

**ISSUES OF CIVIL AND CRIMINAL JURISDICTION IN WISCONSIN  
(As related to Indian Tribes and Reservations)**

*By:*

**Wm. F. Kussel Jr., Esq.**

**I. OVERVIEW – JURISDICTION**

**A. Questions to ponder:**

1. What is jurisdiction in regards to Indian Tribes/Reservation?
2. How does it relate to Indian Tribes?
3. What is the source of the power?
4. What is the effect of jurisdictional mistakes/errors?

**B. Laws related to Indian Tribes/Reservations are complicated and based upon/effected by many factors including:**

1. Treaties
2. Legislation from Congress
3. Administrative rules
4. Trust responsibilities
5. Moral obligations & understandings
6. Executive orders
7. Judge made law/case law
8. Issues predating the ratification of the U.S. Constitution.
9. Federal policy decisions.

**C. Combination of statutory law, agreements, case law, moral obligations, trust responsibilities and understanding make up this area we call “Indian Law.”**

1. Indian law is constantly developing and evolving.
2. Applicability or effect of federal laws are many times not considered at the time of the passage of the laws; this may require, complicated legal review to determine effect of the law(s) on Indian tribes.

**D. Understanding Jurisdictional issues relating to Tribes requires an understanding of the historical legal issues surrounding Tribes as well as the special relationship that exists between the Tribes and the Federal Government.**

**II. TRUST- A SPECIAL RELATIONSHIP BETWEEN THE TRIBE AND THE FEDERAL GOVERNMENT.**

A. Combination of legal duties, understandings, expectations/anticipations, and moral obligations.

1. Federal Government is trustee owing certain fiduciary duties to the several federally recognized Indian Tribes.
2. Indian tribes were characterized as “domestic dependant nations.” *Cherokee Nation vs. Georgia*, 30 U.S. 1 (1831).
3. Called “wards of the nation” in *U.S. v. Kagma*, 118 U.S. 375 (1886)

B. Courts are willing to enforce certain fiduciary responsibilities

1. Federal government is titleholder to most Indian lands, and the tribe and its individual members being the beneficiaries.
2. Income from Indian land is frequently administered by the federal government.
3. Federal government is responsible for protection of Indian interests: assets, lands, water, income from property, treaty rights.

C. Bureau of Indian Affairs (BIA) oversees federal trust responsibilities

1. Responsible from administration and management of 55.7 million acres of land held in trust for 562 federally recognized tribes.
2. Oversees developing forestlands, leasing assets on these lands, directing agricultural programs, protecting water and land rights, developing and maintaining infrastructure and economic development.
3. Provides education services to approximately 48,000 Indian Students.
4. Assistant Secretary of Interior responsible for 10,500 employees who provides services to 1.4 million Native Americans.

D. BIA Policy – Past and Present

1. Past Policy – pervasive presence
  - a) Represented nearly all governing authority in Indian Country
2. Present Policy – narrow
  - a) Narrowly directed in fulfillment of federal trust obligation
  - b) Emphasis upon federal policy of “tribal self-determination.”
  - c) Indian Self Determination Act (25 USC sec. 450 *et sec*)

### III. TRIBAL SOVEREIGNTY

A. Overview

1. The right and/or powers of self-government.
2. Includes all powers and/or the right to make and enforce laws for the benefit and protection of the tribe.
  - a) Police powers
3. Sources of power

- a) Inherent – Tribe is its own source of power
  - b) No need of delegation from federal government.
  - c) Inherent powers described: *Iron Crow v. Ogalala Sioux Tribe*, 231 F.2d 89 (8<sup>th</sup> Cir. 1956).
4. Modern views
- a) Indian tribes possess inherent governmental power over all their internal affairs.
    - (1) Tribes retain the power necessary to protect tribal self-government or to control internal relations not inconsistent with the dependant status of tribes. *Montana v. U.S.*, 450 U.S. 544 (1981)
    - (2) A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands, within its reservation, when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health of welfare of the tribe. *Montana* at 566
  - b) The states are precluded from interfering with the tribe’s self-government.
    - (1) Tribal sovereignty is dependant on, and subordinate to, only the federal government, not to states. *Washington vs. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980)
    - (2) Indian tribes retain attributes of sovereignty over both their members and their territory. *U.S. v. Mazurie*, 419 U.S. 544, 557 (1975)
  - c) Sovereignty is not absolute.
    - (1) Subject to plenary power of Congress to limit tribal jurisdiction .
    - (2) Subject to restrictions placed on it through federal courts.

