The Great Lakes Indian Law Center
Comments on Proposed Wisconsin
Rule of Court 7-11:

"A Perspective on the 'schizophrenic' approach to our legal relationship with Wisconsin's Indian Nations and a modest proposal to give clarity to the federal Public Law 83-280 in Wisconsin"

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to the Wisconsin Supreme Court

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About the Great Lakes Indian Law Center

The Great Lakes Indian Law Center at the University of Wisconsin Law School was established in 1992 to improve the practical legal skills of all students interested in Federal Indian Law while providing a legal resource for Native American Tribes. The Center is chartered to 1) provide academic and educational atmosphere and opportunity for law students to study Federal, State, and Tribal laws affecting Indian Nations and their citizens; 2) provide legal assistance on uniquely tribal matters; and 3) encourage and assist Indian Students in obtaining a legal education. Wisconsin has eleven federally recognized Indian tribes including six bands of Chippewa and the Potawatomi, Ho-Chunk, Oneida, Menominee, and Mohican (Stockbridge-Munsee) Tribes. The Center's strategic proximity to these Indian nations, the quality of our students, and an institutional commitment to "law in action" create a synergistic effect that is truly unique. The University of Wisconsin Law School has graduated more practicing Indian lawyers than any other school in the country, and many if not most of those alumni have benefited from the initiatives and programs sponsored by the Center, which including the tribal externship and Indian business capacity building programs. To find out more about the Great Lakes Indian Law Center visit us on the web at http:/law.wisc.edu/glilc/

Acknowledgement

This work is an organic culmination of efforts between many different parties including Director Richard Monette and Deputy Director Huma Ahsan. The Center would like to acknowledge and thank UW Law student Rachel Lauesen for editing.

This work is dedicated to all the Indigenous peoples of Wisconsin who have been removed to and from the state of Wisconsin and to those who still remain.

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ABSTRACT

Generally, issues arising under the federal Public Law 83-280 (PL280) can be divided into three categories:

1) **criminal**
2) **civil cause of action**
3) **regulatory**

In the first section of PL280, the federal government makes an express grant to the State of Wisconsin of jurisdiction over "offenses" in Indian Country. In the second section, PL280 grants to the State jurisdiction over "civil causes of action" in Indian Country. Each of these two sections contains a second paragraph which expressly excludes state jurisdiction over certain regulatory areas. Furthermore, the US Supreme Court has held that PL280 is not a wholesale grant of jurisdiction over other regulatory matters in Indian Country. Therefore, in summary, PL280 grants to the State Wisconsin jurisdiction over criminal offenses and civil cause of action in Indian Country, but PL280 does not grant to the State of Wisconsin jurisdiction over regulatory matters. Importantly, PL280 does not supplant Federal Indian Law. Those areas beyond the reach of PL280, such as the regulatory arena, continue to invoke Federal Indian Law as the foundation for the State/Tribe relationship.

These three categories continue to give rise to several issues under PL280:

1) **Concurrent Jurisdiction over Criminal Offenses.** First, Federal Indian Law requires that any intent by Congress to abrogate the Tribes' inherent rights must be express, clear, and unambiguous in a federal statute. Because PL280 did not expressly take away the tribes' own inherent power to try crimes, several courts have concluded that States and Tribes have concurrent jurisdiction under PL280 to prosecute and punish crimes. Such concurrent criminal jurisdiction is not unusual in American law, as evidenced by the common practice of dual prosecutions by the federal and states governments.

> **KEY POINT:** While dual prosecutions require cooperation among sovereigns in such matters as investigations, handling evidence, and in some ways sentencing; dual sovereigns can both *have* jurisdiction over the same criminal offense, and *they can both exercise it.*

2) **Concurrent Jurisdiction over Civil Causes of Action.** Even though PL280 expressly granted to the State jurisdiction over "civil causes of action", PL280 did not expressly abrogate the Tribes' inherent judicial power over civil causes of action. As a result, several courts have construed a concurrent jurisdiction in States and Tribes to process civil causes of action arising in Indian Country. Of course, such concurrent jurisdiction over civil causes of action is the crux of the Teague[1] conundrum.

[1] See FN 61 and 62

No amount of cooperation among sovereigns will alleviate the root problems caused by the Teague scenario: one party simply cannot have a contract dispute settled in one court while the other party has the same dispute settled differently in another court; one party cannot reach a tort settlement in one court and proceed on the same tort claim in another; one party cannot be divorced in one jurisdiction and remain married in the other.

> **KEY POINT:** While dual sovereigns can both *have* jurisdiction over the same civil cause of action, *they cannot both exercise it.*

3) **Regulatory Jurisdiction: the "prohibitory/regulatory" distinction.** The very notion of concurrent regulatory jurisdiction invokes a thicket of abstraction. PL280 does not expressly grant regulatory jurisdiction to the States, and instead expressly prohibits certain exercises of regulatory jurisdiction by the States. Accordingly, the US Supreme Court has consistently construed PL280 as not granting any measure of regulatory jurisdiction to States. Therefore, the main issue under this category involves defining what is "regulatory".

Specifically, the charge is to ascertain the dividing line between criminal jurisdiction and regulatory jurisdiction, and to a lesser extent, the dividing line between what is a civil cause of action and what is regulatory. Regarding the dividing line between offenses and regulations, the US Supreme Court has fashioned a test that, it seems, only it can pass: the *criminal prohibitory v. civil regulatory test* ("the pro/reg test"). As a shorthand rule, the US Supreme Court has queried whether the governed action violates the State's "public policy", thus being criminal in nature, or whether the action is simply governed as part of the State's regulatory scheme (meaning the action is regulatory even if a criminal-style punishment is available as part of the overall statutory scheme). As the US Supreme Court has lucidly conceded: "It is not a bright-line rule, however."

A small part of the problem is the US Supreme Court's use of the word "civil" when it speaks of the criminal prohibitory/civil regulatory distinction, since the word "civil" is also in PL280's second section under "civil cause of action". The practice of using the word "civil" for dual purposes has evidently confused some scholars and, apparently, even some judges. Therefore, the Center makes a couple important points at the outset: 1) the term "civil causes of action" means private actions between private citizens, such as a contract or personal injury dispute. The term does not mean a civil regulatory action where one party is the state government and the other is a private citizen or subject; and thus 2) the pro/reg test applies only under PL280's first section, the one regarding criminal offenses; the pro/reg test is irrelevant under PL280's second section regarding civil causes of action. Nonetheless, the dividing lines remain blurred between prohibitory (criminal offenses) and regulatory laws, as well as the dividing line between "civil cause of actions" and regulatory proceedings, and thus continues to cause confusion and discord.

KEY POINT: Federal Indian Law continues to provide the underlayment for the relationship between PL280 States and Tribes in the regulatory arena where, even in non-PL280 States, the States have some measure of jurisdiction over regulatory matters in Indian Country.

The Great Lakes Indian Law Center concludes that the State of Wisconsin and the Tribes can readily possess and exercise concurrent jurisdiction over criminal offenses in the respective reservation. Indeed, the Center opines that such a development will advance the interests of the both the State and Tribes in fighting crime. The Center also concludes that the State of Wisconsin and the Tribes both have jurisdiction over civil causes of action in the respective reservation, while recognizing that both sovereigns cannot both exercise such jurisdiction. At this juncture, the Center urges the Supreme Court to consider that, while a regulatory statutory scheme may ultimately, after repeated violations, be enforceable by criminal prosecution and punishment, the conduct nonetheless remains merely regulated, not prohibited.

Since the State and the Tribes have concurrent jurisdiction over civil causes of action, yet they cannot both exercise it, there arises inevitable cross-jurisdictional issues of both process and resolution, as evidenced by the Teague case. Cross-jurisdictional issues of dispute resolution can be readily appreciated in American law with the federal constitutional notion of Full Faith and Credit between States, an idea readily extended to the final judgments and orders of Tribal courts. However, issues of process spread across jurisdictional boundaries are far more complex when it comes to the more vague notions of comity, especially regarding the inevitable "race to the courthouse" by private parties, or the even less palatable "race to judgment" by the courts themselves. For purposes of this discussion, the Center refers to these "process" issues – the two "races" – as issues of "primacy" and "exhaustion". The Great Lakes Indian Law Center respectfully directs the Wisconsin Supreme Court's attention toward Federal Indian Law developments in both precedent and policy when it comes to primacy and exhaustion.

A Modest Proposal for Primacy and Exhaustion: Federal Indian Law and the *Teague* Conundrum

If the Center may draw upon the simplicity of our 6thgrade civics lessons, that a democratic society's laws derive from the norms and values of its own citizenry, and that therefore our norms and values are indicators of our society's cultural identity and our citizens' social identity. Therefore, under PL280 the State of Wisconsin and its Supreme Court inevitably play a major role in determining whether indigenous Wisconsinites and their own native nations have meaningful opportunities - under the weighty thumb of the federal and state governments - to make their own laws, evolve their own values, grow their own norms, and determine their own identities. In large measure, the federal courts have acknowledged these truisms in Federal Indian Law. The Wisconsin Supreme Court's proposed Rule of Court 7-11 is a significant nod in the same direction.

