Indian Law – An Introduction for Wisconsin

June 2015

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About the Presenters

Kris M. Goodwill is a lower comi trial judge for the Menominee Indian Tribe of Wisconsin where she presides over a variety of criminal and civil matters. For nineteen years before her judicial appointment she was employed as in-house counsel for three (3) different tribes in Wisconsin . She received both her undergraduate and law degrees from the University of Wisconsin-Madison . She is a board member of the Indian Law Section of the State Bar of Wisconsin . She currently serves on the Wisconsin Commission on Children, Families and the Comis.

Carolyn G. Grzelak is a Legislative Attorney for the Ho-Chunk Nation. She has devoted her practice to Indian law by serving tribes and individual tribal members. Ms. Grzelak worked extensively on the codification and implementation of the Wisconsin Indian Child Welfare Act and served on the Wisconsin Department of Children and Families WICWA Advisory Board. She received her B.A. from Miami University and her J.D. from the University of Washington. Ms. Grzelak is the Chair of the Indian Law Section of the State Bar of Wisconsin. She is a member of the State Bar of Wisconsin and the Washington State Bar Association.

Eric Lochen is managing partner at Lochen Silva, PLLC, in Minneapolis. He received his undergraduate degree from Miami University (OH), Master of Liberal Studies degree from the University of Wisconsin-Milwaukee, and his law degree from William Mitchell College of Law in St. Paul. Eric previously served as in-house counsel to the Leech Lake Band of Ojibwe. In 2009, he founded the law firm that became Lochen Silva, PLLC. Eric's work focuses exclusively on the representation of clients with significant ties to Indian Country nationwide. Eric serves as a member of the Wisconsin Bar Association Indian Law Section Board of Directors.

Ann McCammon Soltis is an Attorney and the Director of the Division of Intergovernmental Affairs with the Great Lakes Indian Fish and Wildlife Commission in Odanah, Wisconsin. She has provided legal and policy analysis to GLIFWC and its member tribes for over 20 years on such issues as sulfide mining, and Lake Superior protection and restoration. She also serves as the US co-chair of the Lake Superior Binational Program's Habitat Committee. She received her undergraduate degree in Biology from Lawrence University and her law degree from the University of Minnesota Law School.

TRIBAL COURTS IN WISCONSIN

2015 Annual State Bar Conference
Lake Geneva, Wisconsin
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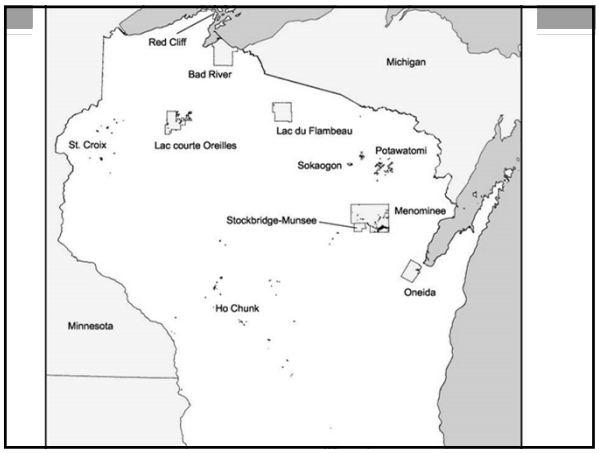
OVERVIEW

- Brief background and history
- Discussion of Tribal Courts in general
- Wisconsin Tribal Courts
- Recent Case Law
- Q & A

Tribes in Wisconsin

- Eleven federally recognized Tribes in Wisconsin
  - Bad River Band of Lake Superior Chippewa
  - Forest County Potawatomi
  - Ho-Chunk Nation
  - Lac Courte Oreilles Band of Lake Superior Chippewa
  - Lac du Flambeau Band of Lake Superior Chippewa
  - Menominee Indian Tribe
  - Mole Lake (Sokaogon) Band of Lake Superior Chippewa
  - Oneida Tribe of Indians of Wisconsin
  - Red Cliff Band of Lake Superior Chippewa
  - St. Croix Band of Lake Superior Chippewa
  - Stockbridge-Munsee Band of Mohicans



Indian Tribes

- The United States recognizes Indian tribes as "domestic dependent nations."
  - Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

Indian Tribes

- Tribes do not draw their powers from any source of federal law. Rather, they are the inherent powers of sovereigns that pre-exist the federal Union.
  - United States v. Wheeler, 435 U.S. 313, 323-24 (1978); Talton v. Mayes, 163 U.S. 376, 384 (1896).

U.S. Supreme Court on Tribal Courts:

- We have repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government. This policy reflects the fact that Indian tribes retain "attributes of sovereignty over both their members and their territory," to the extent that sovereignty has not been withdrawn by federal statute or treaty.
- -Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987)(internal citations and quotation marks omitted)
- -National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985). Must exhaust tribal court remedies.

U.S. Supreme Court on Tribal Courts

- The federal policy favoring tribal self-government operates even in areas where state control has not been affirmatively preempted by federal statute.
  - Id.

U.S. Supreme Court on Tribal Courts

- Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development.
  - Id. at 15.

Public Law 280

- Wisconsin is a Public Law 280 state. 28 USC § 1360, 18 USC § 1162.
- Under PL-280, the State of Wisconsin has criminal jurisdiction on Indian Reservations, over Indians (except on the Menominee Reservation).
- State Courts have concurrent civil adjudicatory jurisdiction over private causes of action arising on Reservations.
- Public Law 280 does not the State civil regulatory jurisdiction on Indian reservations.
  - Bryan v. Itasca County, 426 U.S. 373 (1976).

Wisconsin Tribal Courts

- All eleven Tribes in Wisconsin have some form of a judicial system.
- Formality and procedure vary, but all are based on the adversarial process.
- In addition to adversarial court, the Ho-Chunk Nation operates a Traditional Court and other Tribes have peacemaking available.

Wisconsin Tribal Courts

- **What law is applied in Tribal Courts?**
  - Tribal law
- **Is it written down?**
  - Yes. Many tribes have their Court rules and ordinances available online.
- **Resource for Tribal Court information**
  - www.judicare.org has links to all tribal courts with information online. Phone numbers to each Court also available.

Wisconsin Tribal Courts

- **Do I need to be admitted to practice?**
  - Varies by court; most allow one-time appearance pending application.
  - Some courts have entrance examination.
  - Call the Clerk of Courts.

Wisconsin Tribal Courts

- **What types of actions do tribal courts hear?**
  - Criminal (Menominee)
  - Civil disputes
  - Employment
  - Divorce
  - Child Support
  - Contract claims
  - Constitutional challenges
  - Election disputes
  - Domestic violence restraining orders
  - Name changes
  - Juvenile actions
  - Abuse and neglect cases
  - Workers compensation appeals

Wisconsin Tribal Courts

- Indian Civil Rights Act, 25 USC § 1302
  - Imposes on Indian tribes by federal statute substantially similar, but not identical, obligations under the U.S. Bill of Rights.
  - Limits sentencing to one year and/or $5,000.00 fine.
  - Notable differences:
    - Establishment Clause
    - Right to counsel
    - Jury trial

  Recent changes: Tribal Law and Order Act: Allows enhanced sentencing authority of up to 3 years for tribal felonies if certain criteria met.

  VAWA 2013 Amendments: Allows jurisdiction over non-Indians for domestic violence if court meets certain criteria (law trained judges, counsel for indigent criminal defendants, etc.)

Major Crimes Act

- 18 U.S.C. 1153 (1885)
- General jurisdiction by the federal courts for major crimes committed by a Native American in Indian Country including murder, kidnapping, certain types of assault, sexual assault, burglary, robbery and arson.
- It does not eliminate concurrent tribal jurisdiction.

Federal Case Law

- Montana v. U.S, 450 U.S. 544 (1981)
- Tribal Courts have civil jurisdiction over non-members who enter into consensual relationships with the tribe or its members, or when the conduct of non-members has a direct effect on the political integrity, economic security or health of the tribe.

Wisconsin Case Law

- St. Germaine v. Chapman, 178 Wis. 2d 869 (Ct. App. 1993)
- WI courts does not have jurisdiction if federal law has pre-empted it, or if state jurisdiction would infringe on the rights of tribes to establish and maintain their own government.
- If a tribe has a court and law on the matter then the balance tips in favor of tribal jurisdiction.

Wisconsin Tribal Courts

- Going to a new tribal jurisdiction:
  - Find out as much as possible about law and local rules.
    - Tribal constitution
    - Tribal court code
  - Talk to other lawyers who have practiced there (call the Tribal Attorney).
  - Case law
  - Requirements for practice
  - Respect

Wisconsin Tribal Courts

- **Other issues**
  - Tribes possess sovereign immunity from suit. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)
    - Tribal law on immunity varies by Tribe.
  - Teague v. Bad River Band of Lake Superior Chippewa Indians, 2003 WI 118.
  - **Full faith and credit**; Wis. Stat. § 806.245
  - **Discretionary Transfer** – Allows a circuit court to transfer without the burden of a party filing in tribal court. Wis. Stat. § 801.54.
  - **WICWA Transfers** – Chapter 48.028 (3)(c).

Recent Case Law

- Takeda Pharmaceuticals v. Connelly, Montana District Court, CV 14-50-GF-BMM (April 24, 2015).
- Stifel, Nicolaus & Company, Inc. v. Lac Courte Oreilles Band of Lake Superior Chippewa Indians, Western District of WI, Case No. 13-cv-121-wmc (June 19, 2014).
- Harris v. Lake of the Torches (14 AP 1692).

Wisconsin Indian Child Welfare Act

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Best Interests of an Indian Child

48.01(2) Title and legislative purpose.

In Indian child custody proceedings, the best interests of the Indian child shall be determined in accordance with the federal Indian Child Welfare Act, 25 USC 1901 to 1963, and the policy specified in this subsection. It is the policy of this state for courts and agencies responsible for child welfare to do all of the following:

(a) Cooperate fully with Indian tribes in order to ensure that the federal Indian Child Welfare Act is enforced in this state.

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Best Interests of an Indian Child

48.01(2) Title and legislative purpose cont.

(b) Protect the best interests of Indian children and promote the stability and security of Indian tribes and families by doing all of the following:

1. Establishing minimum standards for the removal of Indian children from their families and placing those children in out-of-home care placements, preadoptive placements, or adoptive placements that will reflect the unique value of Indian culture.
2. Using practices, in accordance with the federal Indian Child Welfare Act, 25 USC 1901 to 1963, this section, and other applicable law, that are designed to prevent the voluntary or involuntary out-of-home care placement of Indian children and, when an out-of-home care placement, adoptive placement, or preadoptive placement is necessary, placing an Indian child in a placement that reflects the unique values of the Indian child's tribal culture and that is best able to assist the Indian child in establishing, developing, and maintaining a political, cultural, and social relationship with the Indian child's tribe and tribal community.

WICWA applies when:

The child is an Indian child,

- a member of an Indian tribe, or
- eligible for membership and the biological child of a member of an Indian tribe [Wis. Stat. § 48.02(8g)]

and

The child is subject of an Indian child custody proceeding or action governed by WICWA

[Wis. Stat. § 48.028(3a)]

Proceedings and Actions Governed by WICWA

Child welfare proceedings or actions *that result or* ***may result*** *in the removal of an Indian child from his or her parent or Indian custodian*.

- Indian child/juvenile custody proceedings
- Voluntary placements

Indian Child/Juvenile Custody Proceeding

Includes:

- **CHIPS** proceedings
- **JIPS** proceeding based on a petition that the youth is:
  - uncontrollable
  - a school drop-out
  - habitually truant from school
  - habitually truant from home
- **Guardianships**
- A **termination of parental rights** proceeding

In which any of the following *may occur*:

- an out-of-home care placement
- an adoptive placement
- a preadoptive placement
- a termination of parental rights

[Wis. Stat. § 48.028 (2)(d)]

Definition of "Out-of-Home Care Placement"

- Removal of an Indian child from his or her parent or Indian custodian for temporary placement in a:
  - foster home or treatment foster home
  - group home
  - residential care center
  - shelter care
  - home of a relative other than a parent
  - home of a guardian
- From which the parent or Indian custodian cannot have the child returned **upon demand**

Notice of First Hearing

The party seeking out-of-home placement or TPR, or initiating proceedings must send Notice

- The notice of the first hearing in an involuntary Indian child/juvenile custody proceeding *must* be sent by ***registered*** *mail, return receipt requested*.
- The return receipt must be filed with the court.

Notice must be sent to:

- the Indian child's parent
- the Indian custodian, if any, and
- the tribe in which the Indian child is a member, or
- the tribe or tribes in which the Indian child may be eligible for membership, or
- if the child's tribe is not known, the Bureau of Indian Affairs

[Wis. Stat. § 48.028(4)(a)]

Formal Notice – Subsequent Hearings

Notice must be sent in writing by:

- mail
- personal service
- fax
- **NOT** e-mail

[Wis. Stat. § 48.028(4)(a)]

Tribal Sovereignty and WICWA

- The tribe must be notified of all Indian child/juvenile custody proceedings.
- The tribe has the right to formally intervene at any point during the proceeding and become a party to the case.

[Wis. Stat. § 48.028(3)(e)]

Failure to allow the Tribe(s) to intervene is grounds for an Invalidation.

[Wis. Stat. § 48.028(6)]

Transfer to Tribal Court

- WICWA presumes that the best interests of an Indian child are best assured in Tribal court.
- Upon the petition of the Indian child's parent, Indian custodian, or Tribe, the circuit court **shall** transfer the case to the Tribal court.

Failure to transfer to tribal court without a finding of good cause is grounds for Invalidation.

[Wis. Stat. § 48.028(6)]

Transfer to Tribal Court

Once a Petition to Transfer is made by the Indian child's parent, Indian custodian, or Tribe, the circuit court must transfer the case **unless**:

- A parent objects to the transfer
- The child's Tribe does not have a court
- The court of the child's tribe declines
- The court finds *good cause* not to transfer

[Wis. Stat. § 48.028(3)(c)]

Transfer to Tribal Court Good Cause Not to Transfer

"Good Cause" is limited to apply if:

- The Indian child is 12 years of age or over and objects to the transfer
- Evidence/testimony cannot be presented in tribal court without undue hardship to parties or witnesses which Tribal court cannot mitigate by use of:
  - Telephone or live audiovisual means
  - Location that is convenient to the parties
  - Other means permissible under tribal court's rules of evidence

[Wis. Stat. § 48.028(3)(c)3.]

Transfer to Tribal Court Good Cause Not to Transfer

- Tribe received notice, **and**
- Tribe has not indicated to the [circuit] court in writing that it is monitoring the proceeding and may request a transfer at a later date, **and**
- Petition for transfer is filed by the tribe, **and**
- Petition is filed more than 6 months after the notice of a CHIPS/JIPS proceeding, or more than 3 months after the notice of a TPR proceeding.

[Wis. Stat. § 48.028(3)(c)3.]

Must meet all 4 requirements to deny the transfer request by the Tribe.

Cases that Remain in Circuit Court

- Must still be handled in accordance with WICWA
- The tribe can continue to intervene at any stage of the proceeding

Active Efforts Standard

- The court may not order an Indian child to be removed from the home of the Indian child's parent or Indian custodian and placed in out-of-home care or order an involuntary TPR unless the court or jury finds:
  - that *active efforts* have been made to provide remedial services and rehabilitation programs designed to prevent the breakup of the Indian child's family, and
  - those efforts proved unsuccessful.

[Wis. Stat. § 48.028(4)(d)& (e)]

- This standard obligates the county agency to take active steps to prevent an out-of-home placement, not just to take active steps to reunify once a removal occurs.

Active Efforts Standard

An ongoing, vigorous, and concerted level of case work made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe...

Active Efforts Standard

... that utilizes the available resources of:

- The Indian child's tribe
- Tribal and other Indian child welfare agencies
- Extended family members
- Other individual Indian caregivers
- Other culturally appropriate service providers.

[Wis. Stat. § 48.028(4)(g)]

Active Efforts - Specific Activities

- The Court must consider each of these items and determine if the County agency:
  - Requested tribal agency to assist in evaluating the case
  - Invited representatives of child's tribe to participate in custody proceeding at earliest point
  - Notified and consulted extended family members to provide structure and support
  - Provided family interaction in a natural setting
  - Offered or employed all available family preservation strategies
  - Offered and actively assisted in accessing community resources
  - Monitored progress and client participation in services
  - Provided alternative ways of addressing the needs if services did not exist or not available to the family

[Wis. Stat. § 48.028(4)(g)1.a.-h.]

Active Efforts - Specific Activities

- If *any* of the specific activities were not conducted, the person seeking the out-of-home placement or involuntary TPR *must* document and explain to the court why the activity was not conducted.
- A court **can not** order an out-of-home placement or involuntary TPR without finding that active efforts have been provided.

Failure to provide active efforts is grounds to file a Petition to Invalidate.

[Wis. Stat. § 48.028(6)]

Best Interests of an Indian Child – Placement out of the home

- When placement is necessary, placing an Indian child in a placement that reflects the unique values of the Indian child's tribal culture, **and**
- That assists the child in establishing, developing, and maintaining a political, cultural, and social relationship with the Indian child's tribe.

Emergency Removals

- If emergency conditions necessitate departing from placement preferences order, When the reason for departing from that order is resolved, the Indian child shall be placed in compliance with the order of placement preferences.