#### IV. MODERN JURISDICTIONAL HISTORY

A. Major case limiting criminal jurisdiction over non-Indians – *Oliphant vs. Saquamish Indian Tribe*, 435 U.S. 191 (1978)

1. Held (Rehnquist): tribal court could not exercise criminal jurisdiction over non-Indians in tribal court.
2. Court stated that sovereignty was limited in three ways:
  - a) Tribes not permitted to exercise powers surrendered by treaty, or;
  - b) Prohibited from exercising by federal statute, or;
  - c) Inconsistent with their status as domestic dependant nations.

3. *Oliphant*, did not preclude tribe from exercising certain civil jurisdiction over non-Indians and left open the question of criminal contempt.

B. Jurisdiction after *Oliphant*

1. Tribes have no criminal jurisdiction over non-Indians.
  - a) *Possible* exceptions:
    - (1) Contempt power in the courtroom to maintain order.
    - (2) Enforcement of subpoenas against non-Indians.
    - (3) Power to exclude non-Indians.
2. Tribes retain certain civil jurisdiction with regards to non-Indians.
  - a) Exclusive for reservation-based claims against Indians.
  - b) Tribe may exercise civil jurisdiction, in certain instances, against non-Indians as part of their inherent power.
    - (1) This was acknowledged and factors enunciated in *Montana v. U.S.*, 450 U.S. 544 and cases that followed.

C. Major case limiting tribal criminal jurisdiction over non-Member Indian – *Duro v. Reina*, 495 U.S. 676 (1990)

1. Non-member Indian sought writ of habeas corpus and *writ of prohibition* over crime committed on reservation and prosecuted in tribal court. U.S. District Court for District of Arizona held for petitioner. Court of Appeals for 9th Circuit vacated and remanded.
2. U.S. Supreme Court held that a tribe could not assert criminal jurisdiction over an Indian who was not a member of their tribe.
3. Court commented that tribes also possess their traditional and undisputed power to exclude persons who they deem to be undesirable from tribal lands. Tribal law enforcement authorities have the power, if necessary, to eject them.
4. Where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their powers to detain and transport the offender to the proper authorities. *Duro* at 695

D. *Duro* Fix – 1990

1. Congress amended Indian Civil Rights Act (ICRA), 25 U.S.C. §1301 by:
  - a) Amend definition of “powers of self government,” to include “the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;” and
  - b) Amend definition of “Indian” to mean any person subject to the jurisdiction of the United States as an Indian under § 1153 Title 18.
2. Effect of *Duro* Fix:
3. *Duro* limitation no longer applicable

- a) Tribes have criminal jurisdiction over all “Indians” regardless of their membership status.
- b) “Indian” defined by case-law.

E. *Nevada v. Hicks*, 533 U.S. 353, 121 S.Ct. 2304 (2001). [Argued March 21, 2001 – Decided June 25, 2001] State officials can execute Search Warrant on Reservation for off-Reservation crimes and Tribal Court has no jurisdiction to adjudicated federal civil rights violations per 42 U.S.C. 1983.

1. Case History: State game wardens executed state court and tribal court search warrant on reservation for evidence of off-reservation crime. Hicks alleged in tribal court, *inter alios*, violations of constitutional rights, abuse of power and civil rights violations per 42 U.S.C. 1983. Tribal Court held it had jurisdiction and Tribal Court of Appeals affirmed. State Agents sought relief in federal district court, which ruled they must exhaust immunity claim in tribal court and 9th Cir. Aff.