In non-PL280 States, where the Federal and Tribal governments can be said to have a measure of concurrent civil jurisdiction, the federal courts have helped to fashion

a workable set of judicial norms in order to avoid unsavory races to the courthouse and races to judgment. In short, the US Supreme Court has fashioned a relatively workable relationship. US Supreme Court case law requires that civil causes of action arising within Indian Country to be filed in the appropriate Tribe's court first, and that, at the very least, the issue of the Tribe's jurisdiction be exhausted in the Tribe's court first. The Great Lakes Indian Law Center urges the Wisconsin Supreme Court to consider following that lead.

As the Wisconsin Supreme Court considers developments under federal law, it may be helpful to recognize two analogies:

1) Analogizing States and Tribes in non-PL280 States. The first analogy emerges in Federal Indian Law, in *non*-PL280 States. Federal courts have, wittingly or unwittingly, analogized States and Tribes when it comes to the federal government infringing on their respective local sovereignty. At times the federal courts have employed a federalism analogy between States and Tribes en route to infringing on Tribes' rights, as they have been known to do when infringing on States' rights. Nevertheless, the federal courts have also, at times, employed a federalism analogy to protect Tribes' rights, as they have done to protect States' rights. Indeed, in some ways, federal courts have employed the logic of federalism to protect Tribes and their local sovereignty *even more than* they have protected States and their local sovereignty. In applying the logic of "Our Federalism" to Tribes, federal courts fashioned a normative, workable approach to primacy and exhaustion.

2) Analogizing the Federal and States in PL280 States. The objective in making this analogy is to illustrate that just as the federal Supreme Court has fashioned rules of primacy and exhaustion in non-PL280 States, the State Supreme Court may fashion rules of primacy and exhaustion in PL280 States. In other words, when a "civil cause of action" arises in Indian Country, the state of Wisconsin may require that the lawsuit be filed in the appropriate Tribe's court in the first instance, and that, at the very least, the Tribe's own court could make its own assessment of its jurisdiction and interests in the matter. The State courts, and indeed the federal courts, will appreciate the benefit of the Tribe court's analysis of its own jurisdiction, just as in non-PL280 States.

The analogies are imperfect. In non-PL280 States, the federal court can decide that the Tribe does not have jurisdiction and the matter is appealed up the federal judiciary. Here if the State decided that tribe lacks jurisdiction, it seems it may be appealed up the State judiciary, in which case it would appealable to the US Supreme Court after the State Supreme Court appeal process are final. If a State lower court decides that a Tribe does not have jurisdiction, the option for tribe is removal to federal court on the federal question of the tribe's jurisdiction. However, the bottom line is that even when the federal courts are deciding whether the tribe has such jurisdiction, the alternative is, if they do not, that the state will then have jurisdiction.

The Great Lakes Indian Law Center (Center) appreciates the opportunity to participate in the discussion of proposed Rule of Court 07-11 regarding the transfer of civil cases from the Wisconsin state courts to the appropriate court of Wisconsin's Indian Nations. The Center's comments are provided for informational purposes[2] in order to assist the court with building a solid legal foundation for the proposed rule. While a thorough analysis requires an overview of "Federal Indian Law", these comments focus on the interplay between the State court and the Tribal court justice systems located in Wisconsin.

INTRODUCTION

The discovers of the New World from the beginning have questioned the abilities and limitations of communicating and forming government to government relationships with the Native Americans. The King of Spain and the Pope separately assigned briefs to inquiry "do Indians have Souls? Are they worthy of conversion of Christianity? Are they human? Do they have human rights?" De Las Casas answered the Spanish King in the affirmative. Sepulveda answered the Pope in the negative. From that point to today, this country's most intelligent decision-makers have struggle to understand the rights of the people whose government predated the establishment of the United States. In a frustration-laden separate concurring opinion, Justice Clarence Thomas remarked:

"Federal Indian policy is, to say the least, schizophrenic. And this confusion continues to infuse federal Indian law and our cases."[3]

-Justice Clarence Thomas (concurring in United States v. Lara)[4]

America and Americans have grappled with the issues that lay at the foundation of this paper. Within Wisconsin, there are eleven Indian Nations; ten of which possess concurrent civil and criminal jurisdiction with the state of Wisconsin under a widely misunderstood law called Public Law 83-280 (PL280). We must begin by posing a few hypotheticals to the Court in order to fully illustrate the confusion presented by jurisdictional issues in Wisconsin and the effects Proposed Rule of Court 7-11 will have on this issues. We pose three hypos with the objective to determine if they are criminal, civil cause of action or regulatory.

Hypothetical One: A domestic relations dispute arose on the Sokaogon Chippewa Reservation; the husband beat up the wife and allegedly threatened her with physical violence. Temporary restraining orders were issued in both the Tribal court and County Courts. Both the Tribal prosecutor and the County District Attorney bring charges of Attempted Murder against the husband in their respective districts.

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[2] See David Schanker, Clerk of Supreme Court, letter dated January 11, 2008.

[3] Lance Morgan, C.E.O. of Ho-Chunk Inc. Community Development, Part I, remarked at ILSA conference 2007 that the United States' schizophrenia is derived from a balancing on the scales of justice, where "one side represents their guilt and the other side represents their greed."

[4] See U.S. v. Lara, 541 U.S. 193, 124 S.Ct. 1628, 1644 (2004)

Hypothetical Two: Same facts as above, except that this time, a legal dispute arises between the husband and wife and the husband files an action for divorce in Wisconsin State Courts and the wife files an action for divorce in Tribal Court.

Hypothetical Three: Same facts as above but this time both Sokaogon Chippewa Community's Social Service department and the Crandon County Social Service intervene. Both impose certain requirements on the husband before he can re-enter the premises. The husband violates both the county requirements and the Tribal Social Services requirements. Both agencies bring an action in their courts. The Tribal Social Services brings a contempt action in Tribal Court and the County Social Services brings an action in State Courts.

As the court can see from one typical domestic relation situation many issues could arise involving the complexities of concurrent Tribal, Federal and State jurisdiction in Indian Country within Wisconsin.

In order to understand the jurisdictional issues presented in Wisconsin and the effects of Proposed Rule of Court 7-11; we must first take a look at how jurisdiction plays out where Public Law 83-280 is not applicable. In western states such as North Dakota[5] and South Dakota, jurisdiction is determined by looking at where the state snowplows or state law enforcement decide not to go. When there is a heavy snowfall in those areas, it is common practice for the state snowplows pick up their blades when they come to Tribal lands. It is also common that on a Friday or Saturday night, that State troopers are met on the Tribal boundaries with the Tribal police who tell them to turn around and not to enter into Tribal Lands. But somehow in Wisconsin, we have forgotten this simple idea that jurisdiction does not automatically confer the right to enter into another Nation's lands and that these ideas of jurisdiction and entry onto Tribal lands are not one and the same legal concept.[6]

It is important in this discussion, to remember that the Indian Nations and their citizens are the source of their power and that the State of Wisconsin did not give them any special rights.[7] The treaties that were signed with the Indians were merely contracts for the sale of land and that the Tribal governments and their citizens are the source of their sovereignty then and now to exercise control and dominion over their lands and peoples who enter on to their lands.[8] It is also important to note that since the Treaties

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[5] North Dakota is considered partial PL280, but however, the tribes refused to grant consent to allow the state to exercise their option under PL 280.

[6] See Menominee Termination Act, PL 399, and thereafter the creation of Menominee County (also placement of state offices on Indians lands) somehow the WI assumed the tribe and its government were terminated when only the Federal-tribal relationship was discontinued. PL 280 did not confer rights to WI the ability to extinguish their hunting and fishing rights

[7] See Forest County Potowatomi Chippewa Community Chief Justice Eugene Whitefish's Comments to the Wisconsin Supreme Court on January 8, 2008, stating "I am an enrolled member of the Forest County Potowatomi Nation" while showing them his enrollment card. See also Oneida Appeals Commission Justice Stanley Webster's comments.

[8] See U.S. v. Winans, 198 U.S. 371 (1905) where the U.S. Supreme Court has referred to treaties made with the Indians as "not a grant of rights to the Indians, but a grant of rights from them-a reservation of those not granted."

with the Indian Nations, subsequent cases and laws were designed to take away their rights to exercise dominion and control over their lands and peoples.

A primary example of this is Public Law 83-280(PL280), enacted in 1952. PL280 supplanted the Federal-Tribal concurrent jurisdiction over criminal and civil causes of action with the State-Tribal concurrent jurisdiction over these matters. Public Law 83-280 has been misinterpreted by some within Wisconsin to mean that the Tribes lack the ability to exercise jurisdiction over these matters. The main issues that seem to be confused in Public Law 280 States pertain to distinguishing between a criminal prohibitory action, a civil cause of action; and a regulatory action.

I. Jurisdiction in Indian Country

In order to understand the jurisdictional issues presented in mandatory Public Law 83-280 States like Wisconsin, we must understand how jurisdiction plays out in Non-Public Law 83-280 States. In non-PL 280 states, the Tribal government and the Federal government exercise concurrent jurisdiction over three areas of law: 1) Criminal law; 2) Civil Causes of Action and 3) Regulatory.