[Wis. Stat § 48.027(bm)]

Placement of an Indian Child

Indian children *must* be placed according to specific identified preferences, unless good cause exists to depart from the preferences, when they are:

- held in temporary physical custody
- placed in out-of-home care
- placed in a pre-adoptive placement
- placed for adoption

[Wis. Stat. § 48.028(7)]

Placement Preferences

- The order is not advisory
- It is required

Placement Preferences

For holding in **physical custody, out-of-home care, and pre-adoptive placements**, preference must be given to placement, in the order of the following:

1. The home of an extended family member of the Indian child
2. A foster home or treatment foster home licensed, approved, or specified by the Indian child's tribe
3. An Indian foster home or treatment foster home licensed or approved by the department, a county department or a child welfare agency
4. A group home or residential care center for children and youth approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the needs of the Indian child

[Wis. Stat. § 48.028(7)(b)]

Placement Preferences

In placing an Indian child for **adoption**, preference *must* be given to a placement with one of the following, in the order of preference listed:

1. An extended family member of the Indian child
2. Another member of the Indian child's tribe
3. Another Indian family

[Wis. Stat. § 48.028(7)(a)]

Placement Preferences

The standards to be applied in meeting the placement preference requirements are the prevailing social and cultural standards of the Indian community:

- where the child's parents or extended family members reside, or
- with which the parents or extended family members maintain social and cultural ties
- Different order of preference established, by resolution, by the child's tribe
- Good cause to depart

[Wis. Stat. § 48.028(7)(d)]

Placement Preferences: Good Cause to Depart

- Request of parent or child (sufficient age and developmental level) unless request is to avoid application of WICWA
- Extraordinary physical, mental, or emotional health needs, established by an expert witness
  - length of time in placement *does not* in itself constitute an extraordinary mental health need
  - **bonding with a foster parent *does not* in itself constitute an extraordinary mental health need**
- Unavailability of suitable placement after diligent efforts have been made to comply
- The burden of establishing "good cause" shall be on the party requesting the departure.

[Wis. Stat. § 48.028(7)(e)]

Qualified Expert Witness

- The party seeking to place the Indian child in out-of-home care or terminate parental rights to the Indian child *must* utilize a qualified expert witness (QEW).
- Any other party may utilize a QEW.
- The testimony of a QEW cannot be waived by any party.

It is a common misconception that the Tribe is responsible for providing a QEW.

The Tribe is NOT.

Qualified Expert Witness

- **Purpose** of Testimony:
  To ensure that basis for the action is not tainted by cultural bias or misunderstanding
- **Subject** of Testimony:
  Whether continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage.

Serious Damage Standard

The court may not order:

- an Indian child to be removed from the home of the Indian child's parent or Indian custodian and placed in out-of-home care or
- an involuntary termination of parental rights to an Indian child

unless the court or jury finds that *continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child*.

[Wis. Stat. §§ 48.028(7)(d)(e)]

Serious Damage Standard

- This is a finding made by the court or jury
- It is the standard that must be used by a county agency when removing an Indian child from his or her parent or Indian custodian

Who may be a QEW?

Qualified expert witnesses, in the descending order of preference:

- A member of the Indian child's tribe.
- A member of another tribe.
- A professional person with substantial education and experience in his or her field.
- A lay person with substantial experience in delivering child and family services to Indians.

[Wis. Stat. § 48.028(4)(f)]

All must be knowledgeable regarding the customs of the Indian child's tribe relating to family organization and child-rearing practices.

Role of QEW

Testify as to whether continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child, using his or her expertise on the child rearing practices and family organization of the child's tribe.

- QEW Testimony is necessary if placement is being changed to out-of-home placement.
- If child moved from one out-of-home placement to another, QEW is not necessary.
- If the children are returned home but then removed again, QEW testimony is necessary to justify the new out-of-home placement.

Qualified Expert Witness

- May be chosen from lower category only if party calling the witness has made a *diligent effort* to obtain a witness from higher order of preference
- The level of the order of preference may not be the sole consideration of the court in weighing their testimony
- Court must consider as paramount the best interests of the Indian child as provided in WI Statute 48.01(2).

[Wis. Stat. § 48.028(4)(f)]

- **Failure to have QEW testimony is grounds for Invalidation.**

[Wis. Stat. § 48.028(6)]

Voluntary Placements and Voluntary TPRs

Any such consents must be:

- Executed in writing
- Recorded before a judge
- Accompanied by a written certificate by the judge that:
  - the terms and consequences of the consent were fully explained, and
  - the parent or Indian custodian fully understood

[Wis. Stat. §§ 48.028(5)(a) and (b)]

Voluntary Placements and Voluntary TPRs

Any consent given prior to or within 10 days after the birth of the Indian child is not valid.

- Parent may withdraw consent
  - *for any reason*
  - at any time
  - Prior to entry of final TPR order
- Child *must* be returned
  - Unless an order or agreement that was in effect prior to the TPR provides for a different placement

[Wis. Stat. §§ 48.028(5)(a) and (b)]

Voluntary Placements and Voluntary TPRs

Withdrawal of consent – Fraud or Duress

- Parent may withdraw consent even after finalization of an adoption order
  - If obtained by fraud or through duress
  - Motion filed within 2 years of the final adoption order
- If court finds fraud or duress, adoption must be vacated and the child returned to the parent
  - Unless an order or agreement that was in effect prior to the TPR provides for a different placement

[Wis. Stat. § 48.028(5)(c)]

Placement Preferences & Voluntary Actions

- Not required in voluntary out-of-home care placements but strongly recommended
  - If voluntary placement becomes an involuntary proceeding, placement preferences will then have to be followed
- Required in *any* post-TPR placement

Remedy for Violations of the WICWA - INVALIDATION

Failure to comply with ICWA:

- § 1911: Exclusive jurisdiction, transfer of jurisdiction, intervention, full faith and credit
- § 1912: Notice, time, counsel, active efforts, evidentiary standard, qualified expert witness, damage to child
- § 1913: Voluntary consent and withdrawal

shall result in the invalidation of the **out-of-home placement** or **termination of parental rights**.

[Wis. Stat. § 48.028(6)]

Return of Custody

If an order granting the adoption of an Indian child is vacated or set aside or the parental rights of all adoptive parents of the Indian child are voluntarily terminated, the Indian child's former parent or former Indian custodian may petition for return of custody of the Indian child.

Court must hold a hearing on the petition.

[Wis. Stat. § 48.028(8)(a)]

Return of Custody

At conclusion of the hearing, court shall grant the petition for return of custody unless there is a showing that return of custody is not in the best interests of the Indian child.

[Wis. Stat. § 48.028(8)(a)]

Implications for Noncompliance

- Invalidation of proceedings
- Possible return of custody to Indian parent before ready
- Nullification of adoption orders
- Instability of placements of children
- Delay in permanence for a child
- Malpractice actions
- State could be required to pay back Federal Title IV-E foster care payments
- Tribe / Family / Child is damaged for life
- Tribe experiences loss of child – history

Wisconsin Forms

DCF Indian Child Welfare Forms:
http://dcf.wisconsin.gov/children/icw/forms/INDX.htm

ICWA Circuit Court Forms:
http://wicourts.gov/forms1/circuit.htm#juvenile

Additional Resources

Federal ICWA Guidelines and Proposed Regulations
http://www.bia.gov/WhoWeAre/BIA/OIS/HumanServices/IndianChildWelfareAct/index.htm

A Practical Guide to ICWA
www.narf.org/icwa

The Indian Child Welfare Act Handbook, B.J. Jones, 2003

Handbook of Federal Indian Law, Felix Cohen
(Newton, Anderson, and et al., 2005 Edition)

WISCONSIN TRIBES AND TRIBAL SOVEREIGNTY

OVERVIEW

- U.S. Constitution—Specific references to tribes
- Marshall Trilogy—*Johnson v. M'Intosh* (U.S. 1823), *Cherokee Nation v. Georgia* (U.S. 1831), *Worcester v. Georgia* (U.S. 1832)—Affirming legal and political status of tribes
- *Morton v. Mancari* (U.S. 1974)—Self-Determination first principles
- *Santa Clara Pueblo v. Martinez* (1978)—Generally, federal government enforcement role limited over tribal governments.
- *Merrion v. Jicarilla Apache Tribe* (U.S. 1982)—Tribe has inherent power to tax non-Indians conducting business in Indian Country
- *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* (U.S. 1998)--Tribes immune from suit (absent waiver)

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U.S. CONSTITUTION

- "Indians not taxed."
- Art. I, Sect. 2, Clause 3: "Representatives and direct Taxes shall be apportioned among the several States…excluding Indians not taxed."

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U.S. CONSTITUTION

- Indian Commerce Clause
- Art. I, Sect. 8: "Congress shall have the power to regulate Commerce with foreign nations and among the several states, and with the Indian tribes."
- Determining that Indian tribes are separate from the federal government, states, and foreign nations

MARSHALL TRILOGY

- *Johnson v. M'Intosh,* 21 U.S. 543 (1823)
  - Discovery Doctrine: Europeans "discovered" the new world and therefore gained title to the land through that discovery;
  - Tribes retained the right to occupy the land but could not sell it without approval of the federal government

MARSHALL TRILOGY

- *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831)
  - Court described tribes as "domestic dependent nations" possessing attributes of sovereignty similar to states but not rising to the level of a foreign state;
  - Established "guardian-ward" relationship between federal government and tribes

MARSHALL TRILOGY

- *Worcester v. Georgia, 31 U.S. 515 (1832)*
  - Established that the federal government, and not the states, had sole and exclusive authority to deal with Indian tribes;
  - "Plenary Power"

SOVEREIGNTY; SOVEREIGN IMMUNITY

- U.S. Supreme Court has described Tribal sovereign immunity as the "common-law immunity from suit traditionally enjoyed by sovereign powers"
- Immunity=Sovereignty

SELF-DETERMINATION

- *Morton v. Mancari*, 417 U.S. 535 (1974)
  - U.S. Supreme Court: Tribal hiring preferences not violative of Due Process Clause of Fifth Amendment
  - First principles of Self-Determination

FEDERAL ENFORCEMENT OVER TRIBAL AFFAIRS

- *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)
  - Suits against Tribe under the Indian Civil Rights Act of 1968 are barred by Tribe's sovereign immunity from suit;
  - Came to stand for strengthening of Tribal self-government

TRIBAL TAXATION AUTHORITY

- *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982)
  - U.S. Supreme Court: Tribe has authority to tax non-Indians conducting business on the reservation as an inherent power of Tribal sovereignty

SOVEREIGN IMMUNITY

- *Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 751 (1998)
  - Tribe entitled to sovereign immunity from suit
  - *Kiowa* dealt specifically with enforcement of a contract

WAIVER

- *C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001)
  - *Tribes can waive immunity, BUT*
  - *Waiver must be CLEAR OR SPECIFICALLY ABROGATED BY CONGRESS*

FINAL THOUGHTS

- WI: Eleven federally recognized tribes, each with unique governmental structure and laws
- WI: PL 280 state: Tribes subject to State criminal jurisdiction (exception: Menominee)
- WI: Gaming
- Practical implications
  - Tort claims
  - Jurisdiction
  - Commercial transactions
  - Tribal-State agreements: law enforcement, tax

QUESTIONS?

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Indian Law – An Introduction for Wisconsin Practitioners

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Introduction to Ojibwe Off-Reservation Hunting, Fishing and Gathering Rights: *Lac Courte Oreilles v. State of Wisconsin,* Wisconsin Warden Law, Tribes' Role in Off-Reservation Development Decisions

I. Setting the Stage – On and Off Reservation Rights

A. Tribal Management/Regulation On-Reservation.

1. Tribes have that authority which hasn't been taken away by Congress, voluntarily relinquished, or which is inconsistent with their status as domestic dependent nations.[1]

2. Certain federal statutes authorize tribes to be treated "as states" for the purposes of regulating aspects of the reservation environment.[2]

a. The Environmental Protection Agency (EPA) has relied on differing rationales to justify tribal regulatory authority – under the Clean Water Act the EPA has focused on inherent tribal authority to regulate, under the Clean Air Act the EPA takes the position that the Act constitutes a specific Congressional delegation of authority.[3]

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[1] *See United States v. Kagama*, 118 U.S. 375 (1886), *Montana v. United States,* 450 U.S. 544, 565 (1981).

[2] *See* Clean Water Act, § 518(e), 33 U.S.C. 1377(e); Clean Air Act, § 301(d), 40 U.S.C. 7601(d); Safe Drinking Water Act § 1451, 42 U.S.C. 300j-11; Toxic Substance Control Act, 40 U.S.C. 745 *et. seq.*, Federal Insecticide, Fungicide and Rodenticide Act, § 23, 7 U.S.C. 136u.

[3] A number of law review articles explore these topics including: Marren Sanders, *Clean Water in Indian Country: The Risks (and Rewards) of Being Treated in the Same Manner as a*

B. Tribal Management/Regulation of Off-Reservation Treaty Rights.

1. Chippewa (also known as Ojibwe or Anishinaabe) Tribes in Minnesota, Wisconsin and Michigan reserved hunting, fishing and gathering rights on territories ceded to the United States.[4]

   a. Reservation of rights by each signatory tribe individually – each tribe may authorize and regulate its own members in the exercise of off-reservation treaty rights.[5]

   b. Reservation of rights by all signatory bands collectively – intertribally shared off-reservation rights.[6]

   c. In signing the treaties, tribes wished to preserve a way of life that meets subsistence, economic, cultural, spiritual, and medicinal needs.

2. Nature and scope of these rights has been adjudicated in a number of cases including: *Mille Lacs v. Minnesota (*1837 ceded territory in MN)[7], *Lac Courte Oreilles v. State of Wisconsin* (1837 and 1842 ceded territories

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State, 36 Wm. Mitchell L. Rev. 533 (2010) and Steffani A. Cochran, *Treating Tribes as States Under the Federal Clean Air Act: Congressional Grant of Authority – Federal Preemption – Inherent Tribal Authority*, 26 New Mexico Law Review 323 (1996).

[4] Chippewa Treaty of 1836 (7 Stat. 401), Treaty of 1837 (7 Stat. 536), Treaty of 1842 (7 Stat. 591), Treaty of 1854 (10 Stat. 1109).

[5] *See Lac Courte Oreilles v. State of Wisconsin* ("*LCO IV*"), 668 F. Supp. 1233, 1241 (W.D. Wis. 1987). *See also Settler v. Lameer*, 507 F.2d 231, 237-238 (9th Cir. 1974); *United States v. Washington*, 384 F. Supp. 312, 340-42 (W.D. Wash. 1974), *aff'd* 520 F.2d 676, 686 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1986); *United States v. Michigan*, 471 F. Supp. 192, 273 (W.D. Mich. 1979).

[6] *See Lac Courte Oreilles v. State of Wisconsin* ("*LCO III*"), 653 F. Supp. 1420 (W.D. Wis. 1987).

[7] *Mille Lacs Band v. State of Minnesota*, 861 F.Supp. 784 (D. Minn. 1994); *Mille Lacs Band v. State of Minnesota*, 952 F.Supp. 1362 (D. Minn. 1997); *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 124 F.3d 904, (8th Cir. (Minn.) August 26, 1997); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 119 S.Ct.1187 (1999).

in WI)[8] and *Grand Portage v. Minnesota* (1854 ceded territory in MN)[9] and *Fond du Lac v. Carlson* (1837 and 1854 ceded territory in MN, phase two of the 1837 portion of the case was consolidated with *Mille Lacs v. State of Minnesota*).[10]

3. State Regulatory Authority. States may regulate exercise of off-reservation rights to the extent reasonable and necessary for conservation, public health and public safety purposes.[11]

4. Tribal Self-Regulation. Tribes may preempt state regulation if they effectively regulate themselves and protect legitimate state conservation, health and safety interests.[12]

a. Implications in the context of intertribally-shared rights – Tribes individually and collectively must:

i. Undertake effective management programs and adopt and enforce regulations consistent with reasonable and

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[8] *Lac Courte Oreilles v. State of Wisconsin (LCO I)*, 700 F. 2d 341 (7th Cir. 1983), cert. denied 464 U.S. 805 (1983); *Lac Courte Oreilles v. State of Wisconsin (LCO III)*, 653 F.Supp. 1420 (W.D. Wis. 1987); *Lac Courte Oreilles v. State of Wisconsin (LCO IV)*, 668 F.Supp. 1233 (W.D. Wis. 1987); *Lac Courte Oreilles v. State of Wisconsin (LCO V)*, 686 F.Supp. 226 (W.D. Wis. 1988); *Lac Courte Oreilles v. State of Wisconsin (LCO VI)*, 707 F.Supp. 1034 (W.D. Wis. 1989); *Lac Courte Oreilles v. State of Wisconsin (LCO VII),* 740 F.Supp 1400 (W.D. Wis. 1990); *Lac Courte Oreilles v. State of Wisconsin (LCO VIII),* 749 F. Supp. 913 (W.D. Wis. 1990); *Lac Courte Oreilles v. State of Wisconsin (LCO IX),* 758 F.Supp. 1262 (W.D. Wis. 1991); *Lac Courte Oreilles v. State of Wisconsin (LCO X)*, 775 F.Supp. 321 (W.D. Wis. 1991).

[9] *Grand Portage Band v. State of Minnesota*, No. 4-85-1090 (D. Minn. February, 1988) (unpublished memorandum and order).

[10] *Fond du Lac et. al. v. Carlson*, No. 5-92-159 at 34 (D. Minn. March 18, 1996) (unpublished memorandum opinion and order).

[11] *LCO IV*, 668 F. Supp. at 1237-1239 (W.D. Wis. 1987).

[12] *LCO IV*, 668 F. Supp. at 1241-1242. See *United States v. Washington,* 384 F. Supp. 312, 340-41 (W.D. Wash. 1974), aff'd 520 F.2d 676, 686 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1986) (requirements of an effective tribal fisheries management program include biologically sound regulations "that, if strictly enforced, will not adversely affect conservation"; "personnel to enforce tribal fishing regulations"; and "experts in fishery resources and management.")

necessary conservation, public health and public safety standards;

ii. Stay within tribal allocation of resources; and

iii. Engage in intertribal "co-management" to effectively manage and regulate, and to prevent regulation by the state.

II. The Structures and Mechanisms of Intertribal Co-Management in the Context of Shared Off-Reservation Hunting, Fishing and Gathering Rights

A. Great Lakes Indian Fish and Wildlife Commission (GLIFWC)[13] – agency of eleven member tribes whose reservations are located in Minnesota, Wisconsin and Michigan

1. Based upon the respective sovereignty of each member tribe – *Not* a "super-regulatory" agency that has inherent authority over member tribes, but an agency of specific delegated authority of certain aspects of tribal sovereignty.