2. United States Supreme Court Ruled:

- a) Tribal Court lacked jurisdiction to adjudicate state warden’s alleged tortious conduct in executing search warrant on the reservation on Indian residence for off-reservation crime; and
  - (1) Tribe’s adjudicatory power is no broader than its regulatory power, with regards to non-members. *Strate v. A-I Contractors*, 540 U.S. 438
  - (2) State’s interest in executing search warrant’s to get evidence on off-reservation crime is considerable, while the tribe’s interest in regulating the same is not essential to self government or internal affairs. It no more impairs the tribes self government/internal affairs than the federal law impairs the state government.
  - (3) Congress did not strip the states of their inherent jurisdiction on reservations for off-reservation crimes.
- b) Tribal Court lacked jurisdiction to hear the 42 U.S.C. 1983 civil rights claims; and
  - (1) Congress did not grant tribal courts jurisdiction over cases arising under 42 U.S.C. 1983
  - (2) Tribal Court jurisdiction over cases arising under 42 U.S.C. would cause serious anomalies under 28 U.S.C. §1441.
- c) The state game wardens did not have to wait to exhaust remedies in Tribal Court.
  - (1) Tribal court clearly did not have jurisdiction over the alleged tortious action of the game wardens and no

legitimate purpose would have been served to require the state wardens exhaust their claims in tribal court.

F. *United States v. Lara* (No. 03-107. Argued January 21, 2004 – Decided April 19, 2004) Upheld the Duro Fix.

1. Defendant Lara argued, *inter alia*, that dual prosecution by tribe-fed violated Double Jeopardy where Def. Was non-member Indian, because “Duro fix” was delegated federal authority.
2. S.Ct. ruled: Not delegated power but rather Congress recognized tribe’s inherent sovereignty rather than delegate it. *Duro* fix sought to adjust tribe’s status; it relaxed the restrictions recognized in *Duro*. Reasons:
  - a) Constitution gave Congress general powers to legislate in respect to Indian Tribes which the Supreme Court had described in past as “plenary and exclusive.” *Washington v. Confederated Band & Tribes of Yakima Nation*, 439 U.S. 463 (1979).
  - b) Congress, with the Supreme Court’s approval, has interpreted the Constitution “plenary” grants of power as authorizing it to enact legislation that both restrains and relaxes restrictions on tribal sovereignty.
    - (1) *Menominee Tribe v. U.S.*, 391 U.S. 404 (1968) – examining the rights of Menominee Indians following termination.
    - (2) *United State v. Long*, 324 F3d 475 (CA7), upholding against Double Jeopardy challenge successive prosecutions by Tribe and Fed Govt. (cert denied).
  - c) Congress’ statutory goal – to modify the degree of autonomy enjoyed by a dependant sovereign, that is not a state, is not an unusual legislative objective.
  - d) Defendant Lara, pointed to no specific language in the Constitution suggesting a limitation on Congress’ institutional authority to relax restrictions on tribal sovereignty previously imposed by political branches.
  - e) “The change at issue in this case is a limited one. It is similar to power to prosecute a tribe’s own members – a power that the Court has called inherent.” *U.S. v. Wheeler.*, 435 U.S. 313 (1978)
  - f) The conclusion that “Congress has the power to relax restrictions imposed by political branches on the tribes inherent prosecutorial authority is consistent with earlier line of cases.”

## V. RELEVANT STATUES REGARDING JURISDICTION

A. Public Law 280, 18 U.S.C. §1162 – State generally has criminal jurisdiction along with Tribe.

*Sec. 1162. State jurisdiction over offenses committed by or against Indians in the Indian country.*

*\* Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the 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:*

Alaska ..... All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.