1. Criminal Jurisdiction

a. Criminal Jurisdiction in Non-PL 280 States

With regards to criminal jurisdiction in non-PL 280 States, the main law that was designed to take away the rights of Indian's peoples to exercise control and dominion over their lands and their peoples was the Major Crimes Act[9]. Through the Major Crimes Act, the U.S. Congress authorized the Federal government to exercise concurrent authority to prosecute Indians within their Indian Nations.[10] This imposed Federal concurrent criminal jurisdiction over Indians peoples where none had existed before.

The Major Crimes Act is one of the primary laws that govern Federal-tribal concurrent criminal jurisdiction in Non-PL 280 states. The Major Crimes Act states

> "Any Indian who commits against the person or property of another Indian or other person any of the following offenses . . . shall be subject to the same law and penalties as all other as all persons committing any of the above offenses, within the exclusive jurisdiction of the United States."[11] [12]

The Major Crimes Act was enacted in 1885 after the white settlers in the Dakotah territories were shocked at the result reached in the Ex Parte Crow Dog case.[13] The issue before the U.S. Supreme Court in Crow Dog was whether federal jurisdiction could be extended over Indians who commit crimes against other Indians within the reservation

[9] 18 U.S.C. § 1153
[10] See 18 U.S.C. § 1153
[11] 18 U.S.C. § 1153
[12] In PL-280 States, this language defines the limits of the concurrent State-Tribal criminal jurisdiction that was transferred to the State of Wisconsin.
[13] See Ex parte Crow Dog, 109 U.S. 556, 3 S. Ct. 396 (1883).

boundaries.[14] The U.S. Supreme Court held that without a clear expression of intent for Congress, federal criminal jurisdiction over Indians could not be imposed. In reaching its decision, the Court argued that Indians were inferior beings that they were being judged by superiors and by a social state which "is opposed to the strongest prejudices of their savage nature, one which measures the red's man revenge by the maxims of the white man's morality."[15] Their savage nature and revenge in this case included a payment of $600 to the victim's family and eight horses and one blanket.[16] In contrast in this case, the white man's morality was the possibility of an execution.[17] Thusly because the white man's morality of a hanging was not satisfied, a popular out cry occurred for reform and resulted in Congress passing the Major Crimes Act.[18]

Since the enactment of the Major Crimes Act, many challenges have arisen to Indian Nations in their ability to exercise dominion and control over their lands and people. One of these challenges is whether Indian tribal court have criminal jurisdiction over non-indians who commit crimes within the reservation. In 1978, the Suquamish Indian Tribe attempted to exercise criminal jurisdiction over a non-Indian who assaulted a tribal police officer.[19] In Oliphant v. Suquamish Indian Tribe, the U.S. Supreme Court further limited Indian Tribes by ruling that Indian tribes did not have authority to try non-indians who committed crimes on their lands.[20]

Other challenges to Tribes who wanted to protect their ability to exercise dominion and control over their lands and peoples is whether Indian Tribal Courts have criminal jurisdiction over Indians, who are not members of the Indian Nation where the criminal acts occurred. In 1990, the U.S. Supreme Court ruled that tribe have no criminal jurisdiction over a non-member Indian.[21] Later, Congress restored and affirmed the Tribes inherent power to exercise criminal jurisdiction over all Indians, including non-member Indians, within its territories.[22]

Other challenges to Tribes exercising dominion and control over their lands and peoples stems from whether Tribes in Non-PL 280 States can exercise their concurrent criminal jurisdiction and does this exercise violate ideas of equal protection and due process as prescribed by the United States Constitution. One of the first cases to discussion these issues was United States v. Wheeler.[23] The questions presented before the Court was whether the double jeopardy clause of the Fifth Amendment bars the prosecution of an Indian in Federal district court under the Major Crimes Act, when he has previously been convicted in a tribal court of a lesser-included offense arising out of the same incident.[24] The U.S. Supreme Court reasoned that in order to determine the double jeopardy issue, it had to determine to the source of the power from which a Tribe

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[14] See id.
[15] Id at p. 569
[16] Cases and Materials on Federal Indian Law 4th Edition, David Getches, p.157.
[17] id
[18] id.
[19] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)
[20] id.
[21] See Duro v. Reina, .
[22] See 25 U.S.C. 1301(2) and (4), commonly known as the Duro Fix.
[23] See U.S.v. Wheeler, 435 U.S. 313, 98 S.Ct. 1079 (1978).
[24] Id.

punishes its citizens.[25] The Court stated that Tribes retained their sovereignty, not as an arm of the Federal government, but as a part of the primeval sovereignty that "has never been taken away from them, either explicitly or implicitly and is attributable in no way to any delegation to them of federal authority."[26] Thusly, the Court held that since tribal and federal prosecutions are brought by separate sovereigns, they are not "for the same offence" and thus, the Double Jeopardy clause is not a bar to Federal prosecution.[27]

In U.S. v. Lara, the rights of Tribes to exercise control and dominion over its territories were tested again when a non-member Indian challenged the federal prosecution of assaulting a federal officer when the Tribe had already prosecuted that non-member for assaulting a tribal officer.[28] The U.S. Supreme Court again held that the "Constitution authorizes Congress to permit Tribes, as an exercise of their inherent tribal authority, to prosecute non member Indians. We hold that Congress exercised that authority in writing" under the Duro fix.[29]

In Wesit v. Staphne, a tribal member challenged the Tribes ability to prosecute her after she was acquitted of stabbing her common law husband, also a tribal member, within the boundaries of the reservation.[30] A federal grand jury acquitted her of the crime of voluntary manslaughter under the Major Crimes Act.[31] She was then charged with manslaughter by the Tribe for the killing, and convicted sentenced and fined in tribal court in a jury trial.[32] She brought a habeas corpus action in federal district court under the Indian Civil Rights Act, alleging that the federal courts had exclusive jurisdiction of manslaughter under the Major Crimes Act.[33] The Ninth circuit affirmed the district court's dismissal of the petition based on her failure to exhaust her tribal remedies by appealing the conviction in tribal courts.[34] The Ninth Circuit held "a tribal court, which is in compliance with the Indian Civil Rights Act is competent to try a tribal member for a crime also prosecutable under the Major Crimes Act."[35]

b. Criminal Jurisdiction in PL 280 states

In contrast to the cases discussed above, PL-280 transferred to the State of Wisconsin only the limited powers to prosecute crimes under the Major Crimes Act[36]. Criminal jurisdiction as defined in Public Law 83-280 states

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[25] Id. at p. 327.
[26] Id.
[27] id. at p. 330.
[28] U.S. v. Lara, 541 U.S. 193 (2004)
[29] id at p. 210 referencing U.S. v. Duro.
[30] See Wesit v. Staphne, 44 F. 3d 823 (9th Cir. 1995). See also, *Cases and Materials on Federal Indian Law 4th edition*, David Getches, Charles Wilkinson and Robert A. Williams, Jr., p.475.
[31] id at 44 F.3d 824
[32] id.
[33] id.
[34] id. at p. 826.
[35] id at p. 824.
[36] And possibly under the Indian Country Crimes Acts (ICCA). Under Major Crimes Act and ICCA, criminal jurisdiction in Indian Country seems to be allocated among the three governments by depending on the status of the accused and the victim. See *Cohen's Handbook of Federal Indian Law*, 2005 Edition, p.745. However for this section, we will discuss this solely as Indian Defendant and crime occurring within the Indian Nations of Wisconsin.

> "each of the States or Territories listed in the following table [Wisconsin (excluding Menominee), Washington, California, Alaska, Nebraska, Minnesota included] shall have jurisdiction over offenses committed by or against Indians in the areas of Indian Country listed opposite that name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory."[37]

In examining how this non-PL 280 precedent applies to mandatory PL 280 states like Wisconsin, we must answer these questions 1) can tribes have inherent sovereignty in Wisconsin; 2) can the State of Wisconsin and the Tribes both prosecute Indians for the same crime committed within the Indian Nations located in Wisconsin.

In order to answer these questions, one should look at the source of the power to prosecute crimes on Indian Nations within Wisconsin. The State's ability to prosecute stems solely from Public Law 83-280[38]. Nothing in Public Law 83-280 has taken away the tribe's inherent rights to exercise control and dominion over its territories and peoples by prosecuting Indians who commit crimes within their territories. In Walker v. Rushing, the Eighth Circuit was confronted with this issue in a case that arose at an Indian Nation located in Nebraska, a mandatory PL 280 state.[39] The case stemmed from a Tribe's criminal prosecution of two counts of vehicular homicide under the Tribe's code.[40] The Circuit Court decided that no applicable federal law ousts the Omaha Tribal Court of jurisdiction in this case.[41] The Court stated that "Public Law 280 did not itself divest Indian Tribes of their sovereign power to punish their own members for violations of tribal law . . . Nothing in the wording of Public Law 280 or its legislative history precludes concurrent tribal authority."[42]

However, the main issue within the criminal jurisdiction arena under PL 280 is deciding what cases or actions are criminal prohibitory (thus allowing concurrent state criminal jurisdiction within Wisconsin); and what actions are regulatory (thus completely excluding state concurrent criminal jurisdiction for Federal/Tribal concurrent jurisdiction within Wisconsin). The primary case that discusses what is regulatory and what is criminal prohibitory is California v. Cabazon Band of Mission Indians.[43]

In Cabazon, the Supreme Court ruled that before a state seeks to enforce a law within an Indian reservation under the authority of Public Law 280, it must first

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[37] See 18 U.S.C. § 1162

[38] See Cohen's at p.754 stating the general rule in non-PL280 states, "as a general rule states lack jurisdiction in Indian Country absent a specific grant of jurisdiction . . . the Major Crimes Act and the Indian Country Crimes Act create federal criminal jurisdiction that is exclusive of the states. . "

[39] See Walker v. Rushing, 898 F.2d 672, 673 (8th Cir. 1990)

[40] id.

