



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 3

TO: SPECIAL COMMITTEE ON STATE-TRIBAL RELATIONS

FROM: David Moore, Staff Attorney

RE: Application of 2011 Wisconsin Act 35 in Indian Country

DATE: September 9, 2011

2011 Wisconsin Act 35 creates a process to obtain a license to carry a concealed weapon. The Act also changes the law in several additional ways with respect to the possession of weapons. This Memo was prepared in response to inquiries this office has received concerning what application if any Act 35 has in Indian country.

Generally speaking, principles of sovereignty dictate that a state does not have jurisdiction to enforce the state's civil law against Indians in Indian country; in many cases, however, a state's criminal jurisdiction extends to Indian country. Despite this distinction, discerning where a state's jurisdiction ends and a tribe's begins is not always straightforward. Some weapons regulations fall within the scope of criminal prohibitions, but others are classified as civil regulatory. Whether a weapons regulation—such as those contained within Act 35—applies in Indian country often depends on this distinction.

This Memo does not purport to answer definitively whether or how Act 35 will apply in Indian country. Rather, this Memo provides a general explanation of Act 35, outlines the analysis used to determine whether a state law applies in Indian country, and suggests issues related to the Act that may affect Indian tribes in Wisconsin. The discussion in this Memo is not exhaustive; instead it is intended as a primer on the issues tribes may face in light of Act 35.

2011 WISCONSIN ACT 35

License for Carrying a Concealed Weapon and Carrying Weapons in Certain Places

As noted above, Act 35 creates a process to obtain a license to carry a concealed weapon. The Act defines “weapon” as a handgun, an electric weapon, a knife other than a switchblade, or a billy club. The licenses are issued by the Department of Justice.

Under the Act, a person who is licensed, or who is an out-of-state licensee, is generally exempted from the crimes that prohibit carrying a concealed weapon, carrying a firearm in a public building, and carrying a handgun where alcohol beverages are sold and consumed if the person is not consuming alcohol on the premises. A licensee must have his or her license document and photo identification with him or her while carrying a concealed weapon.

The Act enumerates several places where, whether licensed or not, persons may not carry a weapon. Among the places where the Act prohibits weapons are police stations, sheriffs' offices, state patrol stations, and county, state, and federal courthouses. Additionally, an owner or occupant of a building or part of a building may prohibit persons from carrying weapons in the building, and in some cases on land, by posting a sign notifying people of the restriction. Posting is not required to prohibit weapons in a single family residence.

Additional Provisions

The Act changes the law in several additional ways with respect to the possession of weapons. These changes are briefly described below.

Firearms in Vehicles

Under current law, a person who possesses a firearm in a vehicle or on certain types of land is generally required to have the firearm unloaded and encased. The Act makes a number of statutory changes with respect to the placement, possession, and transportation of firearms in various types of vehicles. Most notably, the Act permits a person to place, possess, or transport a loaded and unencased handgun in a vehicle or motorboat.

Employer Restrictions

Under the Act, an employer may prohibit an employee from carrying a concealed weapon or a particular type of concealed weapon in the course of the employee's employment or during any part of the course of the employee's employment. However, an employer may not prohibit an employee, as a condition of employment, from carrying a concealed weapon, a particular type of concealed weapon, or ammunition, or from storing a weapon, a particular type of weapon, or ammunition in the employee's own motor vehicle, regardless of whether the motor vehicle is used in the course of employment or whether the motor vehicle is driven or parked on property used by the employer.

Gun-Free School Zones

Under current law, with certain exceptions, any person who knowingly possesses a firearm, whether concealed or not, at a place that the individual knows, or has reasonable cause to believe, is a school zone is guilty of a Class I felony. "School zone" is defined as: (1) in or on the grounds of a school; and (2) within 1,000 feet from the grounds of a school.¹

¹ The definition of school zone includes tribal schools.

Under the Act, it is a Class I felony to knowingly possess a firearm at a place that the individual knows, or has reasonable cause to believe, is in or on the grounds of a school. Under the Act, it is a Class B forfeiture to possess a firearm at a place the individual knows, or has reasonable cause to believe, is within 1,000 feet of the grounds of a school.

