

Wisconsin Legislative Council

- Q-1 American Indian Tribes in Wisconsin
- Q-3 American Indians in Wisconsin
- Q-4 Indian Lands in Wisconsin
- Q-6 Tribal Sovereignty
- Q-7 Sovereign Immunity
- Q-7 Treaties
- Q-8 Jurisdiction
- Q-12 Indian Gaming
- Q-15 Indian Child Welfare Act
- Q-15 Tribal-State Relations in Wisconsin
- Q-17 Glossary of Terms and Abbreviations
- Q-17 Additional References

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Chapter Q

State-Tribal Relations

American Indians and American Indian tribes and bands (“tribes”) in Wisconsin have a complex and evolving relationship with the federal and state governments. Over the decades, the federal government has gone through many phases in its policy toward tribes, sometimes with abrupt shifts in direction. Court decisions continue to define these relationships, with the U.S. Supreme Court typically deciding several Indian law cases each term. U.S. Supreme Court decisions also have periodically shifted direction, typically without explicitly overruling prior decisions. This often leaves contradictory pronouncements by the court. Moreover, the nature of tribal government continues to change as many tribes now have increasing resources to further develop the infrastructure of tribal government and to increase the services provided to tribal members and others residing on reservations.

Because of the complex and evolving nature of the law, the unique status of each tribe, and considerations of brevity, this document describes only general principles; one or more exceptions typically apply to any principle described. Information on legislation affecting American Indians and Indian tribes enacted in the 2009-10 Session of the Wisconsin State Legislature can be found at: <http://www.legis.state.wi.us/lc>.

American Indian Tribes in Wisconsin

There are 11 federally recognized tribes in Wisconsin. Each has its own independent government, tribal membership, and land base. The following table indicates the name of each tribe, the county or counties in which its land base is located, the approximate number of acres of land in Wisconsin held in trust¹ for the tribe or tribal members, and the number of enrolled tribal members.

Name of Tribe	Number of Enrolled Tribal Members	Wisconsin Counties in Which Reservation or Off-Reservation Trust Land Is Located	Approx. Number of Acres of Land in Wisconsin Held in Trust for the Tribe (As of January 2009)
Bad River Band of Lake Superior Chippewa Indians	6,945	Ashland, Iron	57,884
Forest County Potawatomi Community	1,250	Forest, Marinette, Milwaukee, Oconto	12,280
Ho-Chunk Nation	6,563	Adams, Clark, Crawford, Dane, Eau Claire, Jackson, Juneau, La Crosse, Marathon, Monroe, Sauk, Shawano, Vernon, Wood	2,108
Lac Courte Oreilles Band of Lake Superior Chippewas	6,918	Burnett, Sawyer, Washburn	24,365
Lac du Flambeau Band of Lake Superior Chippewas	3,415	Iron, Oneida, Vilas	39,403
Menominee Nation	8,339	Menominee, Shawano	235,524
Mohican Nation, Stockbridge-Munsee Band	1,565	Shawano	16,255
Oneida Tribe of Indians of Wisconsin	15,336	Brown, Outagamie	6,646
Red Cliff Band of Lake Superior Chippewas	5,312	Bayfield	6,404
St. Croix Band of Chippewa Indians	1,054	Barron, Burnett, Polk	2,126
Sokaogon Chippewa Community (Mole Lake)	1,261	Forest	1,320

Sources: For membership information: The Bureau of Indian Affairs (BIA) publishes tribal enrollment data in its Labor Force Report. Although required to be issued every two years, as of this writing, the most recent report is dated 2005. Therefore, membership data and trust land information is taken from "Tribes of Wisconsin," prepared by the Department of Administration (DOA) (January 2009), and reflects information provided by each tribe.

Tribal Government

Each tribe in Wisconsin has a constitution that establishes the structure of its government. All of the tribes in Wisconsin have an elected tribal council (sometimes called a tribal governing board or business committee or legislature) and a chair or president. Tribal councils typically enact legislation (which often is collectively called the tribal code or ordinances) and may make certain administrative or business decisions. Some tribal constitutions provide that certain issues must be voted on by the general membership of the tribe, rather than the elected governing body. Some of the tribal chairs or presidents are elected by the general membership of the tribe; however, some are elected by the tribal council. In addition to serving as part of the tribal council, a tribal chair or president typically performs additional duties.

Some constitutions provide for a tribal court or other dispute resolution forum. The subject matter over which a tribal court or dispute resolution forum has jurisdiction varies from tribe to tribe. Information about the tribal courts in Wisconsin and the jurisdiction of each is available at: <http://www.judicare.org/ilo> (then click on "Wisconsin Tribal Courts").

In addition to these decision-making bodies, tribal governments typically have various departments with staff assigned to work on particular issues, such as human services, child welfare, education, environment, business development, health, or transportation. Some tribal governments have law enforcement departments.

In addition, some tribal governments have established or chartered tribal corporations or tribal business enterprises.

Great Lakes Inter-Tribal Council

Each tribe in Wisconsin is a separate government. No tribe in Wisconsin is controlled by another tribe or speaks for another tribe. However, all Wisconsin tribes belong to the Great Lakes Inter-Tribal Council (GLITC), which is a consortium of federally recognized tribes in Wisconsin and the Lac Vieux Desert Tribe of Michigan.

GLITC was originally devoted to delivering services and programs (such as health, aging, and economic development programs) to member tribes and to the rural Indian communities of Wisconsin. However, as many tribes have become increasingly capable of providing services to their own communities, GLITC’s role has largely changed from direct delivery of services to assisting member tribes in the delivery of services and supplementing a tribe’s service capacity.

The GLITC Board of Directors is comprised of the tribal chair of each member tribe or the chair’s designated representative. The GLITC Board meets several times a year to discuss items of mutual interest. However, neither GLITC nor the GLITC Board has authority over any tribe.

American Indians in Wisconsin

Definition

There is no one definition of an Indian, American Indian, or Native American. Federal law and Wisconsin statutes define “Indian” or “American Indian” in a variety of ways for different purposes and programs.

There is no consensus as to which of these terms is the most acceptable to describe individuals collectively. However, there is consensus that it is preferable to refer to an individual’s particular heritage if at all possible, for example, by referring to a person as an Oneida or a Menominee, rather than referring to the person by the more generic term Indian, American Indian, or Native American.

Tribal Membership

Courts have held that a tribe has the power to establish its own criteria for determining tribal membership. Examples of criteria used include blood quantum requirements, ancestors on a specific roll, and patrilineal or matrilineal descent rules. Some individuals who have “Indian blood” may not be eligible for tribal membership (typically called enrollment) in any tribe or may be eligible for membership in more than one tribe.

Census Data

U.S. Census data count individuals as American Indians based on self-identification, without regard to whether the individual is legally recognized by a tribe as a member. In the 2000 Census, 69,950 individuals in Wisconsin identified themselves as “American Indian or Alaska Native” either as one race or in combination with one or more other races, which is about 1.3% of the total Wisconsin population.² The U.S. Census population estimates in July 1, 2010 are that 67,857 individuals in Wisconsin would so identify themselves.

