribal council; and a tribal court. In some tribes, the full tribal membership serves as a general council with ultimate authority over all matters; in these cases, the elected council has limited powers. Typically, the tribal chairman is either selected by the tribal council or elected by the membership. As is described later in this Information Memorandum, tribes often have a traditional court, in addition to a court based on the model of courts in Europe and the United States.

In spite of their similarity in organization, tribal governments vary greatly in size and sophistication. Over time, they are developing their institutions and expanding the services they provide their members. These developments have been facilitated by federal funds received under 638 contracts and by revenues from gaming operations. At this time, tribes commonly operate medical clinics, schools, police and fire services, and programs in many areas, such as housing, child welfare, social services, and conservation.

Tribal councils represent the legislative function in tribal governments. In addition to setting general policy for the tribe, they adopt codes of tribal ordinances. In some cases, such as traffic law, tribal ordinances mirror their counterparts in state law. Because the scope of both administrative action and judicial jurisdiction depend on the development of these codes, progress in developing codes has a direct impact on the scope of a tribal government’s functions.

### **RELATION TO STATE GOVERNMENT**

Indian tribes have a unique relationship with the federal government, as the first Information Memorandum in this series explains: the federal government has plenary power over the tribes, but also has a trust responsibility toward them. Consequently, tribes have a long history of interaction with the federal government. The relationship between tribes and states is quite different. On the one hand, states were explicitly excluded from the relationship between the federal government and the tribes. In 1886, the Supreme Court stated that the tribes “owe no allegiance to the states, and receive from them no protection.”<sup>5</sup> On the other hand, tribes are

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<sup>2</sup> This act was published as Public Law 93-638.

<sup>3</sup> For a concise history of federal Indian policy, see William C. Canby, Jr., *American Indian Law in a Nutshell*, ch. 2 (West Publishing Co. 2009); for a discussion of tribal governments, see ch. 4.

<sup>4</sup> Some tribes, notably the Navajo and the Pueblos, did revive their traditional forms of government.

<sup>5</sup> *United States v. Kagama*, 18 U.S. 375, 384-85 (1886).

much closer “neighbors” to the states than to the federal government. They are literally the neighbors of the municipalities that surround them; they must interact to some degree with those municipal governments and, by extension, with the state that is comprised of those municipalities.

What is more, American Indians are citizens of the United States and, as such, have the same rights as other citizens and are entitled to the same government services as other citizens. This brings about further necessity for tribes to interact with state government and, in Wisconsin, where many state services are delivered by the counties, to interact with county governments. In many cases, tribes have sought, and to varying degrees have received, the authority to become the delivery agents of state services for the residents of their reservations, in place of the counties.

Tribes have direct interactions with many state agencies. As an example, the Department of Natural Resources (DNR) works with tribal conservation and law enforcement agencies to enforce fish and game regulations, and works in particular with the Chippewa bands and the Great Lakes Indian Fish and Wildlife Commission (GLIFWC) in implementing the numerous orders and stipulations that came from the settlement of litigation relating to the Chippewas’ rights to hunt, fish, and gather in the territory ceded to the United States in 19th century treaties. Similarly, the Department of Health Services works with the tribes to address issues related to public health, mental health, substance abuse, and the need for long-term care, among other problems. At this time, it is providing technical assistance to tribes in the form of information, resources, and training relating to proposed Medicaid changes and implementation of the federal Affordable Care Act.

Law enforcement is an important area where tribes have extensive interaction with the state, particularly through cooperation with county sheriffs, as is described in the next section of this Information Memorandum.

## **TRIBAL POLICE DEPARTMENTS**

Nine of the 11 tribes in Wisconsin have police departments. The two that do not are the Forest County Potawatomi Community and the Sokaogon Band of Chippewa Indians. (See the Appendix for a summary of the information presented in this section.) A number of tribes established their departments in the 1980s. There followed at least a decade during which no new tribal police departments were established. The remaining departments were established since 2000. The newest, established in 2011, is the Ho-Chunk Police Department. Tribal police departments in Wisconsin range in size from two to four officers, including the chief, to 20 to 24 officers. The officers of five tribes have state arrest powers;<sup>6</sup> the officers of two of those tribes and of two other tribes are deputed by the sheriffs of the counties where the tribes are located.

The services provided by, and specialized capabilities of, the tribal police departments vary considerably, but there is some commonality among them. All provide basic patrol services on the reservation, most participate in the Native American Drug and Gang Initiative, and many have school liaison officers. The Appendix identifies all of the functions and capabilities of each department, as reported in interviews with the chiefs of police.

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<sup>6</sup> See IM 2013-10 for a description of statutory state arrest powers for tribal police officers.

Most tribal police departments cooperate extensively with county sheriffs' departments. This cooperation includes performing joint dispatch functions, assisting each other in criminal investigations, and participation in regional SWAT teams, emergency response teams, and drug and gang prevention teams, to name a few. In addition, many tribes have cooperative law enforcement programs or mutual assistance agreements with counties.