The Act also makes changes to the exceptions under which a person may possess a firearm at a place the individual knows, or has reasonable cause to believe, is a school zone. Finally, the Act permits a licensee or an out-of-state licensee to possess a firearm within 1,000 feet of the grounds of a school, but a licensee or out-of-state licensee who does not meet one of the other exceptions may not possess a firearm in or on the grounds of a school.

Trespass Law

Current law generally prohibits entering or remaining on another person's land after having been notified by the owner or occupant not to enter or remain on the premises. The Act creates new provisions in the trespass statute to permit certain owners and occupants of property to prohibit persons from carrying a concealed weapon in or on the property. In addition, the Act permits organizers of a special event to prohibit weapons at the event by posting a sign that is located in a prominent place near each of the entrances to the special event such that any individual attending the special event can be reasonably expected to see the sign.

Exception to Disorderly Conduct Offense

Under current law, whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor. The Act provides that a person may not be in violation of, or charged with a violation of, the disorderly conduct statute or an ordinance relating to disorderly conduct for loading, carrying, or going armed with a firearm, without regard to whether the firearm is loaded or is concealed or openly carried, unless other facts and circumstances apply that indicate a criminal or malicious intent on the part of the person.

Justification for Firearm Discharge

Under current law, a city, village, or town exercising village powers may restrict the discharge of a firearm. Current law also prohibits discharging a firearm near certain parks, from a vehicle, from or across a highway, or in or from an aircraft. The Act contains a provision under which such an ordinance or resolution does not apply if the actor's conduct is justified or, had it been subject to a criminal penalty, would have been subject to a defense of privilege in the Criminal Code (e.g., was under circumstances of coercion or necessity or was in self-defense). The Act also creates exceptions for other statutory firearm discharge prohibitions, as described above, if the actor's conduct is justified or, had it been subject to a criminal penalty, would have been subject to a defense under the Criminal Code.

JURISDICTION TO ENFORCE LAWS IN INDIAN COUNTRY

“Indian country” includes: (1) all lands within the limits of a reservation; (2) all dependent Indian communities; and (3) all Indian allotments.² A state may enforce its laws over non-Indians in Indian country and over Indians outside of Indian country. In general, however, a state may not enforce its laws against Indians in Indian country unless:

1. A treaty or other agreement with a tribe specifies that state law applies;
2. Congress has specified that state law applies; or
3. A court determines that state law applies.

Treaties

It does not appear that any treaty applicable to a tribe in Wisconsin addresses whether the state may regulate weapons in Indian country. However, the establishment of a reservation includes an implied right of American Indians to hunt on that reservation free of regulation by the state,³ and in certain circumstances these hunting rights may override state weapons regulations. For example, the Wisconsin Supreme Court has held that a statute that effectively prohibits hunting from a vehicle impermissibly infringes tribal hunting rights.⁴

A tribe’s exemption from hunting regulations, however, does not authorize its exemption from all statutes related to weapons. The prohibition against a convicted felon possessing firearms, for example, may be applied to a tribal member on the member’s reservation because such laws, as will be discussed below, are generally applicable, criminal statutes.⁵

Congressional Enactment: Public Law 280

Congress has not enacted a law clearly addressing whether states have jurisdiction to enforce, in Indian country, laws concerning the manner in which weapons may be carried. One congressional enactment relevant to addressing this issue, however, is Public Law 280.

P.L. 280 transferred criminal jurisdiction over Indians to the state for all Indian country in Wisconsin except the Menominee Reservation.⁶ P.L. 280 did not, however, transfer civil regulatory jurisdiction to the state.⁷ Thus, except with regard to the Menominee Reservation, whether a law applies

² 18 U.S.C. s. 1151.

³ *Menominee Tribe v. U.S.*, 391 U.S. 404, 405-06 (1968).

⁴ *State v. Lemieux*, 110 Wis. 2d 158, 167 (1983).