Not all of these individuals are legally recognized as members of a Wisconsin tribe, nor do they all live on a reservation. In fact, significant American Indian populations reside in urban areas in Wisconsin, especially in Milwaukee.

Indian Lands in Wisconsin

All of the federally recognized tribes in Wisconsin, except the Ho-Chunk Nation, have a reservation, that is, land that the United States has set aside out of the public domain for the use of a tribe (for example, by treaty, executive order, statute, or U.S. Secretary of Interior proclamation). The Ho-Chunk Nation does not have a consolidated reservation but has trust lands in 11 counties; a few of these trust lands have reservation status. As discussed below, reservation and trust land are not synonymous: not all land on a reservation is trust land; not all trust land is on a reservation.

As discussed below, for purposes of determining civil, criminal, and civil regulatory jurisdiction, the ownership and location of land may be pertinent.

Trust Land Versus Fee Land

Congress provided that the Secretary of Interior has authority to hold and acquire land in trust for the benefit of American Indians and tribes. Trust land refers to land the title to which is held by the United States in trust for a tribe or individual American Indian. Trust land cannot be sold without the prior approval of the Secretary of Interior. Federal law provides that trust land is exempt from taxation by state and local government. In contrast, fee land (sometimes referred to as fee simple land or fee-patented land) refers to land the title to which is held by the owner. In general, an owner of fee land may freely alienate it, for example, by selling it. In general, fee land is subject to taxation by state and local government.³

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

If a tribe or American Indian purchases land and holds the title in fee simple, the tribe or American Indian may, but is not required to, petition the Secretary to take the land in trust, and the Secretary may or may not agree to do so. Unlike a tribe, which may apply to have any land that the tribe owns held in trust, an American Indian may do so only with respect to land owned by the American Indian that is on or adjacent to a reservation or land that is already in trust or restricted status. Federal regulations promulgated by the BIA set forth the procedure and criteria used by the Secretary to make a decision as to whether to take land in trust.

General Background

Each tribe and reservation has a unique history. However, many reservations in the United States were greatly affected by the General Allotment Act of 1887 (also known as the Dawes Act) or by similar federal legislation allotting tribal land. On the affected reservations, the Dawes Act provided for a certain number of acres to be allotted to each tribal member to be held in trust for a certain period of time, after which a fee patent would be issued. Because property taxes generally had to be paid once it became fee land, many sales resulted when a tribal member could not pay property taxes or, in some cases, because a tribal member wanted to sell the land for other reasons. Many such allotted lands were then purchased by non-Indians. The Dawes Act also provided for the disposition of all "surplus" lands remaining after allotment so that the land could be used for non-Indian settlement. In the United States, it is estimated that the 138 million acres of land held by tribes and American Indians in 1887 had declined to about 48 million acres in 1934 when the allotment era ended with passage of the federal Indian Reorganization Act. Among other things, the Indian Reorganization Act prohibited further allotments and continued the trust status of lands then remaining in trust.

Land Tenure on Reservations

However, not all reservations or all lands on a reservation were allotted, and the trust status of all allotments did not expire. Moreover, tribes and individual American Indians may own or purchase fee land on a reservation which they may either hold

title to as fee land or request that it be placed in trust. Thus, there are six broad categories of land tenure on reservations:

- Trust land held for a tribe (commonly called tribal trust land).
- Trust land held for an American Indian who is a member of the tribe which has that reservation (tribal member).⁴
- Trust land held for an American Indian who is not a member of the tribe that has that reservation. (The tribe's permission is required to place land in trust under these circumstances.)
- Fee land owned by a tribe.
- Fee land owned by a tribal member.
- Fee land owned by an entity or individual other than a tribe or tribal member (typically a non-Indian).

Land tenure patterns on reservations in Wisconsin and around the United States vary greatly. For example, almost all of the Menominee Reservation is tribal trust land; in contrast, a small part of the Oneida Reservation is tribal trust land but most of the Oneida Reservation is fee land, much of which is owned by non-Indians. The table on page Q-2 lists the approximate number of acres of trust land in Wisconsin for each tribe, including lands held in trust for American Indians.

Reservation Boundaries

The exact boundaries of a reservation are sometimes clear and are sometimes disputed.⁵ For example, in Wisconsin, the extent of the Oneida Reservation was the subject of litigation in the 1980s; the boundaries of the Stockbridge-Munsee Reservation were the subject of a Wisconsin Supreme Court decision in 1995 and of a 2004 decision by a federal district court (which has been appealed to the U.S. Seventh Circuit Court of Appeals); and land that is ostensibly part of the Menominee Reservation in Shawano County may be part of the Stockbridge-Munsee Reservation.

Off-Reservation Trust Land

Federal law permits a tribe to apply to have land that is owned by the tribe held in trust, even if the land is outside the boundaries of the tribe's reservation. Because Indian gaming may be conducted only on a reservation or on trust land, some tribes have shown an interest in acquiring land outside the boundaries of the tribe's reservation and having it placed in trust for the tribe. A tribe also may acquire land outside its reservation for other purposes.

The Secretary of Interior has discretion in deciding whether to hold the land in trust. Under federal regulations, the criteria that the Secretary uses to decide vary somewhat depending on whether the land is within the boundaries of or contiguous to a tribe's reservation or outside the boundaries of and noncontiguous to a tribe's reservation.

Because of its history, the Ho-Chunk Nation does not have a consolidated reservation but has scattered trust lands in 11 counties; a few of these trust lands have been granted reservation status. Therefore, most Ho-Chunk lands are off-reservation trust lands.

While the status of off-reservation trust land has not been fully litigated for all purposes, in general, courts have held that off-reservation trust land is considered to have the same status as trust land on a reservation for jurisdictional purposes.

Tribal Sovereignty

In very general terms, sovereignty refers to the right or power to govern, including the ability of the governing entity to make and enforce its own laws in its own territory. Tribes are self-governing entities. The sovereign status of tribes is established as a matter of federal law and tribal law. Tribal sovereignty is not dependent on state action.

The sovereignty that a tribe possesses is inherent, which means that it comes from within the tribe itself, and existed before the founding of the United States. However, the U.S. Supreme Court has held that tribal sovereignty is not absolute but, rather, is subject to certain limits resulting from the unique relationship of the tribes to the United States. In general, 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, to use the term adopted by the U.S. Supreme Court, “domestic dependent nations.” In general, the third category is constituted by decisions of federal courts holding that a particular aspect of sovereignty does not apply to a tribe. For example, in 1978, the U.S. Supreme Court held that, because of its domestic dependent status, a tribe could not impose a criminal penalty on a non-Indian for an alleged crime against an Indian on the tribe’s reservation.⁶ The extent of tribal sovereignty continues to be discussed and litigated.

Relation to Federal Government

Tribes have a unique legal and political relationship with the federal government. Early in the history of the United States, a decision was made to have the federal government, not the states, in charge of affairs with the tribes.