The Menominee Tribe is the only tribe in Wisconsin that has its own jail. Other tribes rely on the counties for jail services. The Lac du Flambeau Police Department has two holding cells where prisoners may be held for up to four hours while officers interview the individuals or while waiting for a sheriff's deputy to take the individuals into county custody. About half of the tribes rely on surrounding communities for fire or rescue services, or both.

### **CONSERVATION WARDENS**

Seven tribes in Wisconsin, including four of the six Chippewa bands, employ conservation wardens. These wardens enforce tribal conservation laws on their tribes' reservations. The DNR has not deputed any tribal wardens as department wardens, but works with them to enforce conservation laws.

GLIFWC was created by the Chippewa bands to enforce an off-reservation code that regulates Chippewa Indians when harvesting resources in the ceded territory of the state. GLIFWC employs a corps of wardens for this function. Most, if not all, GLIFWC wardens are trained and certified as law enforcement officers. The Department of Justice identifies 22 GLIFWC wardens who have statutory state law enforcement powers. These wardens are also deputed by the DNR to enforce the state conservation code.

### **TRIBAL COURTS**

There are two types of tribal courts. One is a "court of record," in the model of the American court system. The court's proceedings are transcribed, the court issues final written orders, and the parties have appeal rights. These courts are used by the tribes to prosecute violations of tribal ordinances and by tribal members to resolve disputes. Many tribes also have traditional courts, which are unique to each individual tribe and reflect the tribe's customs and values.

#### **COURTS OF RECORD**

Each tribe in Wisconsin has a court of record. Most are small, with two to four judges, although the Oneida Court has 11 judges. All have appellate systems, also. Most appeals are heard by three-member panels; the Oneida Court uses a five-member appellate panel. The Ho-Chunk, Menominee, and Oneida courts use their own judges, exclusively, on appellate panels; the other tribes use one or more judges supplied by the Wisconsin Tribal Judges Association, on their appellate panels.

The subject matter jurisdiction of tribal courts depends largely on the state of development of the tribe's code of ordinances.<sup>7</sup> Subject matter identified by tribal judges interviewed for this paper include: general civil law, including torts, contracts, small claims, and other civil

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<sup>7</sup> One judge indicated that he feels limited by his tribe's code, and that he advises his tribal council on gaps in the code he feels should be filled.

matters; family law, including marriage, divorce, child support, paternity, adoption, and guardianship; domestic abuse; conservation law; and traffic law. The courts also vary with respect to the personal jurisdiction they assert. All assert jurisdiction over tribal members. Some assert jurisdiction over non-members who have dealings with the tribe, such as through business, marriage to a member, or, in some instances, residency on the reservation. For some purposes, such as regulation of behavior on tribal lands, some tribal courts assert jurisdiction over any person.

The first tribal court in Wisconsin was the Menominee Court. It was established in the 1970s, soon after federal recognition of the tribe was restored. The next tribes to establish courts were the Chippewa bands, who did so in the late 1970s and early 1980s. At this time, litigation relating to the tribe's rights to hunt, fish, and gather in territory they had ceded to the United States in 19<sup>th</sup> century treaties was concluding. One outcome of that and related litigation was that the Chippewa bands were authorized to regulate the off-reservation harvest of natural resources by their members if, among other conditions, they had adequate regulations and the means to enforce them. The tribal courts were a key component of meeting these conditions. The remaining tribal courts were established in the years since then.

#### **TRADITIONAL COURTS**

Traditional courts are based on tribal custom. Some traditional courts, referred to as peacemaking courts, exist for the resolution of conflicts between individuals. Others focus on punishment for transgressions of the tribe's standards of conduct. They often rely on tribal elders or clan leaders to render judgments or to settle disputes, apply traditional values in reaching decisions, and impose traditional punishments. A number of tribes use healing and wellness courts to address underlying mental health or substance abuse problems of offenders. In at least one instance, such a court serves as a drug court for the county, diverting from sentencing tribal members convicted in circuit court from criminal sentences.

However, the distinction between courts of record and traditional courts is an oversimplification. While some tribes have a separate traditional court, others incorporate aspects of tradition into their court of record. This is manifest in a punishment or the resolution of a dispute the court may order, as well as in court procedures, such as rules of procedure and rules of evidence. A number of judges interviewed for this paper indicated that in some tribal courts the parties can have a case removed from the court of record to the traditional court, by consensus, at any point in the proceeding. One judge indicated that, if he or she felt that a case properly belonged in traditional court, the judge could order the removal.

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 September 23, 2013.