⁵ *State v. Jacobs*, 2007 WI App 155, ¶4.

⁶ 1953 Public Law 280 (P.L. 280), 18 U.S.C. s. 1162; exemption of Menominee Tribe discussed in *U.S. v. Long*, 324 F.3d 475 (Ct. App. 7th Cir., 2003).

⁷ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987).

in Indian country depends in large part on whether it is considered a criminal prohibitory law or a civil regulatory law. If it is the former, the law likely applies. If the latter, it probably does not.⁸

There is no bright line test to determine if a law is criminal prohibitory or civil regulatory. Imposing a criminal penalty does not necessarily mean that a law is criminal prohibitory for purposes of analyzing jurisdiction under P.L. 280.⁹ 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 the State’s public policy.”¹⁰

The Wisconsin Constitution protects “the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.”¹¹ However, our state supreme court has also held that this right is not absolute; that is, the state may restrict the manner in which firearms are possessed and used.¹² Because the state permits but regulates firearm possession, there is a strong argument that laws regulating the manner in which firearms may be carried are civil regulatory and therefore unenforceable by the state against Indians in Indian country. Nevertheless, such a determination would ultimately be made by the courts.

Additional Bases for Jurisdiction

Even if a law is civil regulatory, state jurisdiction over tribes and tribal members in Indian country is not necessarily precluded. “[Under] certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation, and ... in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members.”¹³

The state must generally overcome two independent but related barriers to show that a state civil 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.’”¹⁴

In general, “state jurisdiction is preempted ... if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the

⁸ See, *Cabazon*, at 209.

⁹ *Cabazon*, at 211.

¹⁰ *Cabazon*, at 209.

¹¹ Wis. Const. Art. I, s. 25.

¹² *State v. Cole*, 2003 WI 112, ¶26.

¹³ *Cabazon*, at 215 (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983)).

¹⁴ *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)).

assertion of state authority.”¹⁵ Federal preemption need not be explicit. Rather, this question must be analyzed through the prism of “a firm federal policy of promoting tribal self-sufficiency and economic development.”¹⁶ Specifically, the inquiry must “proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its ‘overriding goal’ of encouraging tribal self-sufficiency and economic development.”¹⁷

Applying these principles depends significantly on who is being regulated and the status of the land where enforcement is sought: “When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State’s regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest.”¹⁸ However, state law is more likely applicable with respect to non-Indians “to take account of the State’s legitimate interests in regulating the affairs of non-Indians.”¹⁹ Nevertheless, these principles do not establish an absolute rule. Rather, analyzing state-tribal jurisdictional questions “call[s] for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.”²⁰

The flip side of the jurisdictional coin concerns who tribes may regulate. Tribes may exercise broad regulatory authority over tribe members.²¹ Tribes also have regulatory authority over the conduct of nonmembers on tribal lands.²² However, tribes may only regulate nonmembers on nonmember fee lands under the two exceptions set forth in *Montana v. United States*, 450 U.S. 544 (1981). First, “[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”²³ 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.”²⁴ Courts have construed these exceptions narrowly.

¹⁵ *Cabazon*, at 216.

¹⁶ *Bracker*, at 143.

¹⁷ *Cabazon*, at 216.

¹⁸ *Bracker*, at 144.

¹⁹ *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 171 (1973).

²⁰ *Bracker*, at 145.

²¹ *Montana v. United States*, 450 U.S. 544, 564 (1981)

²² See *Id.* at 565.

²³ *Montana*, at 565-66.

²⁴ *Id.*, at 566.

APPLICATION OF 2011 WISCONSIN ACT 35 IN INDIAN COUNTRY

As stated above, it is unclear how Act 35 will apply in Indian country. Moreover, application of the Act will likely vary depending on whether a tribe has enacted an ordinance that conflicts with a provision of the Act.

A preliminary search of the codes available online for Wisconsin tribes indicates that most tribes currently do not have in place ordinances that substantially conflict with Act 35. Due to the complexity of comparing multiple tribal codes with state law, however, it is beyond the scope of this Memo to analyze possible jurisdictional conflicts with individual tribal codes.