Trust Responsibility. Courts have held that the federal government has a trust responsibility to the tribes which is sometimes asserted in litigation, especially in cases involving tribal lands and resources. It is similar, but not identical, to the fiduciary duty of a guardian in a guardian-ward relationship. The trust doctrine continues to evolve as the extent of the federal government’s trust responsibility to the tribes continues to be litigated.

Congress. The U.S. Constitution grants to Congress the power to regulate commerce with the Indian tribes. Early on, Congress set a pattern of regulating relations between American Indians and non-Indians. In general, the courts have held that Congress has “plenary power” over tribes, which generally means that Congress can make any decision with respect to tribes. For example, Congress has even gone so far as terminating federal recognition of a tribal government and reservation, including the Menominee Tribe effective in 1961. (Congress later restored federal recognition of the Menominee Tribe and reestablished the Menominee Reservation in 1973 by passing the Menominee Restoration Act.) The U.S. Supreme Court also has held that Congress may abrogate a treaty with a tribe, as long as Congress makes clear its intent to do so.

Executive Branch. The President, with the advice and consent of the Senate, may make treaties. Presidents entered into treaties with many, but not all, tribes, up until 1871 when Congress forbade making further treaties with tribes.

On a day-to-day basis, the executive branch of the federal government has the primary responsibility for interacting with tribal governments. The BIA in the U.S. Department of Interior has a central role in federal executive branch dealings with tribes. However, other federal executive branch agencies are also responsible for carrying out the federal trust responsibility to the 564 federally recognized tribes.

Relation to State Government

U.S. Presidents dating back to President Richard Nixon have referred to a government-to-government relationship between the federal government and individual tribes. Under Executive Order 13175 issued by President Bill Clinton in 2000, federal agencies are to consult with tribal officials before taking major action that would affect tribes. President Barack Obama confirmed this consultation requirement in November 2009.⁷

A tribe is distinct and separate from a state and is not a political subdivision of a state. In general, unless Congress, a treaty, or court decisions have specified otherwise, a state does not have jurisdiction over a tribe or over American Indians in Indian country.⁸ This means, for example, that the state may not enact legislation requiring a tribe to do anything unless Congress, a treaty, or court decision explicitly grants such power to a state. However, a state may enact legislation permitting a tribe to do certain things if the tribe chooses to do so (for example, administer a state program) or legislation conditioning the receipt of state funds on certain actions by a tribe.

On February 27, 2004, Governor Doyle issued Executive Order 39 affirming the government-to-government relationship between the state and the tribes in Wisconsin and directing cabinet agencies, whenever feasible and appropriate, to consult with tribal governments regarding state action or proposed state action that is anticipated to directly affect a tribe or tribal members. The consultation policies adopted by executive branch agencies under the Wisconsin State Tribal Relations Initiative are available at: <http://witribes.wi.gov/>.

Sovereign Immunity

Sovereign immunity refers to the doctrine established by the courts that prohibits a lawsuit against a government without its consent. Like the federal and state governments, courts have held that sovereign immunity also applies to tribes and tribal business organizations. The exact extent of tribal sovereign immunity continues to be litigated. However, in general, it applies to activities of a tribe or tribal business organization in Indian country and, in most cases, to activities outside Indian country.

Sovereign immunity may be asserted under various circumstances, for example, for injuries sustained at a tribal facility by workers or visitors or in connection with contracts. A tribe may waive its sovereign immunity, and whether a tribe has done so is sometimes litigated.

Treaties

Most, but not all, tribes in the United States entered into treaties with the United States, often several treaties over a period of time. The tribes often ceded (gave up) the right to occupy certain lands but reserved other rights such as hunting and fishing rights and the right to occupy a smaller territory or agreed to be removed to a different territory that would be reserved for them. Treaties also contained other conditions.

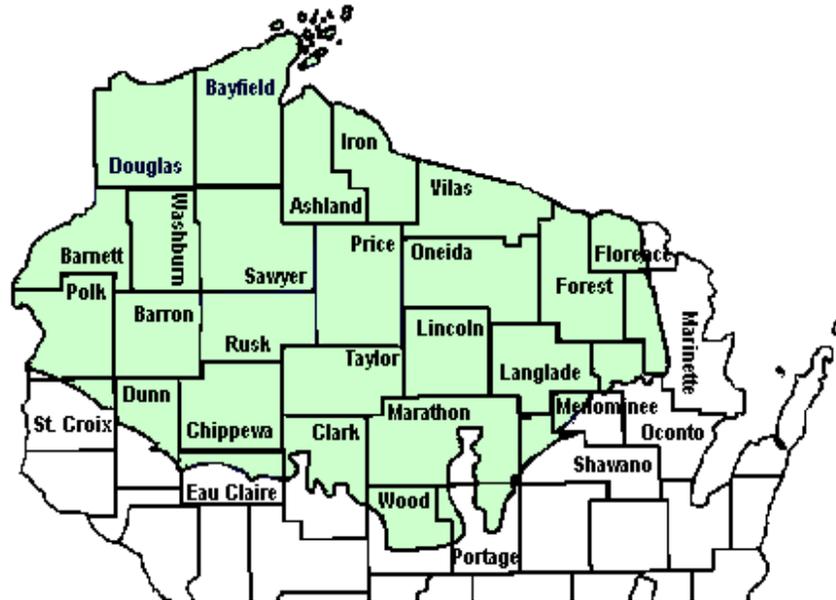
In 1871, Congress essentially prohibited the President from entering into future treaties with tribes. However, then-existing treaties continue to be the law of the land unless Congress has made clear its intent to abrogate a treaty. When considering any legal issue with respect to a specific tribe, any treaty with that tribe may be pertinent if the treaty addresses that particular issue. This means that, from one

tribe to another, there may be different answers to a legal question, depending on whether any treaty provisions are pertinent.

Chippewa Treaties

For example, in 1837 and 1842 treaties with the United States, the Chippewa reserved certain lands in Wisconsin (that is, their reservations) and agreed to cede certain other lands in Wisconsin to the United States.⁹ However, in the treaties, the Chippewa reserved the right to hunt, fish, and gather on those ceded lands which cover approximately 22,400 square miles in the northern third of Wisconsin as shown in the following map:

Territory in Wisconsin Ceded by Chippewas in 1837 and 1842 Treaties



Source: Wisconsin Department of Natural Resources (DNR).

In a series of decisions from 1983 to 1991, the federal courts upheld the rights reserved in the treaties for Chippewas to hunt, fish, and gather off the reservations in the ceded territory in Wisconsin on public lands. Subsequent memorandums of understanding between the Wisconsin DNR, Chippewa bands, and the Great Lakes Indian Fish and Wildlife Commission (GLIFWC)¹⁰ provide for cooperative efforts between the state, Chippewa bands, and GLIFWC relating to regulating hunting, fishing, and gathering in the ceded territory, including regulation of Chippewas by their tribal governments.