[41] id. at p 675.

[42] See id at p. 675 and also Cabazon Band of Mission Indians v. Smith, 34 F.Supp.2d 1195 (C.D.Cal.1998), a U.S. District court rejected the idea that the Court must reject defendants' argument that P.L. 280 should be read as divesting the Cabazon Band of its inherent authority to establish a police force with jurisdiction to enforce tribal criminal law against Indians and to detain and turn over to state or local authorities non-Indians who commit suspected offenses on the reservation

[43] See California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987)

determined whether the state law is criminal in nature and thus fully applicable to the reservation, or civil in nature and applicable only as it may be relevant to private civil litigation in state court.[44] If the intent of the state law is generally to prohibit certain conduct, it falls within Public Law 280's grant of criminal jurisdiction. If the state law generally permits the conduct at issue, subject to regulation, it must be classified as regulatory and Public Law 280 does not authorize state enforcement on an Indian reservation.[45]

These questions as to what constitutes criminal/prohibitory or what is civil/regulatory have not been fully answered in Wisconsin.[46] Taking a look at the hypotheticals presented above, hypothetical one, where the husband beat up his wife and allegedly threatened her, presents us with criminal jurisdiction situation with both sovereigns, the Indian Nations located within Wisconsin and the State of Wisconsin, are seeking to prosecute the husband for attempted murder. The question that arises is whether both the Tribe and the State of Wisconsin can prosecute the Husband for the exact same charge. From the case law presented it seems that both the State and the Tribe may prosecute because nothing in the wording of PL 280 has limited the Indian Nations of Wisconsin inherent sovereignty right to prosecute its own citizens.

However the more interesting question is how the state obtains the evidence in order to prosecute. Let's say most of the forensic evidence is located within the Sokaogon Chippewa Territories and as a Nation they are refusing to cooperate with the State until they have finished prosecuting this matter within their own court system. What does the County District Attorney do - subpoena the tribe to compel them to turn over the evidence? What does the County judge do - order the forcible entry into the Indian Nation's lands and the forcible taking of this evidence?

Further, it is important to note that the proposed Rule of Court 7-11 offers no clarity on these issues as to what is regulatory (thus precluding state concurrent jurisdiction) and what is criminal/prohibitory (thus allowing the state to have concurrent criminal jurisdiction with the Tribes). The proposed Rule of Court 7-11 deals primarily with the discretionary transfer of civil cases to tribal court, not criminal. Thus, the criminal discussion is not applicable to the proposed rule; unless a party alleges the civil case being transferred is criminal in nature.

2. Civil Causes of Action

a. Civil Causes of Action in Non-PL 280 State

In the past 150 years of applying concurrent civil jurisdiction within non-PL 280 states, the federal government and the Indian Nations have come to understand the simple

[44] See FN 40 at p 208.
[45] Id. at p. 209.
[46] See In Re Burgess, 262 Wis.2d 354 (WI 2003), where the Court ruled that the involuntary commitment of a convicted sex offender was not a regulatory in nature but criminal/prohibitory "sexually violent offenses is not permitted conduct that is regulated by the state; rather, it is prohibited conduct that is 'inimical to the health safety of its citizens'." The Court relied on the facts that the Tribal court refused to prosecute. In Burgess v. Watters, 467 F. 3d 676 (C.A.7 2006), the United States Court of Appeals of the Seventh Circuit agreed with the result reached in In Re Burgess; however, they ruled that civil commitments are civil adjudicatory rather than civil/regulatory in nature.

truth that both sovereigns can have the power, but both cannot exercise it. The federal government decided long ago that they must apply a rule of exhaustion in order to preserve the inherent sovereignty of the Indian Nations otherwise they would be nothing more than mere voluntary organizations.[47]

In non-PL 280 States, the territorial boundaries are clear and have a significant political and legal meaning. That is primarily because those non-PL 280 States recognize that those areas are not part of state lands and that their state laws have no force or effect within the Indian Nations located in the non-PL 280 state.[48] In Williams v. Lee[49], the United States Supreme Court created an infringement test to determine when state action fringed on Indian Nations and their citizens rights of inherent sovereignty.[50] The court held "absent . . . Act of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[51] The Court in reaching their holding determined that implicit in the treaty terms was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed.[52] The Court further discussed that if this power of the Indian Nation is to be taken away it is for Congress to do so, not the State.[53]

In coming to the simple truth in the shared Federal and Tribal concurrent civil jurisdiction, that both sovereigns can not exercise their power at the same time, the United State Supreme Court fashioned a rule requiring civil litigants to exhaust tribal remedies before seeking redress within the Federal courts of non-PL 280 states. In National Farmer's Union Insurance Co. v. Crow Tribe[54], the court held that the "examination should be conducted in the first instance in the Tribal Court itself. . . exhaustion is required before such a claim may be entertained by a federal court. . ."[55] In National Farmer's Union, the litigants brought the case in federal court through a jurisdiction based on diversity of citizenship.[56] In Iowa Mutual Insurance Co. v. LaPlante, the case was brought in federal courts under a federal question.[57] LaPlante was a member of the Blackfeet Tribe, employed on a ranch located on the reservation. LaPlante sued the ranch owner's insurer in the Blackfeet Tribal Court, seeking compensation for injuries and claiming compensatory and punitive damages against Iowa Mutual for a bad faith refusal to settle.[58] The tribal court upheld the jurisdiction on the grounds that the tribe can regulate the conduct of non-Indians engaged in commercial relations with Indians on the reservation.[59] Iowa Mutual sued LaPlante, the individual ranch owners, and the ranch company in federal court claiming it had no duty to defend

[47] See FN 39.
[48] See Worcester v. Georgia, 31 U.S. 515 (1832)
[49] See Williams v. Lee, 358 U.S. 217 (1959)
[50] See Williams v. Lee, 358 U.S. 217 (1959)
[51] Id at p 220.
[52] Id.at p. 222.
[53] Id. at p. 221.
[54] See National Farmer's Union Insurance Co. v. Crow Tribe, 471 U.S. 845 (1985)
[55] See National Farmer's Union Insurance Co. v. Crow Tribe, 471 U.S. 845 (1985)
[56] Id.
[57] See Iowa Mutual Insurance. Co. v. LaPlante, 480 U.S. 9, 107 S.Ct. 971 (1987)
[58] Id. at p. 972
[59] id at p. 12

the insured under the policy.[60] When it reached the United State Supreme Court, it held that "unless a federal court determines that the Tribal Court lacked jurisdiction, however, proper deference to the tribal court system precludes relitigation" of the merits.[61] The court reasoned "the federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts. At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determination of the lower tribal courts."[62]

b. Civil Causes of Action in PL 280 States

The question for mandatory PL 280 states is whether the simple truth that both sovereigns can have the power, but both can not exercise it applies to Wisconsin. Another question is whether the rule of exhaustion that applies in non-PL 280 states applicable in Wisconsin.

Public Law 83-280, allows for the limited imposition of state civil jurisdiction, which is concurrent with Tribal civil jurisdiction. Public Law 83-280 states:

> "Each of the states listed in the following table (Wisconsin [excluding Menominee], Washington, California, Alaska, Nebraska, Minnesota included) shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian Country listed opposite the name of the state to the same extent that such State has jurisdiction over other **civil causes of action**, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State."[63]

The concurrent civil jurisdiction granted under PL 280 specifically defines "Indian Country" as:

> "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including *rights-of-way* running through the same."[64]

The primary case that spoke to how state courts should examine civil causes of action in Wisconsin was the Teague v. Bad River Band of Lake

[60] id.
[61] id. at p. 19
[62] id at p 16-17
[63] See 28 U.S.C. §1360
[64] See 18 U.S.C. §1151 (2000).

Superior Chippewas Indians.[65] This case went to the Wisconsin Supreme Court twice and stemmed from an employment dispute between Teague, non-Indian, and Bad River Band of Chippewa Indians.[66] The Court on the first attempt required the state circuit court to confer with the Tribal court in order to decide who has jurisdiction and apply principles of comity to the situation.[67]

In Teague II[68], the Court refenced parts of the exhaustion principle of the Iowa Mutual case,[69] "as a matter of comity, federal courts should allow tribal courts first to determine their own jurisdiction."[70] The Court further acknowledged that "civil jurisdiction 'presumptively lies in the tribal courts unless affirmatively limited by a specific provision or federal statute'."[71] However, the Court in Teague II did not require the exhaustion rule of Iowa Mutual to be applied.[72] Instead, the Court begins a discussion about the relevance of full faith and credit, which is discussed below.