One tribal law that may present conflicts with state law is the Menominee Tribe's firearms ordinance. That ordinance requires firearms to be both unloaded and cased in order to be carried in vehicles. As discussed in the first part of this Memo, Act 35 permits a person to place, possess, or transport a loaded and unencased handgun in a vehicle. Further, the Menominee Tribe's firearms ordinance refers to 25 CFR Part 11, federal regulations that apply to certain tribes and which contain provisions limiting the concealed carry of weapons. Although the federal government does not apply these regulations to the Menominee Tribe, my conversation with an attorney for the tribe indicates the tribe has incorporated by reference certain of these provisions into its own ordinances.

The Menominee Tribe is the only tribe in Wisconsin exempt from the jurisdictional provisions in P.L. 280; therefore, the analysis of jurisdictional issues with respect to Menominee land will often be different than that for the other tribes. As mentioned above, this Memo does not purport to provide a full analysis of the jurisdictional issues presented by the Menominee Tribe's firearms ordinance. At the very least, however, it seems clear that the Menominee Tribe may continue to enforce the ordinance against its members on the Menominee Reservation.

Where a tribe has no conflicting ordinance, the Act could play out as in other parts of the state. In other words, a tribe could recognize state weapons permits and post against weapons in designated locations, such as tribal government facilities, tribal businesses, and casinos. A tribe could also post against weapons at special events, such as pow wows, by posting a sign near all of the entrances. There is an argument that a tribe could generally post all open tribal lands; however, this will remain unclear until the courts determine the extent to which land can be posted.

DISCUSSION

The full implications of Act 35 for Indian country are not yet clear, but it appears the Act may alter the law enforcement environment for Wisconsin Indian tribes. Certainly, tribes will be able to prevent individuals from carrying weapons in certain places through the posting requirements contained in the Act if they choose to do so. However, the extent to which the Act will apply on tribal lands remains to be seen.

In light of these uncertainties, there are a number of issues that may present concerns for tribes. Examples of questions the law may raise, as well as preliminary answers, include the following:

1. May a tribe enforce an ordinance prohibiting the transport of loaded, unencased handguns in vehicles against nonmembers on tribal land? Probably not if the nonmember is traveling on a

public highway. The U.S. Supreme Court has held that tribes' jurisdiction over nonmembers is limited on public highways within reservation boundaries because the tribes cannot assert a landowner's right to occupy and exclude over such highways.²⁵

2. May a tribe restrict a nonmember casino employee from carrying a weapon in his or her vehicle on casino property? Although a tribe could not impose a criminal penalty, there is a strong argument that it could preclude nonmember employees from carrying weapons in their cars on casino property because tribes possess an inherent right to govern their territory. Further, the *Montana* case recognizes that a tribe may assert jurisdiction over nonmembers who enter into certain consensual relationships with the tribe.
3. May the state enforce the prohibition against carrying a concealed weapon without a license in Indian country? The state could enforce this prohibition against nontribal members; however, whether the state could enforce the prohibition against a member depends on whether a court determined the prohibition was criminal prohibitory or civil regulatory. If the former, the state could exert jurisdiction over members of all P.L. 280 tribes. If a court determined the prohibition was civil regulatory, jurisdiction would likely depend on the extent to which the tribe regulated weapons possession.
4. Must a tribe post against carrying weapons in the manner specified by Act 35 to prohibit weapons in certain places or may it simply enact these prohibitions by ordinance? There is a strong argument that a tribe may enact its own prohibitions on carrying weapons in certain places—particularly tribal buildings and businesses—and need not depend on Act 35's posting requirements. As a practical matter, however, it may be advisable for tribes to post locations where weapons are prohibited to remove any ambiguity about whether weapons are permitted.

The responses to these hypothetical questions do not constitute legal advice, but merely suggest how certain jurisdictional issues might be resolved.

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²⁵ *State v. A-1 Constr.*, 520 U.S. 438, 455-56 (1997).