Jurisdiction

The question as to whether the federal government, state, or tribe (or more than one of these entities) has jurisdiction over an activity or person in Indian country is one of the most complicated issues in Indian law. Issues arise with respect to: (1) criminal jurisdiction; (2) civil jurisdiction (which typically involves lawsuits between persons); and (3) civil regulatory jurisdiction. Most of the case law involves adjudicatory jurisdiction, that is, which court system has jurisdiction. However, questions occasionally have been raised in the criminal context about enforcement jurisdiction, that is, which officials have arrest authority.

**Criminal
Jurisdiction**

In Wisconsin, criminal jurisdiction depends on whether a reservation is or is not subject to Public Law 83-280, commonly referred to as Public Law 280 or P.L. 280. Passed by Congress in 1953, P.L. 280 mandated the transfer of criminal jurisdiction in Indian country from the federal government to five states (later six states when Alaska was admitted to the Union), with exceptions for certain reservations. Other states were given the option to have jurisdiction transferred to them, and some states exercised that option in varying ways--although subsequent congressional action limited the option unless the tribe consented.¹¹

Wisconsin is one of the six mandatory states. However, Congress made an exception for the Menominee Reservation, and this exception was reinstated when Wisconsin retroceded (gave back) jurisdiction to the federal government after the Menominee Reservation was restored as noted above. Federal law permits states to retrocede jurisdiction under certain circumstances, but Wisconsin has not done so except for the Menominee Reservation. This means that criminal jurisdiction on the Menominee Reservation (a non-P.L. 280 reservation) is radically different from criminal jurisdiction on the other reservations in Wisconsin.

P.L. 280 Reservations in Wisconsin. All reservations and off-reservation trust lands in Wisconsin, except the Menominee Reservation, are subject to P.L. 280. In general, this means that state courts and state law enforcement officials¹² have jurisdiction over an activity on the reservation or off-reservation trust land that is a crime¹³ under state law. It is generally agreed that the tribes retained jurisdiction over Indians for certain crimes committed in Indian country, that is, that a tribe has concurrent jurisdiction if an Indian also violated tribal law.

Non-P.L. 280 Reservations in Wisconsin--Menominee Reservation. The Menominee Reservation is not a P.L. 280 reservation. This means that jurisdiction is determined by the nature of the crime and whether the perpetrator and victim are Indian or non-Indian. In very general terms, if an Indian is involved as either the perpetrator or victim, depending on the nature of the crime, the federal court or tribal court (or, in some cases, both) have jurisdiction. However, if both the perpetrator and victim are non-Indian or if the perpetrator of a victimless or consensual crime is non-Indian, the state has jurisdiction if a state criminal law was violated.¹⁴

Wisconsin statutes authorize the Wisconsin Attorney General to negotiate an agreement with the Menominee Tribe relating to the extradition of fugitives, witnesses, and evidence from the Menominee Reservation. However, no extradition agreement is currently in place. In 2001, the U.S. Supreme Court held that state law enforcement officials were not prohibited by federal law from entering a reservation (including a non-P.L. 280 reservation in that case) to investigate and prosecute a tribal member for an off-reservation violation of state law.¹⁵

**Civil
Jurisdiction**

Civil jurisdiction essentially refers to matters in a court that relate to private rights and status, as contrasted with criminal proceedings. Civil actions include, for example, a tort claim that arises following an automobile accident or a lawsuit over a contract. It also has been held to include causes of action relating to a person's status, such as a person's involuntary commitment as a sexually violent person under ch. 980, Stats.¹⁶ In addition to its transfer of criminal jurisdiction, P.L. 280 also mandated the transfer of civil jurisdiction to five (later six) states, including Wisconsin, except on the Menominee Reservation, and allowed optional assumption of civil jurisdiction in other states. Thus, as with criminal jurisdiction, a distinction is made between the Menominee Reservation and the other reservations in Wisconsin (that is, the P.L. 280 reservations) for purposes of civil jurisdiction.

P.L. 280 Reservations in Wisconsin. In general, on all reservations and off-reservation trust land in Wisconsin, except the Menominee Reservation, P.L. 280

essentially provides that even if American Indians are involved as parties, state courts have jurisdiction over a civil matter that arises on the reservation or off-reservation trust land. For example, if two individuals had an automobile accident on a P.L. 280 reservation, the state court would have subject matter jurisdiction. Tribal courts may retain concurrent jurisdiction under certain circumstances.

Non-P.L. 280 Reservations in Wisconsin--Menominee Reservation. Because of the exception made for the Menominee Reservation as discussed above, P.L. 280 does not delegate civil jurisdiction to the state on the Menominee Reservation. Therefore, whether the state court, tribal court, or federal court (or more than one such court) has jurisdiction over a matter arising on the Menominee Reservation is based on court decisions that have established principles with respect to other non-P.L. 280 reservations. In general, the courts have held that civil jurisdiction is, in part, determined by: (1) the status of the land where the claim arose, that is, fee land versus trust land on the reservation;¹⁷ and (2) whether one of the parties is a member of the tribe, in this case, the Menominee Tribe.¹⁸

As a general principle developed by the U.S. Supreme Court in 1997,¹⁹ on the Menominee Reservation, a state court likely has exclusive jurisdiction over a lawsuit between individuals who are **not members** of the Menominee Tribe for actions arising on **fee land** on the Menominee Reservation that is **not** owned by the Menominee Tribe or an American Indian, including an action arising on a state highway right-of-way. If a claim arose on **fee land** on the Menominee Reservation and a **tribal member was a party**, the answer to which court has jurisdiction may depend on whether the tribal member is the plaintiff or defendant, but this area of the law is unsettled. When a tribal member or tribal interest is involved on **trust land** on the Menominee Reservation, a state court generally would not have civil jurisdiction. These general principles leave some questions unanswered and will not necessarily be applied by a court in all instances.

Federal Jurisdiction. In some cases, a federal court, rather than a state court, has jurisdiction in a civil suit because the plaintiff and defendant are not from the same state (diversity jurisdiction) or because a federal question is involved. Depending on whether the claim arose in Indian country and the exact status of the land where the claim arose and depending on whether the plaintiff or defendant is a tribal member, a federal court or a tribal court, or both, may have jurisdiction. In certain circumstances, a party may be required to exhaust its remedies in tribal court before the federal court will proceed.

Civil Regulatory Jurisdiction

Outside Indian Country. The general rule is that, absent an express federal law to the contrary,²⁰ activities of American Indians and tribes outside of Indian country are subject to a state's nondiscriminatory civil regulatory laws.²¹ However, the U.S. Supreme Court has yet to resolve the issue of whether a tribe has sovereign immunity (that is, immunity from lawsuit without consent) with respect to suits for violation of a state civil regulatory law outside Indian country.

In Indian Country. In general, a tribe may exercise civil regulatory jurisdiction over its tribal members on the tribe's reservation or off-reservation trust land. However, the applicability of state civil regulatory laws in Indian country and the applicability of tribal civil regulatory laws to non-Indians in Indian country are two of the most complex and unsettled areas of Indian law. Moreover, they are two of the most frequently litigated.