From the ordered status conference, neither side backed down; both the tribal and state courts claimed jurisdiction over the employment dispute. In Teague III, the Court's majority opinion defined the governing principle as comity.[73] The Court described comity as "based on respect for the proceedings of another system of government and a spirit of cooperation."[74]. . . and said it ". . .is neither a matter of absolute obligation or of mere courtesy and good will, but is recognition which one state allows within its territory to legislative, executive, of judicial acts of another, having due regard to duty and convenience and to right of its own citizens."[75] The Court also indicated that the principle of comity is discretionary, highly fact specific, and reviewable on appeal for erroneous exercise of discretion.[76]

In the majority opinion the court created thirteen factors to help "state and tribal" courts to determine, in the spirit of cooperation, not competition, which of the two courts should proceed.[77] Unfortunately, the majority opinion failed to

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[65] See Teague v. Bad River Band of Lake Superior Chippewas Indians, 236 Wis 2d 384 (WI 2000).
[66] Id and Teague v. Bad River Band of Lake Superior Chippewas Indians, 265 Wis 2d 64 (WI 2003)
[67] See FN 61 at p 410.
[68]
[69] See id at p398-399 (WI 2000).
[70] Id.
[71] id citing to Iowa Mutual at p 18.
[72] Id.
[73] See FN 62
[74] Id at p 99
[75] Id.
[76] Id.
[77] See p 101-102, factors include 1) where the action was first filed and the extent to which the case has proceeded in the first court; 2) the parties' and court's expenditures of time and resources in each court. . .; 3) the relative burdens of the parties. . . ; 4) Whether the nature of the action implicates tribal sovereignty. . .; 5) Whether the issues in the case require application and interpretation of a tribe's law or state law; 6) whether the case involves traditional or cultural matters of the tribe; 7) Whether the location of material events giving rise to the litigation is on tribal or state land; 8) The relative institutional or administrative interests of each court; 9) The tribal membership status of the parties; 10) the parties' choice of contract

discuss the realization that Comity is a principle and thus unenforceable. In the lead opinion, Justice Crooks pointed out to the court that Teague failed to file any responsive pleading, including one contesting jurisdiction.[78] "this seems inconsistent with the exhaustion requirements set forth in Iowa Mutual. . ., in that Teague failed, in any form, to contest the tribal court's jurisdiction over him or over the agreements at issue."[79]

Unlike the federal courts in Iowa Mutual and National Farmer's Union, the Teague court failed to recognize the simple truth, which is that while both courts can have the power over civil causes of action, both can not exercise it at the same time. Further, in applying the Teague analysis, a state court may mistakenly understand Teague to mean that a state court has the authority to determine the metes and bounds of tribal jurisdiction. This understanding is flawed because the tribal jurisdiction does not exist from a grant of power from the states and therefore, the state is unable to abridge Tribal jurisdiction.

The Federal courts realized the benefits long ago of allowing the Indian Nations to define what their jurisdiction is or should be.[80] In National Farmer Union, the Court s realized that if the Indian Nations concluded that they have jurisdiction then the federal government should stay its hand.[81] "The risks of the kind of "procedural nightmare" that has allegedly developed in this case will be minimized if the federal court stays its hand until after the tribal court has had a full opportunity to determine its own jurisdiction. Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review."[82] *The question that arises in this state is how the federal government can give the state of Wisconsin jurisdiction that the federal government itself does not have over civil causes of action.* With applying the majority opinion of Teague III, the State courts are forced to determine on a case-by-case basis the limits to tribal jurisdiction, which arguably is not their question to decide.

The Teague's Full Faith and Credit and Comity doctrines do not address the simple truth, which is that both sovereigns can have the power, but both can not exercise it at the same time. For example, what happens if the court was presented with a divorce situation, as in hypothetical two, with the husband filing in Wisconsin state courts and the wife filing for divorce in tribal court; and neither side wanting to back down. Will we accept the fact that in some areas of Wisconsin a person can get divorced twice? And whose child support and

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(meaning choice of forum) . . .; 11) the parties' choice of contract (meaning choice of law); 12) Whether each court has jurisdiction over the dispute and the parties and has determined its own jurisdiction; 13) Whether either jurisdiction has entered a final judgment that conflicts with another judgment. .

[78] See id at p. 86.

[79] Id.

[80] See FN 51 and 53.

[81] See FN 51

[82] Id.

custody order will we follow? The only way to resolve these confusions is to follow the federal precedent of exhaustion established by Iowa Mutual and National Farmer's Union; rather than establishing theoretical doctrines that do not advise either the state or the tribal sovereigns of their rights and duties.

3. Regulatory

a. Non-PL 280 states

In non-PL 280 States, the Federal government has acknowledged that over internal matters that are deemed regulatory and involve Indians, Indian Nations have the power to regulate their citizens, not the state. The main cases in non-PL 280 states that have developed this principle for excluding the state in regulatory matter are Santa Clara v. Martinez[83], McClanahan v. Arizona Tax Commission[84], Warren Trading Post Co. v. Arizona Tax Commission[85], Montana v. U.S[86], Merrion v. Jicarilla Apache[87].

The Santa Clara v. Martinez case upheld inherent tribal sovereign immunity from suit. The United State Supreme Court held that habeas corpus was the sole remedy for enforcement of the Indian Civil Rights Act in federal court.[88] Further, the Court ruled that violations of the Indian Civil Rights Act which do not involve detention by the Tribe must be remedied in Tribal courts.[89]

In non-PL 280 States, two main types of tests are used in deciding whether state regulation on Indians is permissible: the federal preemption test and consensual relationship test. The federal preemption test applied in McClanahan v. Arizona Tax Commission[90]. In McClanahan v. Arizona Tax Commission,[91] the United States Supreme Court stated that "they were, and always have been, regarded as having a semi-independent position. . . not as States, not as nations . . . but as a separate people, with the power of regulating their internal relations, and thus far not brought under the law of the Union or of the State within whose limits they resided."[92] In McClanahan, the Court stated that "the trend has been away from the idea of inherent Indian sovereignty as a bar to State jurisdiction and towards reliance on federal preemption."[93] In 1965, the United State Supreme Court upheld the use of the federal preemption test in Warren Trading Post Co. v. Arizona Tax Commission.[94] The court determined that the licensing and regulation of Indian traders were held "to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders."[95]

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[83] See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 98 S.Ct. 1670 (1978).
[84] McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 93 S.Ct. 1257 (1973)
[85] Warren Trading Post Co. v. Arizona State Tax Commission, 380 U.S. 685, 85 S.Ct. 1242 (1965).
[86] Montana v. U. S., 450 U.S. 544, 101 S.Ct. 1245 (1981)
[87] Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 102 S.Ct. 894 (1982).
[88] See FN 78 at p. 65
[89] id.
[90] See FN 83
[91] id.
[92] See FN 80 p. 165
[93] See FN 80 p. 172
[94] See FN 81
[95] Id at p. 690

In Montana v. U.S.,[96] the United States Supreme Court even went farther with the consensual relationship test allowing for the possibility of tribal civil jurisdiction over non-Indians. A tribe may exercise "some forms of civil jurisdiction over non-Indians on the reservation, even on non-Indian fee lands", particularly when non-Indians have entered into: 1) "consensual relationships with the Tribe"; or 2) when their conduct "threatens the Tribe's political or economic security or the health or welfare of the Tribe."[97] Further, the consensual relationship may be inferred by derived from business dealings with the Tribe. In Merrion v. Jicarilla Apache, the United States Supreme Court determined that the federal government has not divest the Tribe of its inherent authority to tax mining activities on its land, whether this authority derives from the Tribe's power of self-government or from its power to exclude.[98]

b. PL 280 States

It is important for the Courts to understand that PL280 does not confer to the states jurisdiction on regulatory causes of action. Thus, PL 280 and non-PL 280 states are not different on regulatory matters. Therefore, an exclusive Federal and Tribal jurisdiction exists to regulatory matters within Indian Nations located in Wisconsin; and the State is completely excluded.[99]

This idea that, within Wisconsin, state regulations are completely excluded within Indian Nations located here is best exemplified in the PL 280 language relating to hunting and fishing rights:

> "b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement or statute with respect to hunting, trapping or fishing or the control, licensing or regulation thereof."[100]

The analysis of Cabazon is particularly important for Indian Nations located in Wisconsin to determine what is a civil/regulatory act (thus excluding state concurrent jurisdiction); and what is civil cause of action or criminal prohibitory (which allows for limited amounts of intrusion through concurrent state-tribal jurisdiction). Jurisdictions that do not reasonably attempt the pro/reg distinct test in Cabazon are likely to find everything to be "criminal" without considering whether the criminal activity is