2. Structured to facilitate intertribal consensus on issues of common concern regarding off-reservation treaty rights.

3. Provides expertise and exercises delegated tribal authority in areas of biology, conservation law enforcement, and development of tribal ordinances.

4. Part of GLIFWC's Mission extends to protection of ceded territory ecosystems "in recognition that fish, wildlife and wild plants cannot long survive in abundance in an environment that has been degraded."[14]

B. Four-pronged approached of the plaintiff tribes in *Lac Courte Oreilles v. State of Wisconsin* -- Intertribal Co-Management Agreement; Intertribal Resource Management Plans; Intertribal Harvest Declaration Protocols; and Intertribal Model Conservation Regulations.

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[13] For more information about GLIFWC, including its Constitution, Mission Statement and reports on its activities, go to www.glifwc.org.

[14] Mission Statement, Great Lakes Indian Fish and Wildlife Commission. On file at GLIFWC offices.

1. Recognition of intertribally shared off-reservation rights, and acknowledgment that "intertribal cooperation is required in order to make co-management feasible and self- regulation effective."

    a. Purpose (Section 1): To protect the resources of the ceded territory and to promote and preserve the treaty rights involved "by establishing an effective intertribal mechanism for co-management and for tribal self regulation...."

    b. Intent (Section 2): "[T]o establish a binding mechanism for intertribal co-management and regulations, in recognition of the fact that each tribe cannot on its own effectively manage and regulate the exercise of treaty rights in the ceded territory."

    c. Uses structures and committees of GLIFWC.

2. Intertribal Harvest Declaration Protocols.

    a. Protocols have been adopted on fish (walleye and muskellunge), antlerless deer, bear, otter, bobcat, fisher, migratory birds, and wild rice.

    b. Biologists provide data on biological harvest limits and tribal harvest in previous seasons; Tribes then declare their harvest levels for the upcoming season; declarations are transmitted to the state so that the state can take tribal declarations into account in regulating the state harvest.

3. Model Off-Reservation Conservation Code. See, http://www.glifwc.org/Regulations/VoigtModelCode.2011.pdf

    a. Model Code serves as prototype law that incorporates regulations either approved by the court after contested hearings or as part of stipulations between the Tribes and the state.

    b. Model Code outlines the minimum level of regulation which Tribes must adopt to be in compliance with the court's orders.

        i. No less restrictive than standard. Tribes are obligated to enact tribal codes that are no less restrictive than the Model Code.

ii. Tribal policy option to be more restrictive than the Model Code.

c. Model Code codifies intertribal enforcement mechanisms, violations are heard in tribal court.[15]

III. 2007 Wisconsin Act 27 – Authority of GLIFWC Conservation Officers

A. Issue: Until this law was enacted in 2007, GLIFWC officers were not statutorily-recognized "law enforcement officers," – thus did not receive the protection of laws that, for example, protect officers or prohibit interference with law enforcement.

B. The law extends a number of statutory provisions to GLIFWC officers, including:

1. Statutes regarding the use and possession of firearms,[16] and

2. Access to law enforcement tools like the state system that allows officers to access criminal histories and drivers' license and vehicle registration information.[17]

C. To receive state certification, wardens must meet the requirements of the Wisconsin Law Enforcement Standards Board and must meet similar continuing education requirements.

D. Law provides GLIFWC wardens with limited arrest and assistance authority similar to that currently provided to other law enforcement officers operating outside of their areas of primary jurisdiction. It authorizes GLIFWC wardens to render aid or assist a Wisconsin peace officer on request or in an emergency. GLIFWC wardens may make arrests for violations of state law while they are on duty only:

1. In an emergency that poses significant treaty to life or bodily harm, or

2. When the warden believes, on reasonable grounds, that the act(s)

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[15] *See* Model Code, Section 4.02 [Tribal and GLIFWC wardens authorized to enforce].

[16] *See*, e.g. 2007 Act 27, section 28; WI Stats 941.23.

[17] *See*, e.g. 2007 Act 27, section 17; WI Stats 341.17(9)(c)2.

constitute(s) a felony.[18]

E. GLIFWC must maintain liability insurance coverage for its wardens.[19]

IV. Role of Tribes in Off-Reservation Management/Development Decisions

A. GLIFWC and its member tribes are not regulatory agencies for the purposes of issuing off-reservation permits for water or air discharges, or for regulating off-reservation land use decisions. However, they do have standing to influence those decisions.

B. "Habitat Protection" Component of the Treaty Right –

1. No definitive determination about the interplay between treaty rights to harvest natural resources and the right to habitat protection for those species.

2. Both States and the Federal Government must Consult with Tribes on a Government-to-Government basis.

a. States: Treaty rights cases require consultation with Tribes/GLIFWC when States are considering decisions that may impact the ceded territory.

i. E.g. the *Stipulation regarding Wild Rice* in the *LCO* case provides that the state will "consult with the Voigt Task Force before the issuance of any permit which is required to be obtained from the State regarding any activity which may reasonably be expected to directly affect the abundance or habitat of wild rice in the ceded territory. . ." There is a similar stipulation requirement for wild plants.

b. Federal Government: Broad process involving issues like:
i. What is proper, effective and sufficient consultation?
ii. Tribal capacity to engage in effective consultation so as to avoid disputes down the road.
iii. Opportunity to understand to the fullest extent:

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[18] 2007 Wisconsin Act 27, Section 12(3)(b); WI Stats. Ch. 175.41(3)(b).

[19] 2007 Wisconsin Act 27, Section 12(3)(e); WI Stats. Ch. 175.41(3)(e).

- Nature of tribal rights/interests involved.
- Impacts of proposed action/alternatives on those rights/interests.
- Tribal view of what should be done.
- Avoid premature agency determinations and "substitution of judgment."

3. Existence of treaty rights may constrain or compel the substantive permit decision.

   a. *US v. Washington*, the district court ruled ". . .implicitly incorporated in the treaties' fishing clause is the right to have the fishery habitat protected from man-made despoliation."[20] Although that case was vacated on other grounds, this holding resonates as an indispensable component of the treaty right, and it is what GLIFWC and its member tribes seek to achieve.

      i. Recent decision in a *U.S. v. Washington* subproceeding requires the State of Washington to accelerate its replacement of culverts that prevent the passage of salmon to usual and accustomed fishing grounds where tribes have treaty reserved rights.

   c. State permitting decisions – No explicit discussion in *LCO* or *Mille Lacs* cases of the tribes' role in management/development decisions that may affect the quality or quantity of the resources subject to those rights. However, it is clear that:

      i. The State's management authority is "significantly narrowed"[21] and is subject to judicial review.[22] The State carries a burden beyond what it would be free to do in the absence of the Tribes' treaty rights.

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[20] *U.S. v. State of Washington*, 506 F. Supp. 187, 203 (W.D.Wash. 1980).

[21] *Lac Courte Oreilles v. State of Wisconsin (LCO VI)*, 707 F. Supp. 1034, 1060 (W.D. Wis. 1989).

[22] *See Mille Lacs Band of Chippewa Indians v. State of Minn.*, 952 F. Supp. 1362, 1374 (D. Minn. 1997).

4. Tribes are very interested in how the resources of the ceded territory are managed and the quality of those resources. Obligation to weigh in when there are impacts to natural resources in which they have reserved rights.

V. Use of On-Reservation Regulatory Authority to Impact Off-Reservation Development Decisions – Tribal Assumption of Program Authority Under the Clean Water Act and Clean Air Act[23]

A. Both Statutes Require a Determination from EPA that Tribe is Eligible for "Treatment As A State" (TAS).

1. Requires certain demonstrations –

a. Definition of Tribe: Federally recognized and carries out governmental authority over a reservation.

b. Tribe has inherent authority to regulate water resources.[24]

c. Tribe has the ability to carry out the functions required by the Act.[25]

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[23] *Note*: This discussion does not attempt to cover all aspects or sources of tribal regulatory authority to regulate the on-reservation environment, it is limited to those aspects of air and water regulations that have the potential to impact the activities of off-reservation dischargers.

[24] This is an important showing under the CWA, as EPA uses the *Montana* test to demonstrate that impairment of the reservation's waters would affect "the political integrity, the economic security, or the health or welfare of the tribe." *Montana v. U.S.*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981). Contrast with the Clean Air Act, where EPA has found that the tribal provisions constitute an express delegation to tribes, thus a showing of inherent authority is not necessary. *See* 56 FR 64880.

[25] Clean Water Act § 518 (e)(1), 33 U.S.C. 1377(e)(1) and Clean Water Act regulations at 40 CFR § 131.1 *et seq*. Clean Air Act § 301(d), 42 U.S.C. 7601(d) and Clean Air Act regulations at 40 CFR Part 49. SDWA § 1451, 42 U.S.C. 300j-11 and regulations at 40 CFR Part 142 Subpart H. *See also* Memorandum from Marcus Peacock, Re: Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Programs, January 23, 2008, Attachments B (pertaining to the Clean Water Act), G (pertaining to the Clean Air Act), and H (pertaining to the Safe Drinking Water Act).

2. Sokaogon Chippewa Tribe/Mole Lake Band TAS Under Clean Water Act was approved in 1995.

   a. State of Wisconsin Challenged EPA's Approval of Tribal TAS – *Wisconsin v. EPA,* 266 F.3d 741 (7th Cir. 2001). State argued that it owned the lakebed of the waterbody at issue and this precluded tribal jurisdiction over water quality. The court found that even if the State owned the lakebed (a question it did not reach), EPA's grant of TAS was appropriate. As the decision also discusses the consequences of Mole Lake's standards *vis a vis* upstream dischargers, it is attached to this outline.

B. Substantive Water or Air Standards– Identical Process for Tribes and States.

1. Clean Water Act[26]

   a. Tribe designates "uses" to be made of the water. These may include cultural uses including use for drinking as part of a ceremony, for example.
   b. Tribe then adopts criteria to protect those uses. Criteria may be numeric or narrative.
   c. Tribe must also establish an antidegredation policy.[27]

2. Clean Air Act[28]

   a. Tribe may establish tribal implementation plans to implement, maintain and enforce on-reservation air quality standards.[29]

   b. Tribe may choose to redesignate air quality from Class II (default)

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[26] EPA is authorized to treat tribes as states for certain specified purposes, setting water quality standards is one. Others include non-point source management, National Pollutant Discharge Elimination System (NPDES) permits and dredge and fill permits. 33 USC §§ 1313, 1329, 1342 and 1344.

[27] 40 CFR §131.6.

[28] 42 USC §7601(d). The CAA does not specify which provisions for which Tribes may be treated as states. EPA rules treat tribes as states for virtually all statutory purposes.

[29] 42 USC §7601(d)(3).

to Class I.[30]

i. Redesignation involves preparation of a report that describes and analyzes the health, environmental, economic, social and energy effects of the redesignation and hold a public hearing.[31]

ii. If an affected state objects to a tribe's proposed redesignation or if a dispute arises with regard to a permit for a new emission source, EPA negotiates with the parties to resolve the dispute or resolves the dispute itself if the parties cannot reach agreement.[32] With respect to redesignation however, EPA has little discretion to deny redesignation if the procedural requirements of the statute are met.[33]

A. In 1995, the Forest County Potawatomi Tribe in northeast Wisconsin applied to the EPA to redesignate its on reservation air quality from Class II to Class I. The States of Wisconsin and Michigan both objected, and a formal dispute resolution process was undertaken. Eventually, an agreement was reached with the State of Wisconsin. Although no agreement was reached with Michigan, the EPA approved the redesignation in 2008. The State of Michigan appealed EPA's action, but its suit was dismissed because the court found that the State did not have legal standing to pursue its claim.[34]

C. Five Tribes in EPA Region 5 have Approved Water Quality Standards – Sokaogon

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[30] 42 USC 7474(c).

[31] Clean Air Act § 164(b)(1)(A), 42 USC § 7474(b)(1)(A). *See also* 40 CFR § 52.21(g)(4).

[32] Clean Air Act § 164(e), 42 USC § 7474(e).

[33] *Arizona v. EPA*, 151 F.3d 1205, 1208 (9th Cir.1998).

[34] Michigan v. U.S. Environmental Protection Agency, No. 08-2582 (7th Cir. Ct. of Appeals, 2009).

Chippewa (Mole Lake Band), Lac du Flambeau Band of Lake Superior Chippewa, and Bad River Band of Lake Superior Chippewa in Wisconsin; Fond du Lac Band of Lake Superior Chippewa, and Grand Portage Band of Lake Superior Chippewa in Minnesota.

D. Three Tribes in EPA Region 5 have TAS under Clean Air Act, two in Wisconsin and one in Minnesota. One has adopted air quality standards – Forest County Potawatomi (redesignation to Class I) and several others are pursuing redesignation to Class I (Fond du Lac, Bad River).

V. Impact of Tribal Standards on Off-Reservation Discharges

A. Standards do not confer the authority to directly block the issuance of a permit.

B. Standards provide a process in which the outcome is a permit that meets tribal standards at the point at which those standards apply, generally at the reservation boundary.

1. Clean Water Act

a. When EPA Administrator determines that a potential discharge may affect the quality of the waters of a tribe (or a downstream state), the Administrator must notify the tribe (or state).

b. If the affected tribe determines that the discharge will violate water quality standards on the reservation and notifies the EPA, the EPA must hold a hearing. At the hearing the Administrator submits recommendations with respect to objections made by the affected tribe.

i. EPA can make an independent determination that the downstream user's standards will be violated, and can block the issuance of a permit by simply objecting to its issuance.[35] In this case, the state can request a public hearing on the objections. If the state does not revise the permit within 30 days of the hearing, or if no hearing is requested within 90 days of the Administrator's objection, the Administrator may issue the permit with the

[35] 33 USC 1342(d)(2).

conditions it deems appropriate.[36]

c. The permitting agency (i.e. the state that is considering the permit) must condition the permit to ensure compliance with applicable water quality requirements. If the imposition of conditions cannot ensure compliance, the permit may not be issued.[37]

2. Clean Air Act

a. A tribe with Class I air standards can impact permit conditions for "major" sources, in general, those that emit or have the potential to emit more than 100 tons of certain pollutants per year.[38] Major sources are subject to federal "prevention of significant deterioration" (or PSD) requirements in areas with air quality that meets existing standards.[39]

b. PSD review requires an analysis showing the impact of the proposed emission on air quality related values (which can be defined by the tribe), allowable pollution increments and air quality standards.[40]

c. A tribe that determines that a major new source of air pollution would cause a violation of its Class I air quality standards may request that EPA step in and make a recommendation to resolve the dispute and protect the tribe's air quality.[41]

d. As under the Clean Water Act, the statute provides for EPA to resolve a dispute itself if the parties cannot reach agreement. The federal determination then becomes a part of the state's air

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[36] 33 USC 1342(d)(4).

[37] Clean Water Act § 401(a)(2), 33 USC § 1341(a)(2).

[38] 42 USC § 7602(j), Clean Air Act § 302(j).

[39] 40 CFR § 52.21.

[40] 40 CFR § 52.21(k)(1).

[41] Clean Air Act § 126(b), 42 U.S.C. § 7426(b).

quality plan and must be followed.[42]

[42] Clean Air Act § 164(e), 42 U.S.C. § 7474(e).

COURT OF APPEALS
DECISION
DATED AND FILED

March 10, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1692 **Cir. Ct. No. 2011CV188**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

BENJAMIN D. HARRIS,

PLAINTIFF-APPELLANT,

V.

LAKE OF THE TORCHES RESORT & CASINO,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Vilas County: NEAL A. NIELSEN, III, Judge. *Affirmed.*

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Benjamin Harris appeals an order that vacated a circuit court judgment in his favor against Lake of the Torches Resort & Casino (Lake of the Torches). The circuit court determined Lake of the Torches, an arm of the Lac du Flambeau Band of Lake Superior Chippewa Indians (the Tribe),

never waived its sovereign immunity from suit, and, as a result, the circuit court lacked subject matter jurisdiction over Harris' claims. Accordingly, the court concluded its judgment in Harris' favor was void, and Lake of the Torches was entitled to relief from the judgment under WIS. STAT. § 806.07(1)(d).[1]

¶2 We agree with the circuit court that Lake of the Torches did not waive its sovereign immunity from suit in state court. Consequently, the circuit court judgment awarding Harris damages was void for lack of subject matter jurisdiction. We therefore affirm the order vacating the judgment.

BACKGROUND

¶3 The Tribe is a "self-governing, federally recognized Indian nation that exercises sovereign authority over its members and its territory." ***Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Zeuske***, 145 F. Supp. 2d 969, 971 (W.D. Wis. 2000). The Tribe owns Lake of the Torches Economic Development Corporation (the Corporation). *See* ***Wells Fargo Bank, Nat'l Ass'n v. Lake of the Torches Econ. Dev. Corp.***, 658 F.3d 684, 685, 688 (7th Cir. 2011). The Corporation, in turn, owns and operates Lake of the Torches. ***Id.*** at 688.

¶4 Harris was hired as a back-up/prep cook at the Eagle's Nest Restaurant at Lake of the Torches in 2007. On October 13, 2008, Harris injured his right hand at work while operating an industrial mixer. He sought medical attention on October 20, 2008, and learned that three of his fingers were fractured.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶5 Lake of the Torches had a written policy governing worker's compensation. The policy provided, in relevant part, that Lake of the Torches employees were "covered under a Tribal Workers Compensation Insurance program and not subject to State Workers Compensation." Lake of the Torches was self-insured for worker's compensation purposes, but it utilized a third-party worker's compensation system administrator, Crawford & Company. Pursuant to its worker's compensation policy, Lake of the Torches paid Harris lost wages from the date of his injury until December 5, 2008. It also paid his medical expenses during that time.

¶6 On about December 4, 2008, Lake of the Torches' safety manager, Mark Wilke, received a Return-to-Work form from Harris' doctor stating that Harris could return to light duty work. On December 5, 2008, Wilke contacted Harris to offer him a temporary light duty position as a host in the Eagle's Nest Restaurant. For reasons the parties dispute, Harris did not return to work. Consequently, Lake of the Torches terminated Harris' employment and ceased paying him lost wage benefits and medical benefits.