Applicability of State Civil Regulatory Laws. The U.S. Supreme Court has consistently held that P.L. 280 did not transfer civil regulatory jurisdiction to the states. The courts have devised general guidelines to determine if a law is "civil regulatory" (and, thus, not subject to P.L. 280) or "criminal prohibitory" (and, thus, subject to P.L. 280

in Wisconsin on all but the Menominee Reservation). While it may be difficult to categorize some laws as clearly civil regulatory, rather than criminal prohibitory, there are many examples of laws that clearly are civil regulatory, for example, certain laws relating to taxation, banking regulations, employment and workplace regulations, most traffic regulations, building codes, and environmental regulations.

In the absence of a treaty provision or a specific congressional delegation of jurisdiction to a state, a state's civil regulatory laws do not apply to tribes or tribal members in Indian country unless the courts have held otherwise. In recent years, the courts have increasingly held otherwise by moving away from prior court decisions that generally presumed that state civil regulatory laws did not apply in Indian country. The U.S. Supreme Court has created several tests to determine whether a state may validly assert civil regulatory jurisdiction in Indian country. Because the Supreme Court generally has not explicitly overruled its earlier decisions on this issue, there is some uncertainty as to which test a court will apply to make its determination. Moreover, in some decisions, courts have distinguished between: (1) American Indians who are members of the tribe on whose reservation the activity occurred (tribal members) versus American Indians who are not members of that tribe; (2) tribal members who live on the reservation versus tribal members who do not live on the reservation; (3) American Indians versus non-Indians; (4) whether the activity occurred on fee land or trust land; or (5) whether the activity occurred on fee land owned by a tribe or American Indian versus fee land owned by a non-Indian.

One of the tests that may be used by a court is the balancing of state, federal, and tribal interests used by the U.S. Supreme Court in *California v. Cabazon Band of Mission Indians*²² to determine if a state civil regulatory law applies in Indian country. In general, if the state's interests outweigh the federal and tribal interests, the state civil regulatory law would be applicable. However, in conducting this balancing test, the U.S. Supreme Court indicated that the balancing should proceed in light of traditional notions of tribal sovereignty and the congressional goal of tribal self-governance, including the overriding goal of encouraging tribal self-sufficiency and economic development. Because a balancing of interests test is dependent on the facts of the case, it may be difficult to accurately predict the outcome of this test.

In *Vilas v. Chapman*,²³ the Wisconsin Supreme Court used the tradition test based on U.S. Supreme Court precedent established in *Rice v. Rehner*,²⁴ rather than the balancing of interests test. Under the tradition test, the Wisconsin Supreme Court allowed state civil regulatory jurisdiction over a tribal member in Indian country because the tribe did not have a tradition of self-government in that particular area of regulation. Although the U.S. Supreme Court has not explicitly overturned *Rice v. Rehner*, subsequent decisions of that court (including *Cabazon*) appear to have moved away from the tradition test. Thus, it is likely that, in the future, the Wisconsin Supreme Court will similarly move away from the tradition test used in *Vilas v. Chapman*.

In contrast to other civil regulatory laws, the U.S. Supreme Court has developed a clearer test in recent years with regard to state civil regulatory laws involving taxation. The U.S. Supreme Court has generally held that if the legal incidence of a state tax falls on a tribe or tribal member in Indian country, the tax does not apply absent an express congressional authorization.²⁵ However, taxation is a frequently litigated issue in Indian law.

Applicability of Tribal Civil Regulatory Laws to Non-Tribal Members, Including Non-Indians. In recent decisions, the U.S. Supreme Court has used the test developed in *Montana v. United States*²⁶ to determine if a tribe may assert tribal civil regulatory jurisdiction over non-tribal members **on fee land in Indian country that is owned by a non-tribal member**. Under that test, a tribe may do so only if: (1) the non-tribal member has entered into consensual relationships with the tribe or tribal

members through commercial dealings, contracts, leases, or other arrangements; or (2) the non-tribal member's conduct threatens or has some direct effect on the political integrity, economic security, health, or welfare of the tribe.

If the non-tribal member were **on trust land or on fee land owned by a tribe or tribal member in Indian country**, up until 2001, it seemed less likely that the *Montana* test would be used and more likely that a court would permit a tribe to apply tribal civil regulatory laws, even with respect to non-Indians. However, in June 2001, the U.S. Supreme Court's decision in *Nevada v. Hicks*²⁷ cast doubt on that assumption when the Court held that, when non-tribal members are concerned, tribal jurisdiction could be exercised only to the extent necessary to protect tribal self-government or control internal relations in the tribe--regardless of the status of the land on the reservation on which an incident occurred--unless Congress had conferred regulatory jurisdiction on the tribe. It remains to be seen whether the holding of *Nevada v. Hicks* will be extended beyond the circumstances of that case which involved whether a tribe had authority to regulate the ability of state law enforcement officials to search the defendant tribal member's home on trust land on a reservation for a violation of state law off the reservation.

Summary. In summary, unless a specific issue has been fully litigated, there is some uncertainty about civil regulatory jurisdiction. Even if it were clear which test a court would apply to analyze whether a particular state civil regulatory law applies in Indian country, the outcome of the application of the test is by no means certain because the analysis typically would depend on the facts and circumstances involved.

In some cases, uncertainty can be minimized if there is an explicit agreement between a tribe and the state or local government about an issue. For example, Wisconsin statutes authorize the Department of Revenue (DOR) to enter into agreements with tribes about cigarette taxes, and this has occurred.²⁸ As another example, Wisconsin statutes provide that the Secretary of Natural Resources must enter into a reciprocal agreement with a Wisconsin tribe to exempt from state registration and certification requirements boats, snowmobiles, and all-terrain vehicles that are owned by tribal members and registered under a tribal registration program if the tribe requests the agreement and certain conditions are met.

Indian Gaming

Indian Gaming Regulatory Act

As noted above, Congress may enact legislation that affects jurisdiction in Indian country. Congress did so in 1988 with passage of the federal Indian Gaming Regulatory Act (IGRA). IGRA divides gaming into three classes: Class I (social and traditional games played by Indians); Class II (bingo, certain games similar to bingo if played at the same location as bingo, and certain card games under limited circumstances); and Class III (all other forms of gaming, which include casino games, slot machines, pari-mutuel betting (for example, on horse or dog races), and certain forms of lottery).