[96] See FN 85
[97] See FN 82 at p. 566
[98] See FN 79
[99] See Bryan v. Itasca County, Minnesota, 426 U.S. 373,388 (1976) stating that P.L. 280 grants adjudicatory jurisdiction over civil causes of action only; it does not subject the tribe to "the full panoply of civil regulatory powers of state and local government."
[100] 18 U.S.C. § 1162

prohibited and regulated. This result is evident in Wisconsin where the state has held very different causes of action to all be criminal. This assumes jurisdiction over regulatory matters without statutory authority. For example, the Courts have ruled that commitments of sexually violent persons as criminal (thus allowing State concurrent jurisdiction)[101], violations of Wisconsin motor vehicle law as criminal (thus allowing state concurrent jurisdiction)[102], and allowing Indian property located on Indian Nations

[101] See FN 44 regarding In Re Burgess, 262 Wis.2d 354 (WI 2003), where the Court ruled that the involuntary commitment of a convicted sex offender was not a regulatory in nature but criminal/prohibitory "sexually violent offenses is not permitted conduct that is regulated by the state; rather, it is prohibited conduct that is 'inimical to the health safety of its citizens'." The Court relied on the facts that the Tribal court refused to prosecute. In Burgess v. Watters, 467 F. 3d 676 (C.A.7 2006), the United States Court of Appeals of the Seventh Circuit agreed with the result reached in In Re Burgess; however, they ruled that civil commitments are civil adjudicatory rather than civil/regulatory in nature

[102] See State of Wisconsin v. Doud, 145 Wis.2d 903 (WI ct of Apls. 1988) (unpublished opinion) Mr. Doud appeals a judgment of conviction for driving after revocation in violation of sec. 343.44(1). Mr. Doud contend that the state lacked jurisdiction because he was an enrolled member of Lac Du Flambeau Band and the act upon which the conviction rests was performed entirely on the Lac Du Flambeau reservation. He argued that this charge of driving after revocation was regulatory in nature. The Wisconsin Court of Appeals ruled that this charge was criminal/prohibitory in nature. "Driving after revocation is not a permitted activity subject to regulation, but is absolutely prohibited. Driving after revocation fall within the category of criminal conduct defined not only by Wisconsin Statutes as criminal but also by the state policy and purpose for prohibiting such conduct." This case is interesting because it does not mention whether the Tribe prosecuted him under their motor vehicle laws and regulations. See Also County of Vilas v. Chapman, 122 Wis 2d. 211, (WI 1985), Chapman was an enrolled member of Lac Du Flambeau. Chapman was a passenger in a vehicle being driven on State 47 with the boundaries of Lac Du Flambeau reservation. State of Wisconsin was granted an easement or right of way for the maintenance of State Highway 47 on the reservation. The vehicle in which Chapman was a passenger was stopped by a Vilas County deputy sheriff. Chapman was in possession of a small quantity of beer in an open beer can, charging Chapman with possessing open intoxicants in a motor vehicle in violation of Vilas County Ordinance 110(6).
The Wisconsin Supreme Court found that there has been "no federal preemption and because the Lac Du Flambeau tribe had no tradition of self-government in the area of traffic regulation at the time of Chapman's offense, we hold that Vilas County had jurisdiction to enforce its ordinance against Chapman." The authors think the court incorrectly relied on Rice v. Rehner, instead of Cabazon. The parties agreed that the criminal offenses were regulatory. However, the court erroneously concluded that somehow because of Rice, the state had the right to enforce state regulatory authority over Chapman. The case does not mention if the court of its own motion considered the rule of tribal exhaustion or even discussed with the tribe how they their jurisdiction over this issue. See also St. Germaine v. Circuit Court for Vilas County, 938 F.2d 75, (C.A. 7 (Wis.) 1991) a habeas corpus case, where petitioner was convicted of operating his motor vehicle on a state highway within the reservation after his driver's license had been suspended and he is an Indian and the charged offense occurred within the boundaries of his reservation. In 1984, the tribe enacted a Motor vehicle code. On April 27, 1988 petitioner was convicted of a violation of 343.44(2)(d) of the Wisconsin State Motor Vehicle Code for driving after his license had been revoked for the fourth time, and was sentence to 190 days in jail and fined $1,845.00. The Wisconsin Court of Appeals rejected his argument. The WI court of appeals ruled that the St. Germaine's analysis
"is flawed because it fails to address the dispositive issue, which is whether the laws that prohibit operating after revocation and operating while intoxicated are regulatory or prohibitory. Driving after revocation is defined as criminal not only by Wisconsin statutes but also by the state policy and purpose behind the prohibition. Driving after revocation is not conduct permitted subject to regulation; it is absolutely prohibited. This prohibition reflects the state's public policy that certain individuals are dangerous drivers who must be prohibited from operating a motor vehicle to protect the health and safety of citizens." The Wisconsin Supreme Court denied review. The federal court stated "Congress has made it plain that Wisconsin can enforce its criminal laws on reservations. That is all Wisconsin is doing. This enforcement of Wisconsin driver's license public policy by the imposition of criminal sanctions does not impinge upon

to be divested in State Courts as a civil cause of action (thus allowing state concurrent jurisdiction)[103], and allowing the transportation of uncased or loaded firearms in vehicles as regulatory (thus not allowing state concurrent jurisdiction)[104] and some issues involving gambling defined as regulatory (thus not allowing state concurrent jurisdiction for federal-tribal jurisdiction)[105]. How will we examine hypothetical three of violations of both County social service orders and the tribal social service requirements on Indians within Indian Nations of Wisconsin?

This confusion, if not confronted, soon will continue to affect the ability of Indian Nations to govern their people and exercise control and dominions over their lands.

II. Full Faith and Credit and Due process

Tribal societies are like Anglo-American societies, which provide due process to their norms and values. The United States has declared that life, liberty and property are ideals that we value as a society. We, as citizens of the United States and as citizens of Wisconsin, codified these ideas into a federal and state constitutions and statutes. When these ideals are threatened, we have decided as a peoples to enact a measure of fairness and proceedings prior to the taking of these freedoms. Indian Nations and their citizens are no different.

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the respected tribal "attributes of sovereignty over both their members and their territory'." Citing to Cabazon. "The tribal Indian as well as the general public are all better served by uniform enforcement of the Wisconsin driver's license law."

[103] See Jacobs v. Jacobs, 138 Wis 2d 19, (WI. Ct. of Appls. 1987) Wife, who was enrolled member of Stockbridge-Munsee Indian Tribe, brought divorce action against husband, who was also member of tribe. During their marriage, the jacobses built a home on twenty acres of land within the Stockbridge Munsee reservation. By means of a written assignment, the tribe had granted the wife the use and occupancy of the twenty-acre parcel. The assignment limits timber, water and mineral rights and provides that rights granted thereunder may not sold, and that transfer upon the death of the assignee requires tribe's consent.

The wife argued that the state court could not issue a judgement of divorce which included a property division value of the home located on the Indian reservation. However, the Court of Appeals held that they could because the order requiring the wife to pay husband $25,000 as offset of the value of home transferred to wife by the Indian tribe because 1) the order did not violate federal law or damage any federally recognized program and 2) the application of state domestic relations law did not infringe upon rights of the Stockbridge-Munsee Indians to establish and maintain tribal self-government.
". . .although the land assignment gives evidence of a tradition of self-government, we conclude that a more specific code concerning domestic relations is required in order to bar the application of state law." Citing to County of Vilas v. Chapman, 122 Wis.2d. 211, (1985)

[104] See State v. Lemiuex, 106 Wis 2d 484, (Wis.App., 1992) Citations were issued to Indians for violating WI statute for prohibiting possession or transportation of uncased or loaded firearms in vehicles. WI court of Appeals ruled this to be regulatory. "In absence of a specific federal grant of jurisdiction, the presumption is that the state possesses no jurisdiction. We therefore conclude that the state has not established its jurisdiction to enforce sec. 29.224(2). To conclude otherwise would effectively give the state civil jurisdiction in excess of that grant by the federal government."

[105] See Dairyland Greyhound Park, In. v. Doyle, 295 Wis.2d 1, 719 N.W.2d 408 (WI 2006), "the State's interests are less compelling when the inquiry involves Tribal sovereigns because state laws and policies do not extend to Tribal lands unless authorized by Congress."

Indian nations and their citizens want the same measure of fairness that is enjoyed by Wisconsin citizens, but the ideals and the values of Indian Nations and their citizens may differ. For example, the Lac Du Flambeau Indian Nation may value gillnets because of their history and traditions. As a distinct peoples, the Indian Nation may enact a process or proceeding to ensure fairness and due process prior to the taking or threatening of gillnets located within its boundaries. However because that history and attachment to gillnets may not exist for Wisconsin citizens, the State may not deem these items valuable and thus not enact statute or codified language to protect these items.

The Court has asked for comments on how does this proposed rule impacts Wisconsin's full faith and credit statute of 806.245. This statute states that a state court will give full faith and credit to a Wisconsin Tribal Court when, among other things, a measure of due process is given. However, it seems that the real question the Court is asking is not different then what was asked by the King of Spain and the Pope in the 1500s: Are they like us? How can we ensure that what we value is valued by Indian Nations? How do we know that our interpretations of due process are being applied on the Indian Nations located within Wisconsin?