California ..... All Indian country within the State  
Minnesota ..... All Indian country within the State, except the Red Lake Reservation

Nebraska ..... All Indian country within the State  
Oregon ..... All Indian country within the State, except the Warm Springs Reservation

Wisconsin ..... All Indian country within the State (except the Menominee Indian Reservation)\*

*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 the 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.*

The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

\*Added by author for clarification

B. Non-Public Law 280 Tribes – Criminal Jurisdiction rests with Tribe and Federal Government.

1. No state criminal jurisdiction over crimes committed by Indians.
2. State criminal jurisdiction over non-Indians where there is victimless crimes or crimes against other non-Indians.
3. Tribe has criminal jurisdiction for all crimes committed on the Reservation by Indians.
  - a) Tribe must follow restrictions of the Indian Civil Rights Act (ICRA).
4. Federal Courts have jurisdiction over Major Crimes, per 18 U.S.C. §1153, committed by Indians against Indians or Indian property.
5. Federal Courts have jurisdiction over crimes committed by Indians against non-Indians under 18 U.S.C. §1153 and 18 U.S.C. 1152 “General Crimes Act”

C. Major Crimes Act – 18 U.S.C sec. 1153

*Sec. 1153. Offenses committed within Indian country*

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

D. General Crimes Act – 18 U.S.C. sec. 1152

*Sec. 1152. Laws governing*

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

VI. CRIMINAL JURISDICTIONAL TABLES

**CRIMINAL JURISDICTION**  
**Non-PL 280 Tribe**  
**(Where jurisdiction has not been conferred by 18 U.S.C. §1162)**  
**(Simplified)**

<b>Status of Offender</b>	<b>Status of Victim</b>	<b>Jurisdiction</b>
Indian	Indian	Tribal Court. Federal Court for Major Crimes (18 U.S.C. §1153).
Indian	Non-Indian	Tribal Court. Federal Court (Major crimes 1 <sup>st</sup> under 18 U.S.C. §1153; then, assimilative crimes per 18 U.S.C. 1152).
Indian	Victimless	Tribal Court and Federal Court possible.
Non-Indian	Indian	Federal Court for crimes of violence against Indians or Indian property per 18 U.S.C. §1152
Non-Indian	Non-Indian	State court.
Non-Indian	Victimless	State court and Federal Court possible if clear impact on Indian interest.

**CRIMINAL JURISDICTION**  
**Public Law 280 Tribe**  
 (Where jurisdiction has been conferred by 18 U.S.C. §1162)  
 (Mandatory State) - (Simplified)

<b>Status of Offender</b>	<b>Status of Victim</b>	<b>Jurisdiction</b>
Indian	Indian	State court and tribal court.
Indian	Non-Indian	State court and tribal court..
Indian	Victimless	State court and tribal court.
Non-Indian	Indian	State court.
Non-Indian	Non-Indian	State court.
Non-Indian	Victimless	State court

VII. CIVIL JURISDICTIONAL TABLES

**General Civil Jurisdiction**  
**Non-Public Law 280 Reservation**  
 (Simplified)

<b>Plaintiff Status</b>	<b>Defendant Status</b>	<b>Where cause of action arose</b>	<b>Jurisdiction</b>
Indian	Indian	Reservation	Tribal Court
Indian	Non-Indian	Reservation	Tribal Court if tribal civil code allows; State Court.
Non-Indian	Indian	Reservation	Tribal Court
Non-Indian	Non-Indian	Reservation	State Court

## VIII. CIVIL SUITES AGAINST INDIAN TRIBES & THEIR ENTERPRISES IN FEDERAL COURT.

### A. Three significant issues exist:

1. Federal jurisdiction.
2. Tribal sovereign immunity.
3. Exhaustion of tribal remedies.

### B. Federal jurisdiction

#### 1. 28 U.S.C. §1332 (Diversity Jurisdiction)

a) Not available between Indians residing on reservation and non-Indians residing in the same state. *Oneida Indian Nation of New York State v. Oneida County*, N.Y., C.A.2 (N.Y.) 1972, 464 F.2d 916, reversed on other grounds 94 S.Ct. 772, 414 U.S. 661, 39 L.Ed.2d 73, on remand 434 F.Supp. 527.