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## APPENDIX

### Tribal Police Departments, Fire and Rescue Services, and Conservation Wardens

| TRIBE                    | WHEN EST.   | POLICE OFFICERS (INCLUDING CHIEF) | OFFICERS W/ STATE ARREST POWERS <sup>1</sup> | OFFICERS DEPUTED BY SHERIFF | SPECIAL UNITS OR FUNCTIONS   | 638 CONTRACT <sup>2</sup> | DETENTION FACILITY | TRIBAL FIRE DEPT. <sup>3</sup> | TRIBAL EMS <sup>3</sup> | CONSERVATION WARDENS |
|--------------------------|-------------|-----------------------------------|--|-----------------------------|--|---------------------------|--------------------|--------------------------------|-------------------------|----------------------|
| Bad River                | About 2000. | 4                                 | 0  | 4                           | General patrol services. Participates in Native American Drug and Gang Initiative (NADGI). | None.                     | None.              | Volunteer.                     | None.                   | 2                    |
| Forest County Potawatomi | None.       |                                   |  |                             | Security officers patrol tribal facilities.  |                           | None.              | None.                          | None.                   |                      |
| Ho-Chunk                 | 2011.       | 2 <sup>4</sup>                    | 0  | 0                           | General patrol services. Participates in NADGI. Developing additional services.            | None.                     | None.              | None.                          | None.                   | 0 <sup>5</sup>       |

<sup>1</sup> Arrest powers under s. 165.92, Stats. See IM 2013-10 for a description of these powers.

<sup>2</sup> “638 contracts,” also called “self-governance contracts,” are contracts under the Indian Self-Determination Act by which the Bureau of Indian Affairs provides funds to tribes to provide federal Indian services for themselves.

<sup>3</sup> An entry of “None.” indicates that the tribe does not provide this service, but that the reservation is served by a county or municipal service.

<sup>4</sup> Currently recruiting three additional officers.

<sup>5</sup> In early planning stages of a conservation department.

|                     |             |                      |    |                           |  |   |   |            |               |   |
|---------------------|-------------|----------------------|----|---------------------------|--|---|---|------------|---------------|---|
| Lac du Flambeau     | Late 1980s. | 14, plus 3 part time | 17 | 0                         | General patrol services.<br>2 school liaison officers.<br>Sexual assault investigator.<br>Drug & gang investigator.<br>Part of county emergency response team.<br>K-9 officer.     | In range of \$240,000 to \$300,000; mostly for personnel. | Two holding cells; hold suspects up to 4 hours while interviewing or waiting for Sheriff. | None.      | None.         | 3 |
| Lac Courte Oreilles | 2004.       | 12                   | 12 | 12                        | General patrol services.<br>School resources officer.<br>Criminal investigator.<br>Sensitive crimes investigator.<br>K-9 unit.<br>Participates in NADGI.                           | None.   | None.   | Volunteer. | Volunteer.    | 2 |
| Menominee           | 1980s.      | 24                   | 0  | 0                         | General patrol services.<br>School liaison.<br>3 detectives, 1 assigned to sexual assaults.<br>Sex offender registry.<br>Crime victim & witness program.<br>Participates in NADGI. | In range of \$1,000,000                                   | Tribal jail; capacity for 45 inmates.   | None.      | Professional. | 5 |
| Oneida              | 1985.       | 20                   | 20 | <sup>20<sup>6</sup></sup> | General patrol services.<br>School liaison and DARE officer.<br>Community resource officer.<br>K-9 officer.<br>2 drug investigators.<br>Drug Endangered Children                   | None.   | None.   | None.      | None.         | 2 |

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<sup>6</sup> The Oneida Reservation is located in two counties. Currently, Oneida police officers are deputed by the Brown County Sheriff; negotiations are underway to re-establish deputation by the Outagamie County Sheriff.

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|--------------------|--------------|----|----|---------------------------|---|---|-------|--|---------------------------------|---------------------------|
|                    |              |    |    |                           | program.<br>Participates in NADGI.<br>Post-incarceration re-entry program.<br>Investigation of Internet crimes against children.<br>Evidence technician.  |   |       |  |                                 |                           |
| Red Cliff          | About 2005.  | 4  | 4  | 0                         | General patrol services.<br>Participates in NADGI.  | In range of \$150,000.                                  | None. | Volunteer.                             | Volunteer.                      | 2                         |
| Saint Croix        | 2001.        | 14 | 14 | 0                         | General patrol services.<br>School liaison officer.<br>Criminal investigator.<br>2 K-9 officers.<br>Drug and gang investigator.<br>Participates in NADGI. | None.   | None. | Volunteer.                             | None.                           |                           |
| Sokaogon           | None.        |    |    |                           | Evening patrols by security guard.  | None.   | None. | None.                                  | None.                           |                           |
| Stockbridge Munsee | Before 1982. | 6  | 0  | <sup>6</sup> <sup>7</sup> | General patrol services.<br>School liaison officer.<br>Detective.<br>Part of county SWAT and drug units.<br>Participates in NADGI.                        | In range of \$300,000, plus about \$40,000 for wardens. | None. | Volunteer with one full time position. | Cooperate with a neighbor town. | <sup>2</sup> <sup>8</sup> |

Source: Interviews with tribal police chiefs and others.

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<sup>7</sup> Deputation by the Shawano County Sheriff is a condition of employment.

<sup>8</sup> Supervised by Chief of Police.