In examining Proposed Rule 7-11, the Center will look at the implications of this rule on the Wisconsin Full Faith and Credit statute (Wisconsin Statute 806.245); the rule's effect on the precedent set by the Teague cases; and the implications of full faith and credit on Tribal courts.

Full Faith and Credit is an idea that stems from the United States Constitution, which states:

> "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."[106]

Since Indian tribes do not share the same status as states and territories, some courts refuse to grant tribal court judgments full faith and credit.[107] Unlike other states, Wisconsin grants full faith and credit to Indian tribal documents such as Tribal court orders through Wisconsin Statute 806.245. This statute establishes conditions that must be met in order for Indian Tribal judicial orders and legislative documents to be given full faith and credit, provided that the tribal court or tribal legislative body grants full faith and credit to Wisconsin Court orders and legislative enactments.[108] Some of the

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[106] U.S. Const. Art.IV § 1

[107] See Bryan Cahill, "Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians: Bringing the Federal Exhaustion Rule of Tribal Remedies Home to Wisconsin Court," 2004 Wis. L. Rev. 1291, 1335-1336. See also, Wilson v. Marchington 127 F 3d 805, 808 (Ninth Circuit) (stating "no where were Indian tribes referenced in either the constitutional clause or the implementing legislation."). See also In Re Skillen, 287 Mont. 399, 439 (MT. 1998)("certainly, there are policy reasons which could support an extension of full faith and credit to Indian tribes. Those decisions, however, are within the province of Congress or the states, not this Court."). See also John v. Baker, 125 P.3d 323, 326 (AL 2005)(stating " because no formal request for comity had been made and the issue of child support had not been referred to Northway, the superior court correctly determined that it retained jurisdiction over child support."

[108] See W.S.A. 806.245(1)(a-e)

conditions that must be met include 1) the tribal court or legislative body being a validly organized; 2) the tribal court is a court of record; and 3) the tribal court order is a valid judgement.[109] The Wisconsin circuit court determines if the tribal court is a court of record by looking at whether the court keeps a permanent record of its proceedings; if either a transcript or an electronic recording of the proceeding at issue in the tribal court is available; if final judgments of the court are reviewable by a superior court; whether the court has authority to enforce its own orders through contempt proceedings.[110] The statute provides for a mechanism to determine whether a tribal court judgment is a valid judgement by determining if it is a final judgement; on the merits; whether the tribal court had jurisdiction of the subject matter and over the person named in the judgment; whether the judgement was procured without fraud, duress or coercion; the judgement was procured in compliance with procedures required by the rendering court; and if the tribal court complied with the Indian Civil Rights Act of 1968.[111] The intent of Wisconsin Statute 806.245 was to create full faith and credit for tribal judgments consistent with full faith and credit afforded the judgments of courts of other states.[112]

The issue of full faith and credit was examined in the Teague cases. Teague vs Bad River Band of Lake Superior Tribe of Chippewa Indians[113] arose from an employment dispute between a non- Indian casino employee and the Tribe. Teague sued the tribe in state court for a breach of contract action. The tribe, as well, filed a complaint in Tribal court for a declaratory judgement that the contracts were invalid. Throughout both cases, the discussion was centered around which principle should be applied to tribal court orders: the principle of full faith and credit or the principle of comity.[114]

The Teague II and Teague III cases weighed which principles of full faith and credit or comity should be extended to tribal court orders. In Teague II, the court discussed the difference between the Uniform Foreign Judgments Act (UFJA) and Wis. Stat. 806.245, the act granting full faith and credit for Indian tribal documents.[115] The court noted that a major difference was that UFJA imposed procedural requirements only. While the court determined that Wisconsin Statute 806.245 required a discretionary judicial inquiry into the judgment before full faith and credit will be afforded.[116] Ultimately, Teague II court reasoned that the issue was not one of full faith and credit under the statute but of judicial allocation of jurisdiction pursuant to principles of comity.[117] The Court defined comity as a court application to give effect to the laws and judicial decision of another state or jurisdiction, "which is not as a matter of obligation

[109] id.
[110] Id at (3)(a-d)
[111] id. at(4)(a-f)
[112] Supra at 11 (Teague) and Legislative Council Prefatory note, 1991, Wis. Stat. Ann. § 806.245
[113] Teague v. Bad River Band Of Lake Superior Tribe of Chippewa Indians, 236 Wis 2d 384 (WI 2000)(known as Teague II; and Teague v. Bad River Band Of Lake Superior Tribe of Chippewa Indians, 265 Wis 2d 64 (WI 2003)(known as Teague III).
[114] See Teague II at p. 400.
[115] Id.
[116] id.
[117] Id. at 404.

but out of deference and mutual respect."[118] On remand, neither court backed down, still convinced that comity was the best route, the Wisconsin Supreme Court in Teague III created factors to be considered to help tribal and state courts in applying principles of comity.[119]

This discussion between the interplay of Wisconsin Statute 806.245 and the principles of comity continues today with the introduction of proposed Rule of Court 7-11. The proposed rule seems to further develop the principles of comity laid out in Teague III by condensing the thirteen factors stated in Teague III into nine and possibly taking steps to create a rule of tribal exhaustion of remedies.

It seems also that the proposed rule will not affect the full faith and credit statute as laid out in Wisconsin Statutes 806.245. This statute governs a situation when there has been a final order issued in Tribal courts and a party, or the circuit court itself, is seeking enforce the order in Wisconsin. In contrast, it appears that this proposed rule applies to situations where 1) both parties have filed in state court and in agreement are requesting a transfer of the case to tribal court prior to the state court reaching a final determination, or 2) when the one party has filed in state court and another party has filed in Tribal court and neither court has reached a final determination. Of those two situations, the one the court would be most concerned about is the transfer of a case where one party chooses to have the case heard in tribal court and the other party choose to have the case heard in state court and a party files a motion for transfer of the case to Tribal court over the objections of the party choosing the state forum.

This situation raises many questions in the minds of some jurists such as: what weight should the court give to the choice of forum that a party chooses; does this rule violate specific Constitutional protections for state citizens provided in the Wisconsin Constitution and the United States Constitution; and what jurisdiction is exclusive to Tribal Court and what is exclusive to state courts and what jurisdiction is shared?

a. What weight should the court give to the choice of forum factor under proposed Rule of Court 7-11?

In examining what weight the Court should give a state court petitioner choice of forum, the court should examine this choice in light of all the evidence and circumstances

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[118] See id. At FN 12 on p 406.

[119] See Teague III at 101 (citing factors as 1) where the action was first filed and the extent to which the case has proceeded in the first court; 2) the parties and courts' expenditures of time and resources in each court and the extent to which the parties have compiled with any applicable provisions of either court's scheduling orders; 3) the relative burdens on the parties, including cost, access to and admissibility of evidence and matters of process, practice and procedure, including whether the action be decided most expeditiously in tribal court or state court; 4) Whether the nature of the action implicates tribal sovereignty . . . ;5) whether the issues in the case require application and interpretation of a tribes law or state law; 6) whether the case involves traditional or cultural matters of the tribe; 7) whether the location of material events giving rise to the litigation is on tribal or state land; 8)the relative institutional or administrative interest of each court; 9) the tribal membership status of the parties; 10) the parties' choice of by contract, if any, of a forum in the event of dispute; 11) The parties' choice by contract, if any, of the law to be applied in the event of a dispute; 12) Whether each court has jurisdiction over the dispute and the parties and has determined its own jurisdiction; and 13) whether either jurisdiction has entered a final judgment that conflicts with another judgment."

presented and weigh it evenly with other factors listed within the rule.[120] Each court considering a discretionary transfer to tribal court should look at the totality of the circumstances present in the case and to the rule of exhaustion of Tribal remedies.[121] The courts (both Tribal and State) should also examine the choice of forum given by the party in light of that party's refusal or willingness to participate in Tribal court proceedings.

Tribal courts and appellate courts located in Wisconsin would need to examine the whether the tribal court has jurisdiction over the transfer pursuant to their Tribal Constitutions and codes.[122] The tribal courts and tribal appellate courts could examine the issue jurisdiction through their long arm statutes governing jurisdiction to fashion a "minimum contacts" analysis as established in International Shoe [123]as incorporated in the consensual relations test of Montana v. U.S. Some Tribal courts within the state have already begun to apply this type of jurisdictional analysis.[124] Further, Tribal courts located in Wisconsin will need to begin to either develop procedures or case precedent in determining what type of judicial scrutiny is necessary prior to giving full faith and credit to Wisconsin state court orders.[125]

b. Would this rule violate any specific constitutional protections of the Wisconsin Constitution or the U.S. Constitution?

In order to examine the effect of the law we must begin to look at what is the jurisdiction of the Wisconsin circuit courts. Article VII Section 8 of the Wisconsin Constitution lays out the circuit court jurisdiction as

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[120] See Anderson Petroleum Services, Inc. v. Chuska Energy and Petroleum Co., 4 Nav. R. 187 (Navajo 10/26/1983), determining whether to apply full faith and credit to a Oklahoma court order by examining it through the testimony and evidence presented during a hearing.

[121] Id.