IGRA permits Class III gaming on Indian lands in a state only if the state permits such gaming for any purpose by any person, organization, or entity. Further, Class III gaming may be conducted by a tribe or person authorized by a tribe only if there is a state-tribal compact. If requested to do so by a tribe, IGRA requires a state to negotiate with the tribe in good faith regarding entering into a compact. However, in *Seminole Tribe of Florida v. Florida*,²⁹ the U.S. Supreme Court held that a state may claim immunity under the Eleventh Amendment of the U.S. Constitution if the state is sued in federal court to compel good faith negotiation under IGRA. Thus, the requirement to bargain in good faith may not be enforceable. Consequently, the BIA

has issued regulations prescribing procedures to permit Class III gaming when a state asserts its immunity from suit by a tribe that claims the state has failed to negotiate in good faith.³⁰

Under IGRA, special provisions apply with respect to Indian land that is outside of and not contiguous to the tribe's reservation boundaries on October 17, 1988 and placed in trust after October 17, 1988. In general, Class III gaming is not permitted on such land unless: (1) the U.S. Secretary of Interior determines that the proposed gaming establishment would be in the best interest of the tribe and its members and would not be detrimental to the surrounding community; and (2) the Governor of the state concurs with the Secretary's determination. Of course, the terms of the compact also would have to permit (or be amended to permit) a gaming facility on such off-reservation trust land.

Gaming Compacts

Governor Negotiates. IGRA does not specify which entity in the state is responsible for good faith negotiation at the request of a tribe to operate Class III gaming. Wisconsin statutes authorize the Governor to enter into compacts with tribes under IGRA.³¹ The Wisconsin Supreme Court has held that the purpose of this statute is to designate the Governor as the state's lead negotiator.³² Further, the Director of Indian Gaming in the DOA is responsible for various functions related to Indian gaming and the state's regulation of Indian gaming, and the Office of Indian Gaming assists the Governor and Secretary of Administration with respect to gaming compacts.³³

Provisions of Compacts. Each of the tribes in Wisconsin has entered into a compact with the state that permits the tribe to operate Class III gaming. While there are many similarities, each compact is unique. The compacts, including the amendments, are available on the DOA Division of Gaming website at: <http://www.doa.state.wi.us/gaming/index.asp> under "Indian Gaming."

Duration of Compacts. The original compacts were entered into on various dates in 1991 and 1992 and were for terms of seven years. All of the compacts were amended and renewed in 1998 and 1999 for additional five-year terms. (However, the Menominee Tribe entered into compact amendments with the state in August 2000, which provided for a different expiration date for the proposed Kenosha facility, which has not yet been established.) Compacts with 10 of the 11 tribes were amended and renewed in 2003 (the 2003 Amendments). (The compact with the Lac du Flambeau Band of Lake Superior Chippewas was automatically extended for five years from July 1, 2004, because neither the state nor Lac du Flambeau sent a notice of nonrenewal.)

In the 2003 Amendments, a provision in each compact that had permitted the state to give timely notice of nonrenewal at five-year intervals was deleted. Instead, the 2003 Amendments specified that a compact remains in effect until terminated by mutual agreement of the tribe and state or by the tribe revoking its own authority to conduct casino gaming. Also, three of the compacts were additionally amended to specify that if this indefinite compact duration provision were determined to be unenforceable or invalid by a court, the compact term would be 99 years.

In *Panzer v. Doyle*,³⁴ certain aspects of the 2003 Amendments to the compact with the Forest County Potawatomi Community, which included the indefinite duration provision, were challenged. In that case, the Wisconsin Supreme Court characterized the duration provision as creating a "perpetual" compact and held that the Governor had not been delegated authority to agree to such a duration provision. As for the three compacts that default to a 99-year term, no appellate court has been asked to determine whether the Governor had authority to enter into such a default duration provision.

In 2005, the state and Forest County Potawatomi Community entered into a compact amendment which substituted a 25-year term (instead of the indefinite duration provision) with automatic renewal unless a notice of nonrenewal complying with the compact is timely served. In 2008, a 25-year term was also substituted in the compact with the Ho-Chunk Nation (instead of the indefinite duration provision) and the same term was included in the 2009 Amendments to the Lac du Flambeau compact. When any such amendments become effective, they should be posted to the DOA Division of Gaming website at: <http://www.doa.state.wi.us/gaming/index.asp>.

Scope of Games. Prior to the 2003 Amendments, the compacts provided that the tribes had the right to operate the following Class III games: electronic games of chance with video facsimile or mechanical displays, blackjack, and pull-tabs or break-open tickets when not played at the same location as bingo. (The 2000 Amendments to the Menominee compact also permitted the Menominee Indian Tribe of Wisconsin to conduct Menominee Lotto and pari-mutuel racing and wagering activity conducted at the Kenosha facility, which has not yet been established.)

The 2003 Amendments authorized additional games, including roulette, poker and certain other card games, craps, keno, and pari-mutuel wagering on live simulcast horse, harness, and dog racing events. The Governor's authority to agree to the additional games specified in the 2003 Amendments to the Potawatomi compact was challenged in *Panzer v. Doyle*. The Wisconsin Supreme Court held that the Governor did not have authority to agree to the additional games (other than pari-mutuel wagering on live simulcast horse, harness, and dog racing events). However, in *Dairyland Greyhound Park, Inc. v. Doyle*,³⁵ the Wisconsin Supreme Court withdrew this language in *Panzer v. Doyle* and stated that: "gaming can be expanded to the extent that the State and Tribes negotiate for additional Class III games."

Payments to the State. Beginning with the renewals of the compacts in 1998 and 1999, each tribe agreed to make payments to the state over and above the \$350,000 that the tribes collectively had paid to the state annually for the cost of state regulation of Indian gaming. The annual payments under the 1998 and 1999 Amendments collectively totaled approximately \$24 million. Collectively, the 2003 Amendments, 2005 Potawatomi Amendment, and 2008 Ho-Chunk Amendment provided for significantly increased payments to the state. In fiscal year 2008-09, Wisconsin tribes paid the state \$122 million from gaming revenue.

However, in general, the 2003 Amendments provided that certain payments to the state would not be required if the indefinite compact duration provision were determined by a court to be unenforceable or invalid and, in the case of the default 99-year term provision in three compacts, if both provisions were found to be unenforceable or invalid. As discussed above, the Wisconsin Supreme Court held in *Panzer v. Doyle* that the Governor did not have authority to enter into the indefinite duration provision in the 2003 Amendments to the Potawatomi compact. This holding raises questions about the similar provision in the 2003 Amendments to other compacts; moreover, it does not address the 99-year default provision in three compacts. When any such amendments become effective, they should be posted to the DOA Division of Gaming website at: <http://www.doa.state.wi.us/gaming/index.asp>.

General Information. General information about Indian gaming in Wisconsin is available in the following publications:

- *Tribal Gambling in Wisconsin*, Informational Paper #87, Legislative Fiscal Bureau (January 2009), at: <http://www.legis.state.wi.us/lfb/Informationalpapers/info.html>. To view the

most recent version, go to the Legislative Fiscal Bureau's website (<http://www.legis.state.wi.us/lfb/index.html>) and click on "Publications."

- *An Evaluation, Division of Gaming, Department of Administration*, Report 10-11, Legislative Audit Bureau (August 2010), at: <http://www.legis.wisconsin.gov/lab/PastReportsByDate.htm>.