¶7 Harris subsequently obtained additional medical treatment and physical therapy for his hand injury. He underwent seven surgeries, and one physician ultimately diagnosed him with a 100% permanent disability to his right hand.

¶8 On June 13, 2011, Harris sued Lake of the Torches and Crawford in Vilas County Circuit Court.[2] On July 8, 2011, Lake of the Torches, by special

[2] Crawford was later dismissed from the case.

appearance, filed a motion for a temporary stay of the circuit court proceedings pending an allocation of jurisdiction between the circuit court and the Lac du Flambeau Tribal Court. The motion asserted the tribal court was the appropriate forum for Harris' claims because they involved a dispute between a tribal employer and tribal employee related to activities that occurred on tribal land. The motion further asserted that Lake of the Torches "reserve[d] the right to raise all jurisdictional objections including a lack of jurisdiction due to sovereign immunity." (Capitalization omitted.)

¶9 On July 19, 2011, Lake of the Torches moved to transfer jurisdiction to the tribal court, pursuant to WIS. STAT. § 801.54. In its motion to transfer, Lake of the Torches again asserted it "reserve[d] the right to raise all jurisdictional objections including a lack of jurisdiction due to sovereign immunity." (Capitalization omitted.) Shortly thereafter, Lake of the Torches answered Harris' complaint, expressly asserting as an affirmative defense that the circuit court lacked jurisdiction because Lake of the Torches "enjoy[ed] the sovereign immunity of the Tribe."

¶10 The circuit court held a hearing on Lake of the Torches' motion to transfer on September 27, 2011. During the hearing, Lake of the Torches' attorney again asserted that he was making a "special appearance[,]" and he "reserve[d] all jurisdictional objections, including ... the invocation of sovereign immunity." Counsel also repeatedly stated he did not have authority to waive Lake of the Torches' sovereign immunity. The circuit court acknowledged that Lake of the Torches had not waived its sovereign immunity. It subsequently granted Lake of the Torches' motion to transfer the case to tribal court.

¶11 The tribal court held a trial on Harris' claims on August 9, 2012. However, eleven months later, the tribal court had not yet issued a decision. Consequently, on July 17, 2013, Harris filed a motion in the circuit court requesting that the case be transferred back to the circuit court. On August 7, 2013, the tribal court issued a decision denying Harris relief.

¶12 The circuit court subsequently granted Harris' motion to transfer the case back to the circuit court. The circuit court reasoned the tribal court's decision was invalid because it was not "procured in compliance with procedures required by the rendering court[.]" In addition, while the circuit court recognized that Lake of the Torches had asserted sovereign immunity as a defense in the initial circuit court proceedings, it concluded Lake of the Torches later waived that defense by failing to assert it in the tribal court. Accordingly, the court concluded sovereign immunity did not bar it from exercising subject matter jurisdiction over Harris' claims.

¶13 Harris then submitted a trial brief to the circuit court, and the court undertook an independent review of the tribal court record. Lake of the Torches did not participate in these proceedings. The court ultimately entered a judgment awarding Harris $197,152.98 in damages.

¶14 About two weeks later, Lake of the Torches moved to vacate the circuit court's judgment, pursuant to WIS. STAT. § 806.07. The circuit court granted Lake of the Torches' motion. Contrary to its previous decision, the court concluded Lake of the Torches had not waived its sovereign immunity in either the circuit court or the tribal court. As a result, the court reasoned the judgment against Lake of the Torches was void because the court "lacked subject matter

jurisdiction over [Lake of the Torches] due to its sovereign immunity from suit." Harris now appeals.

DISCUSSION

¶15 A circuit court has discretion to grant or deny a motion for relief from judgment under WIS. STAT. § 806.07. *See* ***Harbor Credit Union v. Samp***, 2011 WI App 40, ¶¶37-38, 332 Wis. 2d 214, 796 N.W.2d 813. We will affirm the court's decision if it examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion a reasonable judge could reach. ***Id.***, ¶38.

¶16 However, where a circuit court's exercise of discretion turns on a question of law, we review the legal question independently. *See* ***Olson v. Farrar***, 2012 WI 3, ¶24, 338 Wis. 2d 215, 809 N.W.2d 1. Here, the circuit court vacated its prior judgment because it determined Lake of the Torches had not waived its sovereign immunity from suit, and, as a result, the circuit court lacked subject matter jurisdiction. *See* ***E.F.W. v. St. Stephen's Indian High Sch.***, 264 F.3d 1297, 1302 (10th Cir. 2001) ("Tribal sovereign immunity is a matter of subject matter jurisdiction."). Whether Lake of the Torches waived its sovereign immunity is a question of law subject to independent review. *See* ***C & B Invs. v. Wisconsin Winnebago Health Dept.***, 198 Wis. 2d 105, 108, 542 N.W.2d 168 (Ct. App. 1995).

¶17 "It is well settled that Native American tribes possess the common-law immunity from suit traditionally enjoyed by sovereign powers." ***Id.*** A tribe's sovereign immunity also extends to its business arms. ***Id.*** "Like foreign sovereign immunity, 'tribal [sovereign] immunity is a matter of federal law and is not subject to diminution by the States.'" ***Koscielak v. Stockbridge-Munsee Cmty.***, 2012 WI

App 30, ¶7, 340 Wis. 2d 409, 811 N.W.2d 451 (quoting ***Kiowa Tribe of Okla. v. Manufacturing Techs., Inc.***, 523 U.S. 751, 756 (1998)).

¶18 Consequently, in a state court lawsuit against a tribal entity, sovereign immunity applies "unless 'Congress has authorized the suit or the tribe has waived its immunity.'" ***Koscielak***, 340 Wis. 2d 409, ¶8 (quoting ***Kiowa***, 523 U.S. at 754). A waiver of a tribe's sovereign immunity cannot be implied; it must be unequivocally expressed. ***C & B Invs.***, 198 Wis. 2d at 108. It cannot be inadvertent. *See* ***id.*** at 112. Waivers of sovereign immunity are strictly construed in favor of the sovereign. ***Orff v. United States***, 545 U.S. 596, 601-02 (2005).

¶19 On appeal, Harris argues Lake of the Torches waived its sovereign immunity in three ways.

I. 1992 gaming compact

¶20 First, Harris contends the Tribe waived Lake of the Torches' sovereign immunity from suit when it entered into a gaming compact with the State of Wisconsin in 1992. As Harris observes, Section XIX of the 1992 compact, entitled "Liability for Damage to Persons or Property," states, in relevant part:

> A. During the term of this Compact, the Tribe shall maintain public liability insurance with limits of not less than $250,000 for any one person and $4,000,000 for any one occurrence for personal injury, and $2,000,000 for any one occurrence for property damage.
>
> B. The Tribe's insurance policy shall include an endorsement providing that the insurer may not invoke tribal sovereign immunity up to the limits of the policy required under subsec. A.

Gaming Compact of 1992, Lac Du Flambeau Band of Lake Superior Chippewa Indians-State of Wis., Section XIX, March 23, 1992, *available at* http://www.doa.state.wi.us/Documents/DOG/Indian%20Gaming/Compacts/LDF_Compact.pdf. Harris argues Section XIX of the 1992 compact waived Lake of the Torches' sovereign immunity from all personal injury claims. Because tribal employees are not subject to Wisconsin's worker's compensation statutes, *see* ***Aasen-Robles v. Lac Courte Oreilles Band of Lake Superior Chippewa Indians***, 2003 WI App 224, ¶22 n.7, 267 Wis. 2d 333, 671 N.W.2d 709, Harris asserts his claims against Lake of the Torches amount to common law personal injury claims. He therefore argues the waiver of sovereign immunity contained in the 1992 compact applies to his claims.

¶21 Harris' argument regarding the 1992 compact fails for two reasons. First, Section XIX of the 1992 compact merely requires the Tribe's *insurance policy* to include a promise by the *insurer* that the *insurer* will not attempt to escape liability under the terms of the policy by invoking sovereign immunity. Section XIX does not address the *Tribe's* sovereign immunity from personal injury claims. Moreover, because the Tribe is self-insured for worker's compensation purposes, any provision in the compact requiring the inclusion of a particular term in the Tribe's insurance policy is inapplicable. As such, Section XIX is not a clear and unequivocal waiver of Lake of the Torches' sovereign immunity.[3]

[3] In support of its argument that the 1992 compact did not waive its sovereign immunity, Lake of the Torches cites additional language, which it implies is taken from the 1992 compact. However, upon our review of the record, we discovered that the cited language is actually from a 2009 amendment to the 1992 compact. Because Harris' injury occurred in 2008, the 2009 amendment is inapplicable.

¶22 Second, we agree with Lake of the Torches that any waiver of sovereign immunity contained in Section XIX of the 1992 compact applies only to claims related to Class III gaming activities. In ***Taylor v. St. Croix Chippewa Indians***, 229 Wis. 2d 688, 692, 599 N.W.2d 924 (Ct. App. 1999), a tribal employee was injured during construction of a tribal youth center. The tribe had a comprehensive business insurance policy, but the policy excluded coverage for the injured employee's claim. ***Id.*** The injured employee argued the tribe was required to carry liability insurance covering his claim, pursuant to the tribe's gaming compact with the state, which included a liability insurance requirement identical to the one in the 1992 compact. ***Id.*** at 692-94.

¶23 On appeal, we rejected the employee's argument that the tribe's compact required it to carry liability insurance for his claim, noting that the compact governed "the conduct of Class III gaming under the terms and conditions set forth below[.]" ***Id.*** at 694. Pursuant to this language, we reasoned:

> Clearly, the intent of the parties in entering into the gaming compact was to regulate St. Croix's class III gaming activities. Pursuant to the compact, St. Croix was required to "maintain public liability insurance with limits of not less than $250,000 for any one person." Further, under the gaming compact, St. Croix's policy was mandated to "include an endorsement providing that the insurer may not invoke tribal sovereign immunity up to the limits of the policy required under [the compact]." It follows logically that the gaming compact required St. Croix to maintain liability insurance only with respect to its gaming activities. To require St. Croix to maintain liability insurance with respect to other non-gaming activities would obviously reach beyond the purpose and intent of the gaming compact. Wisconsin has no reason or authority to impose an obligation on the tribe to maintain liability insurance for anything beyond its gaming activities.

Id. In other words, we concluded the liability insurance requirement in the tribe's compact "applie[d] only to gaming activities[.]" ***Id.*** at 695. We rejected the

injured employee's argument that construction of the tribal youth center qualified as a gaming activity because it was funded with gaming revenue. ***Id.***

¶24 Like the compact in ***Taylor***, the 1992 compact purports to regulate the Tribe's class III gaming activities. *See* Gaming Compact of 1992, Lac Du Flambeau Band of Lake Superior Chippewa Indians-State of Wis., Preface. The United States Supreme Court recently clarified that the term "class III gaming activity" "means just what it sounds like—the stuff involved in playing class III games ... each roll of the dice and spin of the wheel." ***Michigan v. Bay Mills Indian Cmty.***, 134 S. Ct. 2024, 2032 (2014). "The 'gaming activit[y]' is ... the gambling." ***Id.*** at 2033. Applying this definition, Harris—who was injured while working as a cook at a restaurant located in a casino—was not injured in connection with a class III gaming activity. Consequently, even if we agreed with Harris that Section XIX of the 1992 compact waived Lake of the Torches' sovereign immunity from personal injury claims, we would nevertheless conclude that waiver was inapplicable to Harris' claims.

II. Failure to timely raise sovereign immunity as a defense

¶25 Harris next argues Lake of the Torches waived its sovereign immunity from suit by failing to timely raise sovereign immunity as a defense. Citing WIS. STAT. § 802.06(2), Harris argues the defense of lack of subject matter jurisdiction must be asserted "in the early stages of the proceedings."[4] Harris then

[4] WISCONSIN STAT. § 802.06(2) provides, in relevant part:

(continued)

asserts that Lake of the Torches "knowingly declined the opportunity to raise [a sovereign immunity] defense at any time before judgment[.]"

¶26 Harris is mistaken. As discussed above, in its first two circuit court filings, Lake of the Torches specifically "reserve[d] the right to raise all jurisdictional objections including a lack of jurisdiction due to sovereign immunity." (Capitalization omitted.) In its answer, Lake of the Torches then asserted as an affirmative defense that the circuit court lacked subject matter jurisdiction because Lake of the Torches "enjoy[ed] the sovereign immunity of the Tribe." Finally, at the hearing on its motion to transfer, Lake of the Torches "reserve[d] all jurisdictional objections, including ... the invocation of sovereign immunity[,]" and its attorney repeatedly stated he did not have authority to waive Lake of the Torches' sovereign immunity. On these facts, Harris' claim that Lake

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(a) Every defense, in law or fact, except the defense of improper venue, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or 3rd-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

....

2. Lack of jurisdiction over the subject matter.

....

(b) A motion making any of the defenses in par. (a) 1. to 10. shall be made before pleading if a further pleading is permitted ....

of the Torches failed to raise sovereign immunity as a defense at the early stages of the circuit court proceedings is demonstrably false.[5]

III. Specific acts by Lake of the Torches or its representatives

¶27 Harris also argues three specific acts by Lake of the Torches or its representatives were sufficient to waive its sovereign immunity. First, Harris asserts that Crawford waived Lake of the Torches' sovereign immunity by writing Harris a letter on December 9, 2008, that stated, "We will continue paying your medical bills as they relate to this work injury." However, a waiver of sovereign immunity must be approved by a tribe's governing body—here, the Tribal Council. *See* ***Calvello v. Yankton Sioux Tribe***, 584 N.W.2d 108, 112 (S.D. 1998). Harris cites no evidence that the Tribal Council granted Crawford authority to waive Lake of the Torches' sovereign immunity.

¶28 Moreover, even if Crawford had authority to waive Lake of the Torches' sovereign immunity, Harris does not explain why Crawford's mere promise to pay benefits constituted a waiver of immunity from suit in state court. A pre-suit promise to pay medical bills is not the sort of clear and unequivocal waiver of sovereign immunity required by law. *C.f.* ***Sanderlin v. Seminole Tribe***, 243 F.3d 1282, 1289 (11th Cir. 2001) (A tribe's contractual promise to comply with the Rehabilitation Act merely amounted to a promise to not discriminate and

[5] In his reply brief, Harris suggests that reserving the right to invoke sovereign immunity was insufficient, and Lake of the Torches was instead required to file a motion to dismiss under WIS. STAT. § 802.06(2)(b). However, § 802.06(2)(a) specifically states that a defense of lack of subject matter jurisdiction may be raised in a responsive pleading. Lake of the Torches raised sovereign immunity as an affirmative defense in its answer to Harris' complaint.

"in no way constitute[d] an express and unequivocal waiver of sovereign immunity[.]").

¶29 Second, Harris argues Lake of the Torches' attorney expressly waived Lake of the Torches' sovereign immunity during the tribal court proceedings. According to Harris, during a June 12, 2012 hearing before the tribal court, counsel stated Lake of the Torches was not asserting sovereign immunity as a defense because it wanted Harris to have his day in court. Harris contends Lake of the Torches' attorney made similar comments during his closing argument at trial.[6]

¶30 Assuming Lake of the Torches' attorney actually made these statements, there is no evidence he was authorized to do so by the Tribal Council. *See* ***Calvello***, 584 N.W.2d at 112. In addition, Harris cites no authority for the proposition that a waiver of sovereign immunity from suit in tribal court also waives a tribe's sovereign immunity from suit in state court. To the contrary, the Supreme Court has repeatedly stated that the scope of a waiver of sovereign immunity must be strictly construed in favor of the sovereign. *See, e.g.*, ***Sossamon v. Texas***, 131 S. Ct. 1651, 1658 (2011). Accordingly, in the context of state sovereign immunity, "a State's consent to suit in its own courts is not a waiver of its immunity from suit in federal court." ***Id.*** Harris has not convinced us the result should be different in a case involving tribal sovereign immunity.

[6] On appeal, Lake of the Torches characterizes these statements by its trial attorney as "off-the-record" comments. However, according to Harris, the only reason the record does not contain a transcript of the June 12, 2012 hearing is that the hearing was not properly recorded. Similarly, the transcript of the August 9, 2012 trial states that the attorneys' closing arguments were not transcribed because they were "[missing] from the disc[,]" which "pick[ed] up during rebuttal." Under these circumstances, Lake of the Torches' attorney's comments cannot reasonably be characterized as off-the-record.

¶31 Finally, Harris argues Lake of the Torches waived its sovereign immunity by failing to participate in the circuit court proceedings after Harris moved to transfer the case back to the circuit court. In response, Lake of the Torches argues its failure to participate was not deliberate because its attorney's license was suspended at the time. Harris, however, asserts that notice of the circuit court proceedings was sent directly to Lake of the Torches, and Lake of the Torches could have hired a different attorney to represent it.

¶32 Regardless of the reason for Lake of the Torches' failure to participate in the circuit court proceedings, we conclude its failure did not constitute a clear, unequivocal, and advertent waiver of sovereign immunity. Shortly after Harris filed his motion to transfer the case back to the circuit court, Lake of the Torches obtained a binding judgment in its favor in tribal court. At that point, there was no need for Lake of the Torches to return to the circuit court to defend the action. Under these circumstances, Lake of the Torches' failure to participate in the circuit court proceedings did not clearly waive its sovereign immunity from suit.

¶33 Because Lake of the Torches did not waive its sovereign immunity, the circuit court correctly concluded the judgment in Harris' favor was void for lack of subject matter jurisdiction. Consequently, the court properly exercised its discretion by granting Lake of the Torches' motion to vacate the judgment.[7]

[7] Lake of the Torches raises alternative grounds to affirm the circuit court's order. Because we resolve the appeal on sovereign immunity grounds, we need not address these alternative arguments. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (appellate court need not address every issue raised by the parties when one is dispositive).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

STIFEL, NICOLAUS & COMPANY, INC.,

Plaintiff,

v.

LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN,

Defendant.