[122] See Ho-chunk Constitution, Article 1 Section 2 stating "The jurisdiction of the Ho-Chunk Nation shall extend to all territory set forth in Section 1 of this Article and to any and **all persons** or activities therein, based upon the inherent sovereign authority of the Nation and the People or upon Federal law."

[123] International Shoe Co. v. State of Washington office of unemployment, 326 U.S. 310 (1945)

[124] See Whitewing et. all v. Oneida Housing Authority, Oneida Appeals Commission June 2001, citing to a discussion what is civil regulatory and what is criminal/prohibitory under CA v. Cabazon within Wisconsin (the Court held that "At the time that U.S. Congress passed PL 280, the Oneida Tribe of Indians of Wisconsin had not yet developed either of these governmental functions. The interpretive note shows there were changes in the federal policy of "Indian self-government." This policy supports the development of Oneida laws and regulations. The governmental structure of the Oneida Nation has evolved and has in its growth, established its own police department and its own judicial system to handle disputes arising within its governmental structure to ensure the rights of the people are protected. As the judicial system evolves and enforcement of its laws develop, its internal agencies/entities are restricted from using State courts to resolve dispute arising within the jurisdiction of the Oneida Tribe of Indians of Wisconsin.")

[125] See In Re A.O., No SR- An 246-86 (Navajo 11/18/87) (the court concluded to decline to exercise jurisdiction "because it does not have exclusive jurisdiction over this action, and because of the way in which the presence of the child was procured." See also, Anderson Petroleum Services, Inc., supra at FN 25, Navajo Judicial District court declined to enforced an Oklahoma judgement primarily due to the impropriety of the Oklahoma proceeding and the failure to obtain service upon the defendant. See also, Father v. Mother, MPTC-FA-99-111 (Mashantucket Pequot Tribal Court 1999), court decline to apply Parental Kidnapping Prevention Act, stating "the plain language of the PKPA addresses enforcement and modification of pre-existing state court child custody orders. . . There is no such pre-existing state court order in this case, thus the PKPA and Eberhard are inapplicable."

"Except as otherwise provided by law, the circuit court shall have original jurisdiction in all matters civil and criminal within this state and such appellate jurisdiction in the circuit as the legislature may prescribe by law."

While opponents of this rule may point to this rule as an infringement of state sovereignty[126] and possibly raise the argument that this rule is legislative in nature somehow changes the jurisdiction scope of the Court.[127] However, it is important to note that the Wisconsin Constitution makes no mention of Indian or Indian lands. It could leave some to wonder whether the framers of the Wisconsin Constitution thought of the Indian tribes already included "within state" or not.[128] Additionally, this section does allow for changes in the court's jurisdiction as the legislature may prescribe by law.[129] And certainly both federal and state laws have shifted as our Anglo- American views and perceptions on Indians have shifted.

Other parts of the Wisconsin Constitution, some opponents could argue that this rule effects would be the Declaration of Rights, specifically Sections 5 through12; and 21.[130] However, these areas within the Wisconsin Constitution are similar to the U.S. Bill of Rights. It is important for the Court to understand that currently the United State's Bill of Rights does not apply to Indian Tribes.[131] In 1968, the Indian Civil Rights Acts was passed requiring that tribes provide many of these protections such as the right to due process[132], right of equal protection[133], freedom from search and seizure[134]; right to counsel[135]; no bill of attainder or ex post facto[136]; right to bail[137]; and double jeopardy[138].

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[126] See In Re Helgemo, 253 Wis 2d 82, 95 (WI 2002), citing the Court ". . . the full faith and credit statute does not require that we automatically admit to the Wisconsin bar any attorney who was admitted to a tribal court in Wisconsin, any more than it requires those tribal courts to automatically admit to its courts any attorneys authorized to practice law in Wisconsin."

[127] See Wisconsin Constitution Article VII § 8, stating the "Circuit Court: jurisdiction as "Except as otherwise provided by law, the circuit court shall have original jurisdiction in all matters civil and criminal **within the state** and such appellate jurisdiction in the circuit as the legislature may prescribe by law."

[128] Id. See also the creating of Menominee County out of the Menominee Indian Nation.

[129] Id.

[130] See Wisconsin Constitution, Article 1- Declaration of Rights Sections 5- 12 and 21(2) providing for state citizens to have the right to 1) a trial by jury in civil cases no matter what the amount in controversy is; 2) no excessive bails or fines be imposed; 3) right against double jeopardy, self-incrimination, a right to bail and a writ of habeas corpus; 4) a right for remedy of wrongs; 5) rights for victims of crime; 6) right against unreasonable searches and seizures; and 6) no bill of attainder or expost facto.

[131] *Cohen's Handbook on Federal Indian Law*, 2005 Edition, page 960, "Constitutional limitation that apply to the states and the federal government do not apply to Indian nations.. . There is no indication that Congress intended these statutes to apply to Indians" citing to 42 U.S.C. §§ 2000b-2000b-3 and to 2000e-2003-17.

[132] See 25 U.S.C. § 1302 (8)

[133] id.

[134] Id at (2)

[135] id. at (6)

[136] id. at (9)

[137] id. at (7).

[138] Id. at (3)

If a tribe or a tribal court violates any of these rights afforded to its citizens, the tribal citizen who is being held in custody can file a petition for habeas corpus.[139]

It is important to note that the Indian Civil Rights Act does not include a right for a jury trial in civil cases. At the open hearing on January 8, 2008, some of the Justices questions implied that this could be a problem in their support for Proposed Rule of Court 7-11. This is easily solvable by including limiting language within section (2), such as "providing that the Tribe is willing to provide a jury trial for civil cases, if requested." Or this language can be put forth in the transferring order of the circuit court.

Many of these protections that apply to criminal cases will not be relevant because the proposed rule specifically governs the transfer of civil cases, not criminal cases. Further, Tribal court's criminal jurisdiction is typically limited to Indians.[140] Thus, many of these protections that relate to criminal proceedings would not be applicable to Proposed Rule 7-11, unless a party argued that the civil case being transferred was criminal/prohibitory in nature.

It is important to remember that there are no guarantees that Indian Nations located within Wisconsin value what we value and thereby provide for the exact same measure of due process.

Conclusion

In conclusion, the Center believes that this proposed rule 7-11 is the beginning of a new effort in collaboration between the state court system and the Tribal court system. It is very likely that within the next ten years Indian Nations located within Wisconsin will seek to fully exercise their inherent sovereignty by creating criminal courts, appellate courts, and Tribal law enforcement. The Indian Nations may even post notices at the entry of their lands that read "You are entering the sovereign lands of ___ Indian Nation. By entering on to these lands, you are entering into a consensual relationship with this Nation and thereby you are consenting to follow our laws and customs."

The proposed Rule of Court 7-11 could facilitate better relations among state and Tribal courts. However, the Center would encourage the State-Tribal Justice Forum to continue their work to promote and sustain communication, education and cooperation among Wisconsin Tribal and state court systems by addressing tougher issues at hand such as requiring Wisconsin State Courts to apply a rule requiring Tribal court exhaustion to civil causes of action.

The Center also encourages the Forum to begin a discussion as to what constitutes a criminal/prohibitory act (thus allowing for concurrent state criminal jurisdiction, along with tribal criminal jurisdiction); what constitute a civil/adjudicatory act (allowing state concurrent civil jurisdiction, along with tribal civil jurisdiction) or what constitutes a civil/regulatory act (thus precluding the state concurrent civil jurisdiction for federal and tribal concurrent jurisdiction). Without discussion and resolution, these categories are meaningless within Wisconsin; thus allowing the State not only complete jurisdiction, but entry onto the Tribal lands and territories of the Indian Nations located within it. Without these categories of jurisdiction (criminal/prohibitory, civil/adjudicatory and regulatory) clearly defined in Wisconsin, the "schizophrenia" will surely continue and the Indian

[139] See 25 U.S.C. § 1303

[140]

Nation's ability to exercise control and dominion over their lands and peoples hang in the mist, as well as our own.

In order to fully answer these questions, it will take leadership and honesty to decide if the Wisconsin Courts are willing to assist in the process of recognizing inherent sovereignty of Indian Nations by respecting the legal and political significance of their territorial boundaries and internal processes that provide due process to their peoples. It will also take an understanding from the Tribal courts and Wisconsin Courts that within Wisconsin, there are places that the hand of the State shall not go.

In closing the Center echoes the words of Professor Charles Wilkinson calls for justice in Wisconsin that

> ". . .In the making of good public policy, cooperation is an end in itself. It reduces stresses of all kinds. It heals and builds community.". . . The Chippewa's (and the other Indian Nations located in Wisconsin) survival depends upon the recognition of their sovereign prerogatives, an understanding of their history, a respect for their dignity and a just application of the law."[141]

Respectfully submitted this 15th day of February, 2008.

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[141] See Charles F. Wilkinson, "To Feel the Summer in the Spring: the Treaty fishing rights of the Wisconsin Chippewa," 1991 Wis. L. Rev 375.

[142] These comments were an organic culmination of ideas between Director Richard Monette and Deputy Director, Huma Ahsan of the Great Lakes Indian Law Center, University of Wisconsin Law School