b) Not available between Indians of different reservations residing within the same state as the non-Indian defendant for an accident occurring on the reservation. *Schantz v. White Lightning*, D.C.N.D.1973.

c) Where Indian tribe's constitution referred to tribe as being "in the nature of a non-profit corporation" did not establish that tribe or ski resort which it operated was a corporation for purposes of diversity jurisdiction with respect to plaintiff's suit for injuries received when he was struck in back of his head by chairlift at ski resort. *Gaines v. Ski Apache*, C.A.10 (N.M.) 1993, 8 F.3d 726.

#### 2. 28 USC §1331 (Federal Question)

a) The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

(1) Federal statutes

(2) Federal common law

(3) Rules that are fashioned by court decisions are laws as the term is used in sec. 1331.

b) Whether and Indian tribe retains the jurisdiction to compel a non-Indian property owner, residing within the external boundaries of the reservation, to submit to tribal court jurisdiction is a Federal question. *National Farmers Union Ins. Company v. Crow Tribe of Indians*, 471 U.S. 845 (1985).

### 3. Tribal Sovereign Immunity

- a) Actions against Indian tribes are barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991).
- b) Indian tribes enjoy the common law immunity from suit traditionally enjoyed by sovereign powers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).
- c) Includes tribal enterprises because an action against a tribal enterprise is, in essence, an action against the tribe itself. *see Local IV-302 Int'l Woodworkers Union of Am. V. Menominee Tribal Enter.*, 595 F.Supp. 859, 862 (E.D.Wis.1984)(Warren, J.).
- d) Includes tribal gaming commission and tribal casino chartered by the Tribal Legislature. *see Barker v. Menominee Nation Casino*, 897 F.Supp. 389 (E.D.Wis.1995)(Warren, J.)
- e) Indian Civil Rights Act (ICRA), 25 USC §1301 *et seq.* does not create a federal cause of action against an Indian tribe for deprivation a substantive rights. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).
  - (1) Except for *habeas corpus* proceedings, suits in federal court against Indian tribes for ICRA violations, are barred by sovereign immunity. *White v. Pueblo of San Juan*, 728 F.2d 1307, 1313 (10th Cir.1984).
  - (2) 10th Circuit exception: where the aggrieved party *actually* sought a tribal remedy and the tribal court failed to exercise jurisdiction.

### C. Tribal Exhaustion Rule

1. Where federal and tribal courts both appear to have concurrent jurisdiction over civil matter, the federal court must dismiss or stay action until the aggrieved party has exhausted his or her tribal remedies. *see Barker v. Menominee Nation Casino*, 897 F.Supp. 389 (E.D.Wis.1995)(Warren, J.)
  - a) 10th Circuit exception: where the tribal court failed to exercise jurisdiction. *Dry Creek Lodge, Inc. V. Arapahoe and Shoshone Tribes (Dry Creek II)*, 623 F.2d 682 (10th Cir.1980)The question as to whether a tribal court had jurisdiction over non-Indian property owner, involves a careful examination of tribal sovereignty and the extent to which it has been altered, divested or diminished, must first be addressed in tribal court. *National Farmers Union Ins. Company v. Crow Tribe of Indians*, 471 U.S. 845 (1985).
  - b) The federal court should not provide any remedies until the aggrieved parties have exhausted their tribal remedies.

c) The federal court may review the tribal court's finding of jurisdiction.

2. Recent exception: No need to exhaust tribal remedies when it is clear that the tribal court does not have jurisdiction and no legitimate purpose would be served. *Nevada v. Hicks*, 533 U.S. 353, 121 S.Ct. 2304 (2001).

a) Supreme Court found tribal court did not have jurisdiction over civil rights claim under 42 U.S.C. 1983 and that exhaustion of tribal remedies would serve no legitimate purpose other than delay.