OPINION & ORDER

13-cv-121-wmc

Plaintiff Stifel, Nicolaus & Company, Inc. ("Stifel") seeks equitable reformation of its Bond Purchase Agreement with defendant Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin (the "Band"), as well as a declaratory judgment that the Band may not proceed to sue Stifel in a currently-pending action in Lac Courte Oreilles Tribal Court. Before the court now is plaintiff's motion for summary judgment on both claims. (Dkt. #37.) Based on the undisputed facts of record, the court holds that Stifel is entitled to reformation of the Bond Purchase Agreement, but also concludes that the Band may proceed with its pending claims against Stifel in Lac Courte Oreilles Tribal Court. Although Stifel has had ample opportunity to do so already, because the Band did not affirmatively move for summary judgment, the court will give Stifel yet another opportunity to proffer additional evidence, if any, that the forum selection clause in the Bond Purchase Agreement clearly precludes the Band from proceeding in Tribal Court.

UNDISPUTED FACTS[1]

I. Background

Defendant Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin is a federally recognized Indian Tribe organized under Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.* In December of 2006, the Band issued and sold two series of bonds, the 2006A Bonds and the 2006B Bonds (collectively, "the 2006 Bonds"). The proceeds from the sale were used to fund various projects, including refinancing certain bonds the Band had previously issued in 2003 ("the 2003 Bonds").

The 2006 Bonds were issued and sold pursuant to SEC Rule 144A, exempting them from registration requirements under federal securities law. Pursuant to that rule, Stifel acted as the Initial Purchaser of the 2006 Bonds and could resell them to qualified institutional buyers.

In connection with this 2006 transaction, the Band issued a Preliminary Limited Offering Memorandum, dated December 7, 2006; a Limited Offering Memorandum, dated December 15, 2006; and Resolution No. 06-110, adopted on December 15, 2006, approving the issuance of the 2006 Bonds. The Band also entered into various agreements, including a Trust Indenture with Wells Fargo Bank, N.A., dated December 1, 2006, establishing a schedule for the Band to repay principal and interest on the bonds; and the 2006 Bonds themselves, which issued on December 22, 2006.[2] Additionally, on or about

[1] Unless otherwise noted, the court finds the following facts to be undisputed for the purposes of summary judgment based on the parties' proposed findings, responses and replies, supporting evidence and the record as a whole.

[2] This transaction in many ways mirrors the transaction in another recent case before this court, *Stifel, Nicolaus & Company, Inc. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, No. 13-cv-372-wmc (W.D. Wis. May 16, 2014), but differs in at least one important respect: in that case, the Trust Indenture had been held void under the Indian Gaming Regulatory Act as unapproved

December 16, 2006, the Band and Stifel executed a Bond Purchase Agreement with Stifel, pursuant to which Stifel agreed to purchase bonds totaling in excess of $31,000,000 issued by the Band.

The version of the Bond Purchase Agreement actually executed was number six in a series of drafts, signified by its document identifier number, MILW_2121571.**6**, the last digit bolded by the court for emphasis indicating the version number. For clarity, the court refers to this version of the Bond Purchase Agreement as "BPA Version 6."

BPA Version 6 provides on the first page:

> This BOND PURCHASE Agreement (the "Agreement") is made and entered into as of December 15, 2006, between LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN (the "Tribe") and STIFEL, NICOLAUS & COMPANY, INCORPORATED, a Missouri corporation (the "Initial Purchaser").

(Compl. Ex. A (dkt. #1-1) 1.) Section 14(b) of BPA Version 6 goes on to provide that:

> The Tribe expressly submits to and consents to the jurisdiction of the United States District Court for the Western District of Wisconsin (including all federal courts to which decisions of the United States District Court for the Western District of Wisconsin may be appealed), and the Lac Courte Oreilles Tribal Court, and in the event that the United States District Court for the Western District of Wisconsin lacks jurisdiction, then the courts of the State of Wisconsin wherein jurisdiction and venue are otherwise proper, with respect to any dispute or controversy arising out of this Agreement and including any amendment or supplement which may be made thereto, or to any transaction in connection therewith.

(*Id.* at 23.)

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management contract. *See* 25 U.S.C. §§ 2710(d)(9), 2711(a)(1); 25 C.F.R. § 533.7. No party has made such an argument here. This is apparently for good reason, as the documents in this case do not include any indicia of management with respect to the Band's casino. *See Wells Fargo Bank, Nat'l Ass'n v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 698 (7th Cir. 2011) (listing provisions that together rendered the Trust Indenture void as an unapproved management contract).

II. Pre-Execution Negotiations

On June 28, 2006, one or more representatives of Stifel, Nicolaus & Company, Inc. entered the Lac Courte Oreilles Reservation to discuss financing options available to the Band in connection with the sale of two series of bonds. On October 18, 2006, Stifel representatives David Noack and Michael Schinzer again traveled to the Band's reservation, toured the facilities and discussed the Band's operations and future financing plans. During those visits, Noack apparently did not disclose to the Band that it could raise desired funds simply by issuing new bonds, rather than refunding and purchasing the 2003 Bonds, nor did he disclose that the interest, commissions and other costs associated with the 2003 Bonds would increase were the Band to issue new bonds and use the proceeds to refund and purchase the 2003 Bonds.[3]

Ultimately, the Band decided to issue the 2006 Bonds. Godfrey & Kahn attorneys Brian Pierson and Tom Griggs represented the Band in negotiating the terms of various documents that memorialized the transaction. In addition, an in-house attorney for the Band, Paul Shagen, worked on the transaction. Stifel was represented by Reed Groethe, an attorney at Foley & Lardner.

A. The Trust Indenture

On October 30, 2006, Griggs sent an e-mail to Groethe, Pierson, Shagen and Norma Ross, who was the Executive Director of the Tribe. In that e-mail, he attached the first draft

[3] Stifel purports to dispute these facts, but offers no contrary evidence, arguing instead that they are relevant only to the claims pending in the Tribal Court. While this court finds that the nature of these claims *are* relevant for the purpose of analyzing jurisdiction under *Montana* and undisputed for summary judgment purposes here, the court agrees that its findings should not be binding as to the merits of the Band's claims in Tribal Court, where both the facts and the motivations to invest time and expense in disputing those facts are very different.

of the Trust Indenture. Section 13.02 of that draft contained a waiver of tribal sovereign immunity and a forum selection clause in which the Band "expressly submit[ted] to and consent[ed] to" the jurisdiction of Wisconsin federal courts and, if they lacked jurisdiction, Wisconsin state courts, "with respect to any dispute or controversy arising out of this Indenture, the Bonds or the Bond Resolution and including any amendment or supplement which may be made thereto, or to any transaction in connection therewith." No reference to the Lac Courte Oreilles Tribal Court appeared in the first draft of Section 13.02.

Two days later, on November 1, Groethe e-mailed Griggs attaching revisions on behalf of Stifel. Among those changes was the addition of language at the end of Section 13.02 reading "to the exclusion of the jurisdiction of any court of the Tribe." Groethe proposed the same addition to the forum selection clauses in the forms of the 2006A and 2006B Bonds, which were exhibits to the Trust Indenture. On November 13, Griggs circulated a new draft, which incorporated Groethe's proposed language excluding Tribal Court jurisdiction. The final version of the Trust Indenture that the parties eventually executed likewise contained that same exclusionary language.

B. The Bond Purchase Agreement

On December 10, 2006, Groethe sent Griggs an e-mail attaching a draft of the Bond Purchase Agreement between Stifel and the Band. Section 14(b) of the draft contained a forum selection clause similar but not identical to the clause in the Indenture. Specifically, the Band consented to the jurisdiction of the United States District Court for the Western District of Wisconsin *and* the Lac Courte Oreilles Tribal Court for "any dispute or controversy arising out of this Agreement and including any amendment or supplement

which may be made thereto, or to any transaction in connection therewith." Five days later, Pierson e-mailed Groethe, stating that Shagen had called, thinking that he needed the final Bond Purchase Agreement for a meeting that day. About thirty minutes later, Groethe e-mailed Griggs, Pierson, Shagen and Ross, attaching a revised draft of the Bond Purchase Agreement. Groethe stated in his e-mail that additional changes would be made later in the day to reflect the final structure of the bond issue. The draft attached was BPA Version 6, which contained the forum selection clause in which the Band consented to Tribal Court jurisdiction.

About two hours later, Pierson e-mailed Groethe. The e-mail read:

> We just got off the phone with [the Band's in-house counsel] Paul Shagen. He wants us to be uniform on all documents with jurisdiction in federal court, state court fall back and get rid of references to tribal court.
>
> On reflection, I agree. From the Tribe's point of view, it doesn't add anything but gives the bondholder a potential extra remedy. But from the bondholder's point of view, that extra remedy is at the price of giving the tribe the right to preempt any state court action with a tribal court declaratory judgment action.
>
> I think we can assume that the Tribe, having submitted to federal/state court jurisdiction, will comply with any orders or judgments issued by those courts.
>
> Sorry for the inconvenience. Can you make the changes?

(*See* Groethe Decl. Ex. E (dkt. #41-5).)

In response, Groethe circulated an updated draft with the document identifier number MILW_2121571.7 ("BPA Version 7"), which struck the phrase "Lac Courte Oreilles Tribal Court" from the forum selection clause. No evidence in the record suggests that the Band objected to the changes. BPA Version 7 also included the final principal

amounts of the 2006 Bonds and the mandatory sinking fund redemption amounts for the Bonds, which had not been included in prior versions of the agreement.

Two hours later, at 4:09 P.M., Groethe e-mailed Griggs, Pierson, Shagen, Ross and Stifel representatives attaching yet another version of the Bond Purchase Agreement ("BPA Version 8"). Like the forum selection clause in BPA Version 7, the forum selection clause in BPA Version 8 also omitted reference to the Lac Courte Oreilles Tribal Court.[4] Again, no evidence in the record suggests that the Band objected to this omission. Unlike the Indenture, however, no version of the BPA expressly *excludes* the Tribal Court's exercise of jurisdiction. BPA Version 8 was the last version of the Bond Purchase Agreement circulated.

III. Closing

Presumably, sometime before the end of 2006, the actual closing on the 2006 bond transaction took place at the offices of Godfrey & Kahn in Milwaukee.[5] Attorney Groethe was out of town and did not attend. While representatives from both Stifel and the Band

[4] In full, the forum selection clause in BPA Version 8 reads:

> The Tribe expressly submits to and consents to the jurisdiction of the United States District Court for the Western District of Wisconsin (including all federal courts to which decisions of the United States District Court for the Western District of Wisconsin may be appealed), and in the event that the United States District Court for the Western District of Wisconsin lacks jurisdiction, then the courts of the State of Wisconsin wherein jurisdiction and venue are otherwise proper, with respect to any dispute or controversy arising out of this Agreement and including any amendment or supplement which may be made thereto, or to any transaction in connection therewith.

Thus, even this version does not include the language in the Indenture specifically excluding Tribal Court jurisdiction.

[5] The parties' proposed findings do not give an exact date of closing, nor does it appear particularly relevant.

executed BPA Version 6, there is no dispute that Pierson as counsel for the Band expected BPA Version 8 to be executed by the parties.

In addition to including the Band's consent to the jurisdiction of the Lac Courte Oreilles Tribal Court, BPA Version 6 does not accurately reflect the 2006 Bonds' final principal amounts as listed in the Indenture:

Bonds	BPA Version 6	Indenture	BPA Version 8
2006A Bonds	$13,115,000	$13,150,000	$13,150,000
2006B Bonds	$18,210,000	$18,285,000	$18,285,000

On January 10, 2007, Godfrey & Kahn sent Noack and Groethe, among others, a transcript of the 2006 bond transaction, including all of the key documents. No representative from Stifel ever contacted Pierson to advise that the wrong version of the Bond Purchase Agreement had been signed and included in the closing transcript. On multiple occasions thereafter, Stifel declared and swore under penalty of perjury that the BPA Version 6 was a "true and correct copy" of the Bond Purchase Agreement between Stifel and the Band.

IV. Other Documents

As mentioned above, the parties executed a variety of other documents in connection with the bond transaction. Those documents contain their own forum selection clauses, although the language varies among documents, just as it does in the Indenture and BPA.

A. Confidentiality Agreement

Stifel and the Band also entered into a Confidentiality Agreement. Pursuant to that agreement, Stifel acknowledged performing work as a "Consultant" for the Band in connection with the "General Obligation Tribal Purpose and Refunding Bonds, Series 2006A and General Obligation Taxable Economic Development and Refunding Bonds, Series 2006B (the 'Engagement')." Section 10(e) of that agreement provides:

> Consultant shall bring all actions, claims or suits arising in connection with this Agreement solely in the LCO Tribal Court. Tenant (*sic*) consents to the personal jurisdiction of the LCO Tribal Court for any action, claim or suit arising in connection with this Agreement.

B. Trust Indenture

The Trust Indenture between the Band and Wells Fargo establishes the means by which the Band is to repay the principal and interest on the 2006A and 2006B Bonds. Its forum selection clause provides that the Band expressly submits to and consents to the jurisdiction of the United States District Court for the Western District of Wisconsin and, if that court fails to exercise jurisdiction, the courts of the State of Wisconsin "for the adjudication of any dispute or controversy arising out of this Indenture, the Bonds or the Bond Resolution and including any amendment or supplement which may be made thereto, or to any transaction in connection therewith, to the exclusion of the jurisdiction of any court of the Tribe." That clause does not mention the "Bond Purchase Agreement."

In Section 1.01, the Trust Indenture defines some of the terms that appear within that forum selection clause. "Bonds" is defined as "the Series 2006 Bonds and any Additional Bonds issued under a supplement to this Indenture." "Bond Purchase Agreement" means "the Bond Purchase Agreement dated December 15, 2006, between the

Tribe and [] [Stifel]." "Bond Resolution" means "the resolution of the Tribe adopted by Tribal Governing Board on December 15, 2006, authorizing the Series 2006 Bonds, as the same may be amended, modified or supplemented by any amendments or modifications thereof." "Indenture" is defined as "this Trust Indenture between the Tribe and Trustee, dated as of December 1, 2006, under which the Bonds are authorized to be issued, and including any amendments or supplements thereto."

Section 14.03 states that nothing in the Trust Indenture:

> is intended or shall be construed to confer upon or to give to any person or corporation, other than the parties hereto and the Holders of the Bonds issued hereunder, any right, remedy or claim under or by reason of this Indenture or covenant, condition or stipulation thereof; and the covenants, stipulations and agreements in this Indenture contained are and shall be for sole and exclusive benefit of the parties hereto, their successors and assigns, and the Holders of the Bonds.

"Holder" is defined within the Indenture as "the person in whose name such Bond shall be registered."

The Trust Indenture also includes a "Situs of Transaction" clause, which discusses the Band's willingness to submit to the jurisdiction "of both the federal courts and the courts of the State of Wisconsin." In that clause, the Band affirmed that the transaction represented by the Indenture did not take place on Indian lands and represented that the negotiations regarding the Indenture "occurred on lands within the jurisdiction of the courts of the State of Wisconsin, and the execution and delivery of this Indenture have not occurred on Indian Lands, but rather on lands within the jurisdiction of the courts of the State of Wisconsin."

C. Offering Memoranda

The Preliminary Limited Offering Memorandum and the Limited Offering Memorandum both state that they are "brief outlines of some of the provisions" of the Bonds and the Indenture. They go on to state that neither the Memoranda themselves nor any statements made orally or in writing are to be "construed as a contract with the owners of the Bonds."

Like the other documents, the Memoranda contain statements of the Band's consent to the jurisdiction of Wisconsin federal and state courts. Specifically, the Memoranda provide that the Band consents to Wisconsin courts' jurisdiction "for the adjudication of any dispute arising under the Bond Documents or the Bond Purchase Agreement, to the exclusion of the jurisdiction of any court of the Tribe."

D. Resolution No. 06-110

Resolution No. 06-110 was passed on December 15, 2006, by the Band's Tribal Governing Board. The Resolution states that it "shall constitute a contract with the Trustee." Resolution 06-110 contains a forum selection clause in which the Band consented to the jurisdiction of Wisconsin federal and state courts "with respect to any dispute or controversy arising out of the Indenture, the Bonds, this Bond Resolution and including any amendment or supplement which may be made thereto, or to any transaction in connection therewith." The Resolution neither authorizes nor precludes litigation in the Lac Courte Oreilles Tribal Court in connection with the bond transaction, nor does it mention the Bond Purchase Agreement in the forum selection clause.

E. Bonds

On December 22, 2006, the Band executed the 2006A Bonds. The 2006A Bonds contain forum selection language in which the Band submits and consents to the jurisdiction of Wisconsin federal and state courts "for the adjudication of any dispute or controversy arising out of this Bond, the Indenture, or the Bond Resolution and including any amendment or supplement which may be made thereto, or to any transaction in connection therewith, to the exclusion of the jurisdiction of any court of the Tribe." These bonds contain no express reference to the "Bond Purchase Agreement" in the forum selection clause.

In the 2006B Bonds, the Band likewise represented it "submits to and consents to" the jurisdiction of Wisconsin federal and state courts for the adjudication of any dispute or controversy arising out of "this Bond, the Indenture, or the Bond Resolution and including any amendment or supplement which may be made thereto, or to any transaction in connection therewith." However, the 2006B Bonds do *not* contain language excluding the jurisdiction of the Lac Courte Oreilles Tribal Court. Like the 2006A Bonds, the 2006B Bonds also contain no express reference to the "Bond Purchase Agreement" in the forum selection clause.

V. The Tribal Court Action

On December 13, 2012, the Tribe brought suit against Stifel in the Lac Courte Oreilles Tribal Court (the "Tribal Court Action"), alleging that Stifel undertook to advise the Band regarding its financing options in 2006, but failed to disclose certain information before the Tribe entered into the Bond Purchase Agreement. The Band alleged three specific causes of action: (1) fraudulent concealment or non-disclosure; (2) breach of

fiduciary duty; and (3) unjust enrichment. It sought rescission of the Bond Purchase Agreement or, in the alternative, a judgment for money damages.