Indian Child Welfare Act

In 1978, Congress passed the Indian Child Welfare Act (ICWA) in order to reduce the high incidence of removing American Indian children from their homes and placing them in non-Indian foster care, adoptive homes, or institutions. ICWA applies to certain child custody proceedings in which an Indian child may be removed from his or her home, such as a child in need of protection or services (CHIPS), juvenile in need of protection or services (JIPS) under certain circumstances, adoption, or termination of parental rights proceeding; ICWA does not apply to divorce proceedings or delinquency proceedings.

Four tribes have exclusive jurisdiction for Indian children who reside on the tribe's reservation. Under certain circumstances, a child custody proceeding in state court that is subject to ICWA must be transferred to tribal court; if the state court retains jurisdiction, the child's Indian custodian and tribe have the right to intervene in the state court proceeding. If an American Indian child must be placed outside the home, ICWA provides certain preferences for the child's placement that attempt to keep the child as close as possible to the Indian community. For example, for adoptive placements, the order of preference (in the absence of good cause to the contrary) is with a member of the child's extended family, then a member of the child's tribe, and then a member of another tribe, before consideration is given to placing the child outside the Indian community.

ICWA includes various requirements for these child custody proceedings. In order to comply with ICWA, Wisconsin statutes provide that ICWA supersedes any inconsistent provision in state statutes.³⁶

The Department of Health and Family Services, and later the Department of Children and Families (DCF), consulted with tribal officials and developed a legislative proposal which codified ICWA requirements in Wisconsin statutes and defined terms used in ICWA. 2009 Wisconsin Act 94 took effect on December 22, 2009.

Tribal-State Relations in Wisconsin

On February 27, 2004, Governor Doyle issued Executive Order 39 affirming the government-to-government relationship between the state and the tribes in Wisconsin.

Tribes in Wisconsin provide many services to individuals on their reservations, including non-Indians, such as health care, housing, and education. Some Wisconsin statutes specify that tribes may administer a particular state program and provide funding for a tribe to do so. For example, some, but not all, tribes participate in administering the Wisconsin Works (W-2) program.

In addition, Wisconsin statutes explicitly provide that if a law authorizes a grant of state funds by a state agency to any county, city, village, or town, a grant also may be made to any tribe for the same purpose.³⁷ Moreover, the statutes specify that the state or any state agency and local units of government may contract with a tribe to

receive or furnish services or to jointly exercise any power or duty required or authorized by law unless a statute specifies otherwise.³⁸ The state and some local units of government have entered into intergovernmental cooperative agreements with a tribe for various purposes.

Wisconsin does not have a state counterpart to the BIA. There is no one state agency assigned primary responsibility for interacting with tribes. The state executive branch negotiates gaming compacts. Various state executive branch agency officials have on-going relationships with tribal officials with respect to programs administered by their state agency. For example, the Department of Health Services contracts with tribes for various services. Executive Order 39 directs cabinet agencies, whenever feasible and appropriate, to consult with tribal governments regarding state action or proposed state action that is anticipated to directly affect a tribe or tribal members. Consultation policies have been developed under the Wisconsin State Tribal Relations Initiative and are available at: <http://witribes.wi.gov/> under "Government to Government."

Legislative Branch

The Wisconsin Legislature as a whole does not have a formal relationship with tribal governments. However, Wisconsin statutes require the Joint Legislative Council to establish the Special Committee on State-Tribal Relations (formerly known as the American Indian Study Committee) in every biennium to study issues relating to American Indians and tribes in Wisconsin and develop specific recommendations and legislative proposals relating to these issues. By statute, the Special Committee consists of legislators and public members who are recommended by the tribes and GLITC. The committee meets periodically and has developed many proposals over the years. The activities of the committee may be followed on its website at: <http://www.legis.state.wi.us/lc> under "Study Committees." In addition, in the past four years, the tribes have been invited each year to present a State of the Tribes address to the Legislature.

Judicial Branch

Wisconsin statutes provide that a state court must give full faith and credit to the judicial records, orders, and judgments of a tribal court in Wisconsin under certain circumstances.³⁹ In *Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians*,⁴⁰ the majority opinion of the Wisconsin Supreme Court interpreted this statute as applying in situations when a tribal court holds proceedings and enters a judgment and a party then goes to state court to enforce the judgment. However, the Court held that this full faith and credit statute does not apply when a tribal court and state court are exercising concurrent jurisdiction over the same dispute involving the same parties at the same time. In such cases, principles of comity require that the courts consider various factors listed by the Supreme Court to decide, in the spirit of cooperation, not competition, which court should proceed and which court should abstain and cede its jurisdiction.⁴¹

In response to the first *Teague* case, in December 2001, the 10th Judicial Administrative District of Wisconsin (consisting of Ashland, Barron, Bayfield, Burnett, Chippewa, Douglas, Dunn, Eau Claire, Polk, Rusk, St. Croix, Sawyer, and Washburn Counties) and four Chippewa bands in that district (Bad River, Red Cliff, St. Croix, and Lac Courte Oreilles) signed a protocol for allocating jurisdiction over a controversy when both the tribal court and state court have jurisdiction and the same issue is pending in both courts at the same time. In July 2005, the 9th Judicial Administrative District (consisting of Florence, Forest, Iron, Langlade, Lincoln, Marathon, Menominee, Oneida, Price, Shawano, Taylor, and Vilas Counties) and five tribes (Bad River Band, Forest County Potawatomi Community, Lac du Flambeau Band, Sokaogon Chippewa Community (Mole Lake), and the Mohican Nation Stockbridge-Munsee Band) also signed a protocol allocating jurisdiction and listing the factors to be considered in determining which court exercises jurisdiction. The protocols are available at: <http://www.wicourts.gov/about/committees/tribal.htm>.

Beginning in the late 1990s, the Wisconsin Supreme Court, the Wisconsin Tribal Judges Association, and the federal judges in Wisconsin have made concerted efforts to bridge the gaps of understanding, respect, and working relationships between courts, especially between the state courts and tribal courts in Wisconsin. In 2005, Wisconsin Supreme Court Chief Justice Shirley Abrahamson established the State-Tribal Justice Forum to promote and sustain communication, education, and cooperation among tribal and state court systems.

In response to Petition 07-11 filed on behalf of the State-Tribal Justice Forum with the Wisconsin Supreme Court, the Supreme Court created a rule [s. 801.54, Stats.], effective January 1, 2009, and subsequent amendment effective July 1, 2009, which in general authorized a circuit court to transfer a civil action to a tribal court when the courts have concurrent jurisdiction. Unless all parties agree to the transfer, the circuit court is required to consider all relevant factors, including factors specified in s. 801.54, in exercising its discretion as to whether to transfer the civil action.