Stifel commenced the present lawsuit on February 19, 2013, seeking a declaratory judgment that the Tribal Court lacks jurisdiction over it. On May 29, 2013, Tribal Court Judge James B. Mohr entered an order staying the Tribal Court Action, pending the conclusion of this suit and exhaustion of all appellate rights related to it. In August of 2013, the parties stipulated to Stifel filing an amended complaint, through which it added a claim to reform the Bond Purchase Agreement on the grounds of mutual mistake. (Dkt. #34.)

OPINION

This court has subject matter jurisdiction under 28 U.S.C. § 1331 over the question of whether the Tribal Court's exercise of jurisdiction over Stifel exceeds the limitations imposed on tribal court jurisdiction by federal law. (See Compl. (dkt. #1) ¶¶ 28; 39.) It is less clear that this court's original jurisdiction extends to the question of whether the various forum selection clauses divests the Tribal Court of jurisdiction or at least precludes the Band from proceeding against Stifel in that court. *See Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, No. 13-cv-372-wmc, 33-37 (W.D. Wis. May 16, 2014). In any event, the issues are sufficiently intertwined that the court will exercise supplemental jurisdiction over that claim, as well as over Stifel's claim for contractual reformation pursuant to 28 U.S.C. § 1367, in the interest of efficiency, consistency and fairness to all parties.

I. Reformation

The executed version of the Bond Purchase Agreement, BPA Version 6, explicitly makes venue in the Lac Courte Oreilles Tribal Court proper. (*See* Compl. Ex. A (dkt. #1-1) 23 ("The Tribe expressly submits to and consents to the jurisdiction of . . . the Lac Courte Oreilles Tribal Court[.]") Stifel asks the court to reform that contract to reflect the parties' actual intentions, as manifested in BPA Version 8, the last circulated version of the Bond Purchase Agreement.

The general rule in Wisconsin is that a contract may be reformed when "the 'writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing.'" *Vandenberg v. Continental Ins. Co.*, 2001 WI 85, ¶ 50, 244 Wis. 2d 802, 628 N.W.2d 876. In such circumstances, courts may reform the contract so as to express the parties' actual intentions or agreement. *Am. Cas. Co. of Reading, Pa. v. Memorial Hosp. Ass'n*, 223 F. Supp. 539, 542 (E.D. Wis. 1963); *Newmister v. Carmichael*, 29 Wis. 2d 573, 576-77, 139 N.W.2d 572 (1966). In an action for reformation on the grounds of mutual mistake, it must "be established by clear, convincing evidence that both parties intended to make a different instrument than the one signed and both agreed on facts different than those set forth in the instrument." *Newmister*, 29 Wis. 2d at 577. "Parol evidence is admissible to establish mutual mistake in a reformation action." *Id.*

Here, the parties to the Bond Purchase Agreement all acknowledge a failure to execute the most recent version of the document, which all the evidence indicates was their collective intent. One particular uncontroverted piece of evidence supporting this conclusion is the fact that BPA Version 6 incorrectly relays the principal amounts of the

2006A and 2006B Bonds. In contrast, BPA Version 8 contains the correct figures while also omitting any reference to the Lac Courte Oreilles Tribal Court, consistent with the parties' negotiations.

Indeed, following circulation of BPA Version 6, one of the Band's own attorneys requested that its language be altered to remove all references to the Lac Courte Oreilles Tribal Court, because from the Band's point of view then, that language simply gave the bondholders an additional remedy. Nothing in the record suggests that either Stifel or the Band ever changed its view that all references to the Lac Courte Oreilles Tribal Court should be removed from the Bond Purchase Agreement. Based on this record, the court finds clear and convincing evidence that the parties did not intend to include consent to the jurisdiction of the Lac Courte Oreilles Tribal Court in that agreement. The court also finds no credible evidence or argument of a contrary interest by any party.

The Band nevertheless argues that Stifel has not met its burden of proof, pointing out that the best evidence of parties' intent is what is actually contained in the written contract. As a general proposition, of course, this is absolutely true. *See KBS Constr., Inc. v. McCullough Plumbing, Inc.*, 2010 WI App 19, ¶ 25, 323 Wis. 2d 276, 779 N.W.2d 723 (unpublished) (citing *Seitzinger v. Cmty. Health Network*, 2004 WI 28, ¶ 22, 270 Wis. 2d 1, 676 N.W.2d 426). But if the language of a written contract were itself dispositive, all claims for contractual reformation based on mistake would be precluded, since the entire premise of such claims is that the written instrument does *not* correctly express the parties' intent. *See Vandenberg*, 2001 WI 85, ¶ 50.

The Band also faults Stifel for failing to present evidence of what occurred between the circulation of BPA Version 8 and the closing, presumably suggesting that something *may*

have occurred to change the parties' minds on the Lac Courte Oreilles Tribal Court as a venue. Stifel's claim, however, is that *nothing* occurred to change the parties' minds on that point and that they intended to execute BPA Version 8. Given the clear and convincing evidence that this is true, Stifel cannot be faulted on summary judgment for failing to prove a negative. If additional negotiations took place or one of the parties shifted positions, the Band should have come forward with some evidence of those changes.

Finally, the Band argues that Stifel failed to exercise reasonable diligence in seeking reformation and should be estopped from maintaining such a claim now. *See Emmco Ins. Co. v. Palatine Ins. Co.*, 263 Wis. 558, 569, 58 N.W.2d 525 (1953) (articulating the "general rule" that "one seeking to reform an instrument for mutual mistake must have exercised reasonable diligence"). Its argument is premised primarily on the fact that the Bond Purchase Agreement was executed in late 2006 and Stifel only filed suit for reformation in 2013, nearly seven years later. But estoppel is not so formulaic a doctrine. As Stifel correctly points out, there was no reason it should have become aware of the parties' mutual mistake following the closing until the Band filed the Tribal Court Action in late 2012, as that was the first time a dispute with respect to the Bond Purchase Agreement arose. The delay between 2006 and 2012, therefore, is excusable. *Cf. Stadele v. Resnick*, 274 Wis. 346, 353, 80 N.W.2d 272 (1957) ("The continued recognition of rights based upon the omitted terms acknowledged by the interested parties is generally sufficient to account for a delay in instituting suit to enforce the reformation. 'Delay will thus be excused . . . by defendant's silence or other conduct indicating acquiescence in plaintiff's right.'") (citation omitted; internal quotation marks and alteration in original).

Stifel also points out that it first discovered the mistake in July of 2013, when the parties' attorneys met to discuss the Band's written discovery requests in this lawsuit.[6] After Stifel informed the Band of its discovery, the parties stipulated that Stifel could file an amended complaint in August of 2013 seeking reformation based on mutual mistake. (*See* dkt. #34.) Nothing about these facts suggests that Stifel failed to exercise reasonable diligence in seeking reformation, nor has the Band indicated how it is even prejudiced by Stifel's claim for reformation. On the contrary, the Band contends that reformation of the Bond Purchase Agreement to omit reference to the Lac Courte Oreilles Tribal Court is essentially irrelevant to whether that court has jurisdiction over the dispute. (*See* Def.'s Resp. (dkt. #44) 12.)

Accordingly, the court concludes that Stifel has met its burden to show by clear and convincing evidence that BPA Version 6 does not reflect the parties' actual intent with respect to the forum selection clause; that BPA Version 8 does; and that Stifel is entitled to summary judgment on this issue.[7]

II. Tribal Court Jurisdiction

"[A]bsent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances." *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997). This doctrine was first articulated in *Montana v. United States*, 450 U.S. 544 (1981), the landmark case in which the Supreme Court held that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers

[6] Apparently, the Tribal Court Action was stayed before any discovery could take place in that case.
[7] The Band also reasonably suggests that this motion should be denied as moot, but the court disagrees, at least to the extent that the lack of reference to the Lac Courte Oreilles Tribal Court has *some* bearing on the other contractual issues discussed below.

of the tribe." *Id.* at 565. The first exception to *Montana*'s general bar is that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* The second exception is that 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 or welfare of the tribe." *Id.* at 566. Subsequently, the Supreme Court held in *Strate* that the rule of *Montana* limits tribal adjudicatory authority, as well as regulatory authority. *Strate*, 520 U.S. at 453. Stifel contends that neither *Montana* exception authorizes the Tribal Court's exercise of jurisdiction over it in the action filed by the Band.

A. First Exception

With respect to the first exception, Stifel argues that the "consensual relationship" exception requires a factual nexus between the Tribal Court Action and the relationship between the parties. In contrast, Stifel contends that the Tribal Court Action in this case seeks to dismantle, rather than regulate, the consensual relationship between the parties, meaning that the required factual nexus is not present.

Montana's first exception certainly requires a nexus between the tribe's attempt at regulation and the consensual relationship between the tribe and the non-tribal party. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001). The distinction Stifel would draw between *regulation* of a relationship and *dismantling* of a relationship, however, finds no support in the case law it cites. On the contrary, the nexus inquiry appears to be far broader

than that, asking simply whether the tribal action is related to the nonmember's consensual relationship with the tribe. In *Atkinson Trading*, for example, the Navajo Nation enacted a hotel occupancy tax upon all hotel rooms located within the boundaries of the Navajo Nation Reservation. *Id.* at 648. Atkinson Trading Company owned a hotel with the reservation boundaries but on non-Indian land that derived much of its business from nonmember tourists. Atkinson challenged the imposition of that tax under *Montana*'s general restrictions on tribal authority over nonmembers, contending that neither *Montana* exception applied. *Id.*

The Supreme Court held that *Montana*'s first exception did not justify the tax. The tribal parties pointed to two separate relationships they contended gave the Nation regulatory authority over Atkinson. First, they argued that Atkinson had entered into a consensual relationship with the Nation by benefiting from numerous services provided by the Nation, such as tribal police, fire and medical services. The Court rejected that argument, explaining that *Montana* requires the "consensual relationship . . . stem from 'commercial dealing, contracts, leases, or other arrangements.'" *Id.* at 655. As the court explained, a finding that the mere receipt of tribal services was enough to establish the requisite connection would cause the first *Montana* exception to "swallow the rule." *Id.* Second, the tribal parties argued that Atkinson had consented to the tax by becoming an "Indian trader" under 25 U.S.C. § 261. The Court also rejected that argument, holding that "the tax or regulation imposed by the Indian tribe [must] have a nexus to the consensual relationship itself." *Id.* at 656. Thus, Atkinson's "Indian trader" status could not support the imposition of a hotel occupancy tax, although the Court left open the question of

whether the Navajo Nation could impose a tax on activities arising out of the "Indian trader" relationship. *Id.*

In *Strate*, the other case that Stifel cites, a traffic accident occurred on a portion of highway that ran through the Fort Berthold Indian Reservation. Neither party to the accident was a member of the Three Affiliated Tribes, but one driver's employer, A-1 Contractors, was at that time under a subcontract with a corporation wholly owned by those tribes and performed all work under that subcontract within the boundaries of the reservation. The other driver, Fredericks, sued A-1 Contractors and its employee, Stockert, in tribal court. After contesting jurisdiction in the tribal court, A-1 Contractors and Stockert counter-sued in federal court, seeking a declaratory judgment that the tribal court lacked jurisdiction.

The Supreme Court held that *Montana*'s first exception did not authorize the tribal court to exercise jurisdiction over A-1 Contractors and Stockert. While A-1 Contractors had a consensual relationship with the Tribes by means of the subcontract, Fredericks' claims against Stockert were unrelated to that subcontract. Furthermore, Fredericks was not a party to the subcontract at all, and the Tribes were "strangers to the accident." *See Strate*, 520 U.S. at 457. In contrast to the cases fitting within *Montana*'s first exception, which generally authorized regulation of nonmembers' on-reservation business activities and transactions, the Court found that "the Fredericks-Stockert highway accident present[ed] no 'consensual relationship of the qualifying kind." *Id.*

In contrast, it is undisputed here that Stifel entered into a consensual commercial transaction with the Band, as memorialized in the Bond Purchase Agreement, following on-reservation negotiations and discussion of financing options. Moreover, the Band now seeks

to hold Stifel accountable for its on-reservation actions (or failures to act) in connection with that same relationship -- that is, its alleged fraudulent omissions and the resultant breach of its fiduciary duty. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 332 (2008) (discussing first *Montana* exception and noting that "*Montana* and its progeny permit tribal regulation of nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests") (emphasis in original). Stifel entirely fails to identify a factual disconnect between the Band's claims in Tribal Court and the commercial relationship between the parties.

In fact, this case bears more similarity to *Williams v. Lee*, 358 U.S. 217 (1959), cited in *Montana* itself in *support* of the first exception, than it does to either *Atkinson* or *Strate*. *See Montana,* 450 U.S. at 564. In *Williams*, a nonmember who operated an on-reservation general store brought an action in state court against a Navajo Indian to collect for goods sold to them on credit. The Supreme Court held:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.

Williams, 358 U.S. at 223 (internal citation omitted); *see also Strate*, 520 U.S. at 457 (describing the facts in *Williams*). While no one has suggested in this proceeding that tribal court jurisdiction over the Band's claims is *exclusive* (indeed, the Band would have a difficult time with such a claim, given the forum selection clauses authorizing venue in Wisconsin federal and state courts), *Williams* further supports the proposition that the first *Montana*

exception authorizes jurisdiction over Stifel, at least with respect to the specific claims currently pending before the tribal court.

Even if the nexus is otherwise sufficient between Stifel's consensual relationship with the tribe and the tribal court action seeking to regulate it, Stifel argues that the Band cannot overcome its representations in the Indenture and Bond Purchase Agreement that the bond transaction did *not* take place on Indian lands. The court disagrees. Whatever the import of these contractual representations, they are not sufficient to overcome the undisputed fact that Stifel representatives actually did enter the reservation to discuss financing options, at which time they allegedly failed in a common law duty to disclose better options for the Band. While the Band's express *exclusion* of its courts may be sufficient to foreclose the Tribal Court's exercise of jurisdiction, even over the Band's designated "Consultant," an indirect, vague statement as to where the bond "transaction" itself took place is not enough to overcome the direct nexus between Stifel's alleged misrepresentations on tribal land and a tribal court action challenging those misrepresentations.

B. Second Exception

The second *Montana* exception states that 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 or welfare of the tribe." *Montana*, 450 U.S. 566. The plain terms of this exception are deceptively broad, since "virtually every act that occurs on the reservation could be argued to have some political, economic, health or welfare ramification to the tribe." *County of Lewis v.* Allen, 163 F.3d 509, 515 (9th Cir. 1998) (en banc). The

Supreme Court has rejected such an expansive interpretation, however, holding that "if *Montana's* second exception requires no more, the exception would severely shrink the rule." *Strate*, 520 U.S. at 458.

Rather, for the second *Montana* exception to apply, the harm at issue must "do more than injure the tribe, it must 'imperil the subsistence' of the tribal community." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 341 (2008). "[T]h[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences." *Id.* (quoting F. Cohen, Handbook of Federal Indian Law § 4.02[3][c], at 232 n.220). In general, where a case does not affect a tribe's ability "to preserve 'the right of reservation Indians to make their own laws and be ruled by them,'" *Strate*, 520 U.S. at 459 (quoting *Williams*, 358 U.S. at 220), the second *Montana* exception does not apply.

Given this narrow application, the second *Montana* exception does not provide for tribal court jurisdiction in this instance -- at least on the facts in this record. While the Band argues that Stifel's allegedly fraudulent conduct has caused it significant financial harm, there is no evidence that the increased interest, commissions and charges at issue have imperiled the subsistence of the tribal community or will affect the Band's ability to make and enforce its own laws.

C. Forum Selection Clause

While the Lac Courte Oreilles Tribal Court may exercise jurisdiction over Stifel under the first *Montana* exception on the claims currently before it, this does not end the inquiry. Stifel argues that even if *Montana* authorizes jurisdiction, the Band is limited to

litigating the dispute in the forum for which it contracted.[8] "[A] forum-selection clause is entitled to a favorable presumption, [but] the law also holds that where jurisdiction normally would exist, 'it cannot be ousted or waived absent a clear indication of such a purpose.'" *Converting/Biophile Labs., Inc. v. Ludlow Composites Corp.*, 2006 WI App 187, ¶ 23, 296 Wis. 2d 273, 722 N.W.2d 633 (quoting *John Boutari & Son, Wines & Spirits, S.A. v. Attiki Importers & Distribs., Inc.*, 22 F.3d 51, 53 (2d Cir. 1994)). Thus, to prevail on its argument, Stifel must demonstrate that the parties clearly intended to waive the jurisdiction of the Lac Oreilles Tribal Court for the purposes of the pending Tribal Court action.

As this court has previously recognized, "where venue is specified with mandatory or obligatory language, [a forum selection] clause will be enforced; where only jurisdiction is specified, the clause will generally not be enforced unless there is some further language indicating the parties' intent to make venue exclusive." *Stifel, Nicolaus & Co., Inc. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, -- F. Supp. 2d --, 2013 WL 5803778, at *7 (W.D. Wis. Oct. 29, 2013) (quoting *Muzumdar v. Wellness Int'l Network, Ltd.*, 438 F.3d 759, 762 (7th Cir. 2006)). "Mandatory" forum selection clauses are those in which a particular forum is designated as *exclusive* -- for example, those stating that venue "shall" lie in a particular court for "any dispute." *See Paper Exp., Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753, 756 (7th Cir. 1992) (collecting cases). "Permissive" forum selection clauses are

[8] The Band appears to concede that entering into a narrowly-tailored forum selection clause like the one in the Bond Purchase Agreement may serve to divest its court of jurisdiction. The court expresses no opinion on that question. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972) ("No one seriously contends in this case that the forum selection clause 'ousted' the District Court of jurisdiction …. The threshold question is whether that court should have exercised its jurisdiction to do more than give effect to the legitimate expectations of the parties … by specifically enforcing the forum clause."). In light of the fact that jurisdiction is proper under *Montana*, the court only holds that the Band is not otherwise precluded from proceeding with its pending claims in Tribal Court.

those in which parties consent to the jurisdiction of a court but do not foreclose litigation in other courts. *See id.*; *Converting/Biophile Labs.*, 2006 WI App 187, ¶¶ 25-32.

Applying these general principals here yields inconsistent results because of the differing language in the various bond documents. The Bond Purchase Agreement, the 2006B Bonds and the Resolution include permissive forum selection clauses, in which the Band has consented to jurisdiction in Wisconsin federal and state courts, without any indication that this jurisdiction is *exclusive*. In such cases, "where only jurisdiction is specified, the clause will generally not be enforced[.]" *Muzumdar*, 438 F.3d at 762.[9] In contrast, the Trust Indenture, the Offering Memoranda and the 2006A Bonds not only consent to Wisconsin federal and state court jurisdiction, but also expressly exclude the jurisdiction of the Lac Courte Oreilles Tribal Court, making jurisdiction in federal and state court exclusive "as a practical matter." *See Stifel*, 2013 WL 5803778, at *8 n.8.[10]

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[9] When a contract is deemed unambiguous under Wisconsin law, a court's construction of that contract generally begins and ends with the "four corners of the contract, without consideration of extrinsic evidence." *Town Bank v. City Real Estate Dev. LLC*, 2010 WI 134, ¶ 33, 330 Wis. 2d 340, 793 N.W.2d 476. Presuming the Bond Purchase Agreement to be unambiguous, the court's analysis would end here, with the determination that its forum selection clause is merely permissive and does not foreclosure Tribal Court jurisdiction. An argument can be made, however, that the Bond Purchase Agreement was not intended to stand on its own in reflecting the parties' intent, given that all the documents were executed close in time and refer to one another throughout. *See id.* at ¶ 38 (court may consider extrinsic evidence in determining whether parties intended contract to represent the final and complete expression of their argument). Here, Stifel implicitly, if not overtly, is asserting that consideration of these other documents injects ambiguity into the parties' choice of forum over the pending Tribal Court Action, and so this court proceeds to consider them as though the Bond Purchase Agreement is ambiguous on this question. For the reasons discussed in the remainder of this opinion, Stifel cannot prevail under this assumption either.

[10] Stifel appears to misinterpret this court's previous decision, arguing that the language applying the forum selection clauses to "any dispute" makes jurisdiction in Wisconsin federal and state courts the only option. That is incorrect. In that case, the clauses at issue did *not* contain express language making jurisdiction in Wisconsin federal court exclusive. However, because the parties were all Wisconsin-based and their transactions took place in Wisconsin, they had only three options: Wisconsin federal court, Wisconsin state court, and tribal court. By consenting to two, and foreclosing the other, the parties had manifested an "intent to make venue exclusive." *Muzumdar*, 438 F.3d at 762. The same is true here, but only with respect to those documents including the

Stifel appears to recognize that it must rely on the Trust Indenture and the 2006A Bonds to prevail on its claim.[11] This is a weak starting point, particularly because the Tribal Court Action seeks *at most* to rescind only a single document: the Bond Purchase Agreement. Other than the Confidentiality Agreement, which makes the Tribal Court the *exclusive* venue for resolving disputes arising out of that agreement, the Bond Purchase Agreement is also the only document to which Stifel is actually a party. And as discussed above, the Bond Purchase Agreement does not foreclose the jurisdiction of the Lac Courte Oreilles Tribal Court, even in its reformed state. (*See* Stipulation Ex. B (dkt. #34) 23 (BPA Version 8 jurisdiction clause).)

In response to its status as a non-party to the agreements containing more favorable forum selection clauses, Stifel argues that courts have permitted non-signatories to invoke forum selection clauses so long as the party being bound was a signatory, citing *American Patriot Insurance Agency, Inc. v. Mutual Risk Management, Ltd.*, 364 F.3d 884 (7th Cir. 2004). In that case, the Seventh Circuit considered the enforceability of a forum selection clause in a "Shareholder Agreement" by non-parties. The plaintiff, American Patriot, had entered into the Shareholder Agreement with a company called Mutual Holdings. That agreement was the principal contract establishing a program through which various Mutual affiliates issued policies to American Patriot's customers, with American Patriot acting as agent. *Id*.

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language excluding the Lac Courte Oreilles Tribal Court as a venue. Without that additional language, the forum selection clauses are merely permissive. *See Converting/Biophile Labs.*, 2006 WI App 187, ¶¶ 25, 32.

[11] Stifel also looks to the Offering Memoranda, but as the Band points out, neither memorandum is a contract. Stifel offers no authority for the proposition that the Band may waive its court's jurisdiction merely by expressing intent, rather than through a contract, and the court has found none. Indeed, the presumptive validity of forum selection clauses in Wisconsin comes from the common law concept that parties to a contract are obligated to perform their duties under that contract. *Converting/Biophile Labs.*, 2006 WI App 187, ¶ 22.

at 886. In the Shareholder Agreement, the parties contracted for exclusive jurisdiction in Bermuda for "any dispute concerning this Agreement." *Id*. The plaintiff also executed various other contracts with Mutual affiliates in connection with that insurance program, although those contracts did not include forum selection clauses.

After the insurance program went into effect, plaintiff began to suffer large losses. Eventually, it sued for breach of contract and fraud in the inducement, naming the Mutual affiliates as defendants, but excluding Mutual Holdings itself. The defendants moved to dismiss for improper venue, and the district court granted the motion on the basis of the forum selection clause. 364 F.3d at 886.

On appeal, the plaintiff argued, among other things, that none of the Mutual defendants was a party to the Shareholder Agreement (though they were parties to other related contracts without forum selection clauses) and that defendants, therefore, lacked the right to enforce the forum selection clause therein. The Seventh Circuit rejected that argument, holding that it would

> amount to saying that a plaintiff can defeat a forum-selection clause by its choice of provisions to sue on, of legal theories to press, and of defendants to name in the suit. If this were true, such clauses would be empty. It is not true.

364 F.3d at 888. The court went on to say that a forum selection clause cannot be defeated "by suing an affiliate or affiliates of the party to the contract in which the clause appears, or employees of the affiliates." *Id.* at 889; *see also Organ v. Byron*, 434 F. Supp. 2d 539, 541-42 (N.D. Ill. 2005) (plaintiff could not avoid forum selection clause by suing non-signatory officers of signatory corporation).

As outlined above, the material facts here differ from those in *American Patriot* in compelling ways. As an initial matter, there is no evidence that Stifel is an "affiliate" of *any* of the parties who are signatories to the Trust Indenture or the 2006A Bonds. The Seventh Circuit recently confirmed that "affiliation," or common ownership, is one of two concepts that may give rise to a non-signatory's right to enforce a forum selection clause. *See Adams v. Raintree Vacation Exch., LLC*, 702 F.3d 436, 439-40 (7th Cir. 2012). Here, the evidence is to the contrary. Stifel certainly has no legal affiliation with Wells Fargo, which has the rights to enforce the Indenture, nor with any of the buyers of the 2006A Bonds.[12] And Stifel does not point to any case in which an *unrelated* party has been permitted to enforce a forum selection clause in a different contract, much less when it is inconsistent with the forum selection clause in the agreements actually signed by that party. Indeed, *American Patriot* and *Organ* involved affiliates and officers, respectively, of contract signatories.[13]

Furthermore, the Trust Indenture explicitly states that it is *not* intended to confer rights on *any* parties except for the signatories and the Holders of the Bonds, with "Holder" defined as "the person in whose name such Bond shall be registered." As the Band points out, Stifel has adduced no evidence that it currently holds any of the 2006 Bonds.

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[12] The record is silent as to who owns the 2006A Bonds now.

[13] The other concept the Seventh Circuit identified as potentially giving a non-signatory to a contract the right to enforce its forum selection clause is that of mutuality -- that is, whether the *other* party would have the right to enforce the forum selection clause against the non-signatory. *Adams*, 702 F.3d at 442-43. Stifel does not argue mutuality as a basis for its invocation of the clause, and nothing in the present case suggests that the Band could bind Stifel to a forum selection clause in documents that it did not even sign in any event, particularly where there is *no* indication that Stifel was "simply [a] cat's paw[]" of a signatory or bondholder. *Frietsch v. Refco, Inc.*, 56 F.3d 825, 828 (7th Cir. 1995); *see also Adams*, 702 F.3d at 442 (permitting non-signatory to invoke forum selection clause where plaintiff's theory was that non-signatory was co-conspirator and secret principal of signatory).

In fairness, Stifel *was* the original buyer of those bonds and, therefore, has at least an arguable claim to enforcement of the forum selection clause as to the 2006A Bonds. As previously discussed, however, the Band does not claim any rights under those bonds or the bond transaction as a whole in the pending Tribal Court Action, which only seeks to rescind the Bond Purchase Agreement or, in the alternative, seeks monetary damages to compensate it for the increased interest payments, commissions, and fees associated with its decision to issue the 2006 Bonds and use the proceeds to refund and purchase the 2003 Bonds. (*See* Compl. Ex. K (dkt. #1-11).) Said another way, the Band does not seek to dismantle the entire bond transaction, but seeks only those damages arising from Stifel's alleged material omissions with respect to its options to raise capital. In allowing the Band to proceed on these claims in Tribal Court, this court obviously expresses no opinion on the merit of that underlying lawsuit, noting only that given the limited nature of the claims, it is unclear why an express forum selection clause in the Trust Indenture or 2006A Bonds, should have any bearing on a dispute under the Bond Purchase Agreement alone.

Despite the Trust Indenture's clause indicating that conflicts between the Bond Purchase Agreement and the Trust Indenture are to be resolved in favor of the Indenture, the court also agrees with the Band that there is no such conflict here. The different forum selection clauses give rights to different parties and deal with controversies arising from different sets of bond documents. Accordingly, Stifel has offered no principle basis for disregarding one clause in favor of the other when they can coexist without conflict simply by means of the court enforcing them to give effect to their plain language.

This case differs from *American Patriot* in another way as well. In *American Patriot*, the Shareholder Agreement was deemed part of a "package" of contracts executed with the

Mutual defendants to implement the insurance program. The Seventh Circuit noted that "no reason ha[d] been suggested for why the parties would have wanted disputes under [the Shareholder A]greement to be litigated in Bermuda but not disputes under the other pieces of the jigsaw puzzle." *American Patriot*, 364 F.3d at 889. Here, the different documents are certainly *related* to one another as well, but they were not all executed as part of a single "package" with a single goal. Moreover, there is an obvious reason why the Band may have contracted to limit suits arising out of the larger bond transaction in Wisconsin federal and state courts, while preserving the option to pursue its so-called "Consultant," Stifel, in Tribal Court. In contrast, Wells Fargo and the Band apparently agreed to resolve any disputes between them only in Wisconsin federal and state courts, to the express exclusion of the Lac Courte Oreilles Tribal Court as a possible alternative venue.

This conclusion is further strengthened by the fact that the documents themselves draw a distinction between the Bond Purchase Agreement on the one hand, and the Trust Indenture, Bonds and Resolution on the other. The Bond Purchase Agreement's forum selection clause applies "with respect to any dispute or controversy arising out of *this Agreement* and including any amendment or supplement which may be made thereto, or to any transaction in connection therewith." (*See* Stipulation Ex. B (dkt. #34) 23 (BPA Version 8 jurisdiction clause) (emphasis added).) It makes no mention of the Trust Indenture, the 2006 Bonds themselves or the Resolution. Likewise, the Trust Indenture and Bonds contain *no* explicit reference to the "Bond Purchase Agreement," despite that phrase being *expressly* defined within the Trust Indenture itself. Rather, the Trust Indenture's forum selection clause applies to "any dispute or controversy arising out of this Indenture, the Bonds or the Bond Resolution," as well as supplements and amendments

thereto and transactions in connection therewith. The 2006A Bond likewise applies to disputes arising out of the Bonds, the Trust Indenture and the Resolution, plus any supplements, amendments or connected transactions.[14] Thus, the documents themselves support the Band's argument that the Bond Purchase Agreement represents one "core" transaction, while the Trust Indenture, Bonds and Resolution form part of another.

Still, Stifel argues that the language of the forum selection clauses in the Trust Indenture and 2006A Bonds is sufficiently broad to enfold *all* of the bond documents, because it applies not only to disputes "arising out of" the explicitly-listed documents but also to disputes "arising out of" all "transactions in connection therewith." Certainly, the Seventh Circuit has construed such clauses "quite broadly to include all manner of claims tangentially related to the agreement, including claims of fraud, misrepresentation, and other torts involving both contract formation and performance." *Welborn Clinic v. MedQuist, Inc.*, 301 F.3d 634, 639 (7th Cir. 2002) (referencing standard arbitration clause "requiring that 'all controversies and claims' either 'arising out of' or 'relating to' the contract" be settled by arbitration). But in this case, the Bond Purchase Agreement is not easily deemed "a transaction in connection" with the Trust Indenture, for example, where the Bond Purchase Agreement was explicitly defined in the Trust Indenture but omitted from the forum selection clause, while other defined, seemingly less fundamental, documents are specifically mentioned in that clause.

"When possible, contract language should be construed to give meaning to every word, 'avoiding constructions which render portions of a contract meaningless, inexplicable

[14] The Resolution also mirrors this same language and does not refer to the Bond Purchase Agreement explicitly (though it is missing the exclusivity language of the 2006A Bonds and the Trust Indenture and is, therefore, far less important to the present analysis).

or mere surplusage.'" *Md. Arms Ltd. P'ship v. Connell*, 2010 WI 64, ¶ 45, 326 Wis. 2d 300, 786 N.W.2d 15. To interpret "transaction in connection therewith" to encompass *all* the documents executed as part of the overarching bond transaction would arguably make the references to specific documents meaningless.

Finally, the Confidentiality Agreement, though tangential to the larger bond transaction at issue here, provides additional support for the Band's arguments. That Agreement includes a forum selection clause of its own and requires Stifel, as the "Consultant," to bring all actions, claims or suits arising in connection with the Confidentiality Agreement in the Lac Courte Oreilles Tribal Court. No one is suggesting that the Tribal Court Action "arises from" the Confidentiality Agreement, but this clause does further suggest that the parties viewed the relationship between Stifel and the Band as different from that of the other parties to the larger bond transaction.

Of course, Stifel might argue that the court's lengthy discussion here of its reasons for construing the forum selection clauses in agreements between the Band and other parties differently from the less restrictive clauses in the actual agreements between the Band and Stifel at least suggests a dispute of fact remains for trial -- although Stifel makes no such argument, having itself moved for summary judgment. But this argument would require the court to ignore that *Stifel* has the burden to prove a "clear" waiver of the Band's right to proceed with its claims in Tribal Court. *Converting/Biophile Labs.*, 2006 WI App 187, ¶ 23. Whatever else the discussion above may demonstrate, it shows as a matter of law that Stifel cannot meet this burden with respect to the specific claims currently alleged against it in that court.

III. Final Judgment

"[I]t is proper for a court to enter summary judgment for non-moving parties, if no factual dispute exists and if the non-movants are entitled to summary judgment as a matter of law." *Kealey Pharmacy & Home Care Serv., Inc. v. Walgreen Co.*, 539 F. Supp. 1357, 1370 (W.D. Wis. 1982); *see also* Fed. R. Civ. P. 56(f)(1). While sanctioning this procedure, Rule 56 requires a court to give "notice and a reasonable time to respond." Fed. R. Civ. P. 56(f); *see also, e.g.*, *Advantage Consulting Grp., Ltd. v. ADT Sec. Sys., Inc.*, 306 F.3d 582, 588 (8th Cir. 2002) (grant of summary judgment proper only where party against whom judgment is entered was given notice and adequate opportunity to demonstrate why summary judgment should not be granted).

Here, the Band expressly requested that the court enter judgment in its favor in its brief in opposition, relying in part on Stifel's right to enforce the forum selection clauses in the Trust Indenture and 2006A Bonds. (*See* Def.'s Resp. (dkt. #44) 13 n.4; 18.) Stifel was thus on notice of the argument, formally replies and had no obvious reason to withhold any evidence or argument in reply. (*See* Pl.'s Reply (dkt. #49) 5-6.) In an abundance of caution, since the Band did not itself move for summary judgment based on Stifel's inability to meet its burden, the court will nevertheless give Stifel one last opportunity to demonstrate a genuine dispute of material fact remains for trial with respect to the applicability of the forum selection clauses in the Trust Indenture and 2006A Bonds to the pending claims in Tribal Court.

ORDER

IT IS ORDERED that:

1. Plaintiff Stifel, Nicolaus & Company, Inc.'s motion for summary judgment (dkt. #37) is GRANTED IN PART and DENIED IN PART consistent with the opinion above.

2. As to the claim for contractual reformation on the grounds of mistake, the clerk of court is directed to enter judgment for plaintiff.

3. Stifel may have until Friday, June 27, 2014, to make any further evidentiary or legal proffer it may wish to show that the Band is not entitled to judgment as a matter of law on the issue of the Band's right to select Tribal Court as the forum for its pending claims against Stifel. No response is to be filed unless the court concludes Stifel has raised a potentially meritorious argument or fact that would necessitate a response.

4. Consistent with the above, the scheduled trial of this case to begin next Monday, June 23rd is stricken from the court's calendar.

Entered this 19th day of June, 2014.

BY THE COURT:

/s/

_____

WILLIAM M. CONLEY
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

TAKEDA PHARMACEUTICALS AMERICA, INC.; TAKEDA PHARMACEUTICALS U.S.A., INC., F/K/A TAKEDA PHARMACEUTICALS NORTH AMERICA, INC.; and TAKEDA PHARMACEUTICAL COMPANY, LIMITED,

Plaintiffs,

vs.

VICTOR CONNELLY,

Defendant.

CV 14-50-GF-BMM

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

I. SYNOPSIS

Defendant Victor Connelly has moved this Court to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1), for failure to exhaust tribal court remedies. (Doc. 10). Plaintiffs Takeda Pharmaceuticals America, Inc. ("TPA"), Takeda Pharmaceuticals U.S.A., Inc., f/k/a Takeda Pharmaceuticals North America, Inc. ("TPUSA"), and Takeda Pharmaceutical Company Limited ("TPC") (collectively "Takeda") oppose the motion. (Doc. 20).