Additional References

1. http://www.legis.state.wi.us/lc/publications/im/IM_2010_12.pdf.
2. <http://www.legis.state.wi.us/lc>. Website of the Legislative Council staff which lists the study committees of the Joint Legislative Council, including the Special Committee on State-Tribal Relations.
3. <http://witribes.wi.gov/>. Website of the Division of Intergovernmental Relations, Division of Administration, providing information about the Wisconsin State Tribal Relations Initiative and other information about tribes in Wisconsin.
4. <http://www.glitc.org>. Website of the GLITC. This website provides links to the websites of all of the tribes in Wisconsin.
5. <http://www.glifwc.org>. Website of the GLIFWC.
6. <http://www.judicare.org/ilo/index.html>. Website of Wisconsin Judicare, Indian Law Office. This website provides links to tribal websites, including information about tribal courts in Wisconsin.
7. <http://www.ncsl.org/programs/statetribe/statetribe.htm>. Website of the National Conference of State Legislatures (NCSL) relating to state-tribal relations, including links to various NCSL publications and resources.

Glossary of Terms and Abbreviations

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

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

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

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

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

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

¹ Trust land is discussed on page Q-4.

² Of these, 48,322 individuals identified themselves as of one race in the category of “American Indian or Alaska Native,” which is about 0.9% of the total Wisconsin population.

³ Some fee lands on certain reservations may be tax-exempt based on provisions of a treaty. Moreover, fee land may be tax-exempt for a reason unrelated to Indian law, for example, if it is owned by certain nonprofit organizations, such as a church, or by the federal, state, or local government.

⁴ Just as fee land may be owned by more than one individual, land may be held in trust for more than one tribal member.

⁵ Because of its importance, the U.S. Supreme Court has considered several cases relating to the existence of a reservation and its boundaries.

⁶ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

⁷ Presidential memorandum, November 5, 2009.

⁸ In general, “Indian country” is defined as: all land on reservations, all dependent Indian communities, and all Indian allotments. In Wisconsin, Indian country likely consists of all land on reservations and all off-reservation trust land.

⁹ The Chippewa also reserved certain lands and ceded other lands in Minnesota and Michigan in treaties dating from 1836 to 1854.

¹⁰ GLIFWC, located in Odanah, Wisconsin, is comprised of the six Chippewa bands in Wisconsin and five Chippewa bands in Minnesota and Michigan. GLIFWC’s purposes are to: (a) protect and enhance treaty-guaranteed rights to hunt, fish, and gather in the ceded territory; (b) protect and enhance treaty-guaranteed fishing on the Great Lakes; and (c) provide cooperative management of these resources.

¹¹ In addition to P.L. 280, Congress has occasionally passed laws relating to criminal jurisdiction on specific reservations, typically in connection with land claim settlement acts. For the United States as a whole, criminal jurisdiction in Indian country has been likened to a “jurisdictional maze” because of: reservation-specific enactments, the diversity between mandatory versus optional states under P.L. 280, exceptions for certain reservations under P.L. 280, the varying approaches taken by the optional P.L. 280 states (including not exercising the option in some cases or exercising the option only for certain crimes, on certain reservations, or in certain counties), and the possibility of state retrocession of jurisdiction.

¹² In this section, references to state courts and state law enforcement officials include county circuit courts and law enforcement officials of local governments as they are political subdivisions of the state.

¹³ P.L. 280 does not transfer jurisdiction to a state if state law regulates conduct (civil regulatory law), rather than prohibits conduct (criminal prohibitory law). In most cases, it is clear whether an activity is criminal prohibitory (thus, subject to P.L. 280) or civil regulatory (thus, not subject to P.L. 280). However, in some cases, the answer is not always clear and the matter is sometimes litigated.

¹⁴ The fact that a state court has jurisdiction when only non-Indians are involved is based on decisions of the U.S. Supreme Court, rather than a congressional delegation of authority to the states.

¹⁵ *Nevada v. Hicks*, 533 U.S. 353 (2001).

¹⁶ *Burgess v. Wisconsin*, 2003 WI 71, 262 Wis. 2d 354, 665 N.W.2d 124 (2003), *cert. denied*, 541 U.S. 961 (2004).

¹⁷ In contrast to the law relating to criminal jurisdiction where Indian country includes all the land on reservations, including fee land and rights-of-way, for civil jurisdiction, the courts have distinguished between fee land and trust land and between rights-of-way that are state highways versus tribal roads.

¹⁸ This is in contrast to criminal jurisdiction where the distinction is Indian versus non-Indian, instead of tribal member versus non-tribal member.

¹⁹ *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

²⁰ An example of an express law to the contrary is a treaty reserving off-reservation rights to hunt, fish, and gather.

²¹ However, specialized statutes may vary this result. For example, federal statutes that provide that tribes may be treated as states under certain circumstances with respect to certain environmental laws may result in tribal law having an impact off the reservation.

²² 480 U.S. 202 (1987).

²³ 122 Wis. 2d 211, 361 N.W.2d 699 (1985).

²⁴ 463 U.S. 713 (1983).

²⁵ Whether a tribal member resides on or off a reservation has sometimes been pertinent to a court for certain kinds of taxes, such as income tax, in determining whether the legal incidence falls in Indian country.

²⁶ 450 U.S. 544 (1981); also see *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S. Ct. 2709 (2008) (further discussing *Montana* and holding that a tribal court did not have jurisdiction to hear a claim against a non-tribal member relating to discrimination regarding the sale of fee land on a reservation because the tribe did not have authority to regulate a non-tribal member's sale of fee land on a reservation).

²⁷ 533 U.S. 353 (2001).

²⁸ DOR may enter into an agreement with a tribe to provide for refunding all of the cigarette tax imposed on cigarettes sold on that tribe's reservation to enrolled members of that tribe who reside on that reservation. [s. 139.325, Stats.] For cigarettes sold to others, DOR may enter into an agreement with a tribe to provide for refunding to the tribal council 70% of the cigarette tax collected on that tribe's reservation or land placed in trust for that tribe before January 2, 1983, if certain conditions are met. [s. 139.323, Stats.]

²⁹ 517 U.S. 44 (1996).

³⁰ 25 C.F.R. ss. 291.1 to 291.15.

³¹ s. 14.035, Stats.

³² *Panzer v. Doyle*, 2004 WI 52, ¶ 67, 271 Wis. 2d 289, 680 N.W.2d 666 (2004).

³³ ch. 569, Stats.

³⁴ 2004 WI 52, 271 Wis. 2d 289, 680 N.W.2d 666. Legislative Council Information Memorandum 04-6, *Wisconsin Supreme Court Decision on Indian Gaming Compact [Panzer v. Doyle]*, May 27, 2004, describes the court's decision.

³⁵ 2006 WI 107.

³⁶ ss. 48.028 and 938.028, Stats.

³⁷ s. 20.002 (13), Stats.

³⁸ s. 66.0301 (2), Stats.

³⁹ s. 806.245, Stats.

⁴⁰ 2003 WI 118, ¶ 67, 265 Wis. 2d 64, 665 N.W.2d 899 (2003). See, also, *Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians*, 236 Wis. 2d 581, 612 N.W.2d 709 (2000), when the court first dealt with this case in which a suit over a contract was brought in state court and also in tribal court while the state court action was pending.

⁴¹ *Teague*, 2003 WI 118, ¶ 71.

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