This case stems from a lawsuit presently venued in the Blackfeet Tribal Court. (Doc. 1). The corresponding Blackfeet Tribal Court case involves the same jurisdictional issues as the case pending before this Court. (Doc. 1-1). Takeda has moved to dismiss Connelly's complaint in the Blackfeet Tribal Court. (Doc. 1-6). Takeda's motion remains pending in the Blackfeet Tribal Court. (Doc. 1).

II. JURISDICTION and VENUE

The Court possesses jurisdiction under 28 U.S.C. §1331. The Blackfeet Tribal Court's jurisdiction over Takeda presents a federal question. *Plains Commerce Bank v. Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008). Takeda may bring a federal action to challenge the Blackfeet Tribal Court's jurisdiction. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985).

Venue is proper under 28 U.S.C. § 1391(b) and L.R. 3.2(b). The underlying tribal court suit remains venued in the Blackfeet Tribal Court. The Blackfeet Tribal Court is located in Glacier County, Montana. Glacier County is within the Great Falls Division of the District of Montana.

III. FACTUAL and PROCEDURAL BACKGROUND

Defendant Victor Connelly is an enrolled member of the Blackfeet Tribe who resides on the Blackfeet Reservation. (Doc. 1 at 3). Connelly sought medical treatment at the Indian Health Service ("IHS") clinic on the Blackfeet Reservation for his Type 2 diabetes beginning in 2005. *Id.* at 6. Medical personnel at the IHS

clinic on the Blackfeet Reservation prescribed Actos for Connelly from 2005 to 2012. (Doc. 11 at 4). Actos controls blood sugar in adults with Type 2 diabetes. (Doc. 1 at 5). IHS medical personnel prescribed Actos to Connelly on the Blackfeet Reservation. (Doc. 11 at 14). Connelly filled the Actos prescriptions and ingested Actos on the Blackfeet Reservation. *Id.* IHS medical personnel diagnosed Connelly with bladder cancer in 2008. (Doc. 1 at 6).

The IHS provides medical care to Blackfeet Indians at clinics on the Blackfeet Reservation. (Doc. 1 at 6). The IHS clinic where Connelly received services sits on an allotment owned by the Blackfeet Tribe. (Doc. 20-1). The Blackfeet Tribe leases this allotment to the Public Health Service. *Id.*

Plaintiff TPUSA markets, and Plaintiff TPA sells, markets, and distributes Actos. (Doc. 1 at 3). TPA and TPUSA are incorporated in Delaware and their principal place of business is located in Illinois. *Id.* Plaintiff TPC is a Japanese corporation with its principal place of business in Japan. *Id.* TPC researched and manufactured Actos. *Id.* TPC is the parent company of TPUSA. *Id.*

Connelly filed a complaint against Takeda in the Blackfeet Tribal Court on August 1, 2013, in which he alleged that he contracted bladder cancer as a proximate result of his Actos use. (Doc. 1-1). Connelly alleges that Takeda violated the Blackfeet Consumer Sales Practices Act and various common law torts including strict products liability, negligence, gross negligence, breach of express

and implied warranties, misrepresentation and fraud. *Id.* Takeda moved to dismiss Connelly's complaint in Blackfeet Tribal Court for lack of jurisdiction on August 30, 2013. (Doc. 1-6). Takeda's motion to dismiss remains pending. (Doc. 1 at 8).

Takeda participated in limited discovery. (Doc. 1 at 8). Takeda produced a corporate representative to testify about Connelly's allegation that Takeda employees entered the Blackfeet Reservation to market Actos to IHS physicians. *Id.* Takeda's corporate representative claimed that Takeda employees did not enter the Blackfeet Reservation to market or promote Actos. (Doc. 1-8). The corporate representative's deposition testimony also stated that Takeda's contacts with IHS were through IHS headquarters in Oklahoma. (Doc. 1-9). Takeda sales representatives and other employees also indicated that they never entered the Blackfeet Reservation. (Doc. 1-10).

Connelly filed an amended complaint in the Blackfeet Tribal Court on May 2, 2014. (Doc. 1-11). Connelly's amended complaint asserts tribal court jurisdiction based on Takeda's contacts with IHS to market Actos for the formulary, including to Blackfeet Indians. *Id.* Connelly's amended complaint also alleges that Takeda used marketing tactics to drive Actos business in all IHS facilities. *Id.*

Takeda filed a renewed motion to dismiss on May 14, 2014, in the Blackfeet Tribal Court. (Doc. 1-12). Takeda's renewed motion to dismiss continues to assert

that Connelly's new allegations fail to confer tribal court jurisdiction. *Id.* Takeda's renewed motion to dismiss remains pending in the Blackfeet Tribal Court. (Doc. 1 at 13).

Takeda sought injunctive and declaratory relief in this Court on July 8, 2014. (Doc. 1). Connelly moved to dismiss on September 10, 2014, based on Takeda's failure to exhaust tribal court remedies. (Doc. 10). Takeda has responded to Connelly's motion. (Doc. 20). Connelly has replied to Takeda's response. (Doc. 31). Takeda filed a surreply. (Doc. 35). The Court conducted a hearing on February 28, 2015, regarding Connelly's motion to dismiss. (Doc. 57).

IV. DISCUSSION

Non-Indians may bring a cause of action under 28 U.S.C. § 1331 to challenge tribal court jurisdiction. *Elliott v. White Mountain Apache Tribal Ct.*, 566 F.3d 842, 846 (9th Cir. 2009). Subject to limited exceptions, a non-Indian is subject to a mandatory requirement to first exhaust remedies in tribal court before bringing suit in federal court. *Nat'l Farmers Union*, 471 U.S. at 850-53; *see also Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 920 (9th Cir. 2008).

The tribal court exhaustion requirement is not a jurisdictional bar. *Grand Canyon Skywalk Development, LLC v. 'SA' NYU WA Inc.*, 715 F.3d 1196, 1200 (9th Cir. 2013). The exhaustion requirement instead represents a prerequisite to a federal court's exercise of its own jurisdiction. *Grand Canyon Skywalk*, 715 F.3d at

1200. A federal court may intervene only after the tribal appellate court has ruled on the jurisdictional issue. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 20 (1987).

Principles of comity obligate the Court to dismiss or abstain from adjudicating claims over which the tribal court's jurisdiction is "colorable" or "plausible." *Atwood v. Fort Peck Tribal Ct. Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008). The Court may relieve a non-Indian from the duty to exhaust, however, where it determines that tribal court jurisdiction is "plainly lacking." *Strate v. A-1 Contractors*, 520 U.S. 438, 459 n. 14 (1997); *see also Nat'l Farmers Union*, 471 U.S. at 854. Accordingly, this Court is charged with determining only whether the Blackfeet Tribal Court "plainly" lacks jurisdiction over Takeda.

A. Ownership Status of Land

Connelly bases his claims on activities that took place at the IHS facility on the Blackfeet Reservation. (Docs. 1, 1-1, 10). The IHS clinic sits on a land allotment owned by the Blackfeet Tribe. (Doc. 20-1). The Blackfeet Tribe leases the allotment to the Public Health Service ("PHS lease") for the purpose of operating the IHS clinic. *Id.* The Bureau of Indian Affairs ("BIA") for the Department of the Interior administers the lease. *Id.*

As a threshold matter, the Court must examine the ownership status of the land on which the IHS facility sits and the restrictions, if any, the PHS lease imposes on the Blackfeet Tribe's status as a landowner. Land ownership status

may prove a dispositive factor in determining whether to uphold a tribe's regulation of non-Indians. *Nevada v. Hicks*, 533 U.S. 353, 360 (2001). The absence of tribal land ownership generally corresponds with the absence of tribal civil jurisdiction. *Hicks*, 533 U.S. at 360. The Supreme Court has rejected tribal jurisdiction over non-member activity on land over which the tribe could not assert a landowner's right to occupy and exclude. *Strate*, 520 U.S. at 456; *Montana v. United States*, 450 U.S. 544, 557 (1981). Takeda asserts that the leased status of the land that the IHS clinic occupies deprives the Blackfeet Tribe of this authority. (Doc. 20 at 10-13).

An Indian tribe possesses the authority to lease its own land. 25 U.S.C. § 415. The Secretary of the Interior, as a procedural matter, grants and terminates leases involving tribal land. *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072, 1073 (9th Cir. 1983). The federal regulations applicable to tribal leases seek to "promote tribal control and self-determination over tribal land." 25 C.F.R. § 162.021(b). The BIA also aims to ensure that the use of tribal land comports with the Indian landowner's wishes and tribal law. 25 C.F.R. § 162.021(d).

Tribal law applies to these leases and to the lands underlying the leases. 25 C.F.R. § 162.014. The BIA must comply with tribal law in making decisions that concern a tribal land lease. 25 C.F.R. § 162.016. A tribe may contract or compact

under the Indian Self-Determination Act, 25 U.S.C. 450 *et seq*., to administer any portion of the lease, including its cancellation. 25 C.F.R. § 162.018.

McDonald v. Means, 309 F.3d 530 (9th Cir. 2002), informs the Court's analysis of the PHS lease and the PHS lease's impact on the Blackfeet Tribe's landowner authority. In *McDonald*, a tribal member was involved in a vehicle collision with a non-member's horse that wandered onto a BIA road within an Indian reservation. 309 F.3d at 535. The tribal member sued the non-member in tribal court. *Id.* at 536. The non-member sought relief in federal court. *Id.* The federal district court held that the tribal court lacked jurisdiction and granted summary judgment in favor of the non-member. *Id.*

The Ninth Circuit reversed and concluded that the tribe retained civil jurisdiction over the suit. *Id.* The Ninth Circuit determined that the federal regulations applicable to the tribal road right-of-way grant to the BIA conferred significant tribal responsibilities and tribal control over the land that reserved the tribe's gatekeeping authority. *Id.* at 537-40. The Ninth Circuit also cited the fiduciary nature of the relationship between the tribe and the BIA as relevant to its determination that the tribe's right to occupy and exclude were not encumbered significantly by the BIA grant. *Id.* at 538. The Ninth Circuit determined that the BIA right-of-way qualifies as a tribal road not governed by *Strate*, or non-Indian fee land under *Montana*. *Id.* at 537.

The Blackfeet Tribe appears to exercise authority over the leased parcel comparable to the authority retained by the tribe in *McDonald* based on the applicable federal regulations. The Blackfeet Tribe owns the land in question. The BIA administers the PHS lease as part of its fiduciary responsibilities similar to the BIA's role in managing the right-of-way grant in *McDonald*. The PHS lease remains subject to BIA regulations similar to those applicable to the BIA grant in *McDonald*, both of which are for a uniquely Indian purpose and for the benefit of Indian tribes. The Blackfeet Tribe retains authority to commence, administer, and cancel the lease. The PHS lease does not appear to diminish the Blackfeet Tribe's landowner status to the point of negating Connelly's claim of Blackfeet Tribal Court jurisdiction. At a minimum, the IHS allotment does not qualify as non-Indian fee land that prohibits tribal court jurisdiction.

B. Tribal Court Jurisdiction Based on the Inherent Right to Exclude

Connelly argues that the recent decisions of the Ninth Circuit in *Water Wheel Camp Recreation Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011), and *Grand Canyon Skywalk* eliminate the need to consult *Montana*. (Doc. 11 at 14). Connelly claims that the land's status as tribal precludes application of *Montana*. (Docs. 11 at 14, 31 at 15). Connelly cites the fact that Takeda widely circulated Actos on the Blackfeet Reservation. *Id.* Connelly further argues that IHS physicians prescribed Actos on the Blackfeet Reservation and that he ingested

Actos on the Blackfeet Reservation. *Id.* Connelly argues that these factors invoke application of the *Water Wheel* and *Grand Canyon Skywalk* analysis. *Id.* Takeda argues that it marketed Actos to the BIA in Oklahoma and that Takeda's agents never actually stepped foot on the Blackfeet Reservation. (Doc. 20 at 19).

Indian tribes maintain broad authority over the conduct of both tribal and non-tribal members on Indian land, or land held in trust for a tribe by the United States. *Strate*, 520 U.S. at 454; *Williams v. Lee*, 358 U.S. 217, 222 (1959). The Court presumes that tribal courts maintain civil jurisdiction over the activities of non-Indians on tribal land unless affirmatively limited by federal law. *McDonald*, 300 F.3d at 1040; *LaPlante*, 480 U.S. at 18.

An Indian tribe retains the authority to regulate activities that take place on tribal land based on the tribe's inherent power to exclude. *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993); *see also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983). The Ninth Circuit previously has determined that a tribe's inherent authority over its own land provides for regulatory authority over non-member actions on tribal land. *Grand Canyon Skywalk*, 715 F.3d at 1204; *see also Water Wheel*, 642 F.3d at 804-05. A tribe's adjudicatory authority remains coextensive with its regulatory authority. *Strate*, 520 U.S. at 453.

This Court's analysis begins with *Water Wheel*. The tribe in *Water Wheel* leased tribal land to a non-Indian corporation. 642 F.3d at 805. The non-Indian

corporation operated a recreational resort on the leased tribal land. *Id.* The lease expired and the non-Indian corporation refused to vacate. *Id.* The non-Indian corporation continued to operate on the tribal land. *Id.* The tribe brought an action in the tribal court against the non-Indian corporation for eviction. *Id.* The non-Indian corporation sought declaratory and injunctive relief in federal district court while the tribal court case was pending. *Id.* at 807. The district court entered jurisdictional rulings from which both parties appealed. *Id.* at 808.

The Ninth Circuit held that the tribe possessed regulatory jurisdiction over the non-Indian corporation for claims arising from the non-Indian corporation's activities on tribal land. *Id.* at 814. The Ninth Circuit determined that the tribe possessed jurisdiction based on its inherent authority to exclude. *Id.* The Ninth Circuit concluded that the tribe's status as landowner conferred regulatory jurisdiction. *Id.* The tribe's inherent authority to exclude stands apart from the limitations recognized in *Montana*. *Id.* The Court saw no need to consider *Montana* where the non-member activity in question occurred on tribal land, the activity interfered directly with the tribe's inherent powers to exclude and manage its own lands, and there are no competing state interests at play. *Id.*

Grand Canyon Skywalk further guides this Court's analysis. A non-Indian corporation and a tribal corporation entered into a contract to construct and manage a tourist attraction on tribal land for a fee. *Grand Canyon Skywalk*, 715 F.3d at

1199. The tribe invoked its eminent domain authority when it commenced proceedings in tribal court to acquire the non-Indian corporation's interest. *Id.* The non-Indian corporation sought a temporary restraining order in federal court. *Id.* The district court denied the petition and required the non-Indian corporation to first exhaust tribal court remedies. *Id.* The Ninth Circuit affirmed. *Id.*

The Ninth Circuit recognized the tribe's inherent power to exclude in explaining that the tribe retained the power to limit access to the tourist attraction since the attraction was located on tribal land. *Id.* at 1204. The contract between the non-Indian corporation and the tribal corporation interfered with the tribe's right to exclude the non-Indian corporation from the reservation. *Id.* Tribal court jurisdiction was not "plainly" lacking based on the tribe's power to exclude, which provides for the lesser powers to regulate and adjudicate. *Id.* at 1205 (citing *Water Wheel*, 642 F.3d 802, and *Bourland*, 508 U.S. 679).

The analysis in *Water Wheel* and *Grand Canyon Skywalk* seems to apply to Takeda's alleged interference with the Blackfeet Tribe's right to exclude. The actions underlying Connelly's claims took place on the Blackfeet Reservation. The claims in *Water Wheel* and *Grand Canyon Skywalk* stemmed from conduct that took place on tribal land. Connelly further claims that he suffered the effects of Takeda's product Actos while on the Blackfeet Reservation and that he acquired the drug after it had been prescribed by IHS medical personnel. Connelly's claim

implicates no competing state interest that would mitigate against tribal court jurisdiction. *Water Wheel*, 642 F.3d at 814.

The Court at this juncture simply must determine whether Blackfeet Tribal Court "plainly" lacks jurisdiction. The IHS facility sits on leased Indian land. This fact, by itself, amounts to a colorable claim of jurisdiction. The Blackfeet Tribal Court maintains a colorable claim of jurisdiction based on the alleged conduct on tribal trust land. This determination precludes analysis at this point as to whether either *Montana* exception provides a colorable basis for Blackfeet Tribal Court jurisdiction. *Admiral Ins. Co. v. Blue Lake Rancheria Tribal Ct.*, 2012 WL 1144331 (N.D. Cal. 2012).

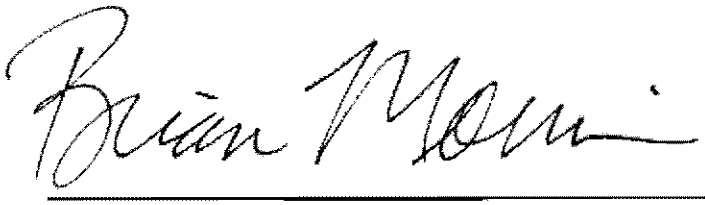
V. CONCLUSION

It is not apparent at this stage of the litigation that the Blackfeet Tribal Court "plainly" lacks jurisdiction over this matter as to excuse Takeda from exhausting tribal court remedies. *Grand Canyon Skywalk*, 715 F.3d at 1205. The orderly administration of justice will be served by allowing the Blackfeet Tribal Court to develop a factual record before this Court addresses the merits of Takeda's claims or questions concerning appropriate relief. *Stock West Corp. v. Taylor*, 942 F.2d 912, 919 (9th Cir. 1991).

IT IS HEREBY ORDERED that Defendant Victor Connelly's motion to dismiss (Doc. 10) is GRANTED. Plaintiff Takeda's complaint (Doc. 1) is DISMISSED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that Plaintiff Takeda's motion for summary judgment (Doc. 36) is DENIED WITHOUT PREJUDICE as moot.

DATED this 24th day of April, 2015.



Brian Morris
United States District Court Judge