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Winner, Best Appellate Brief in the 2016 Native American Law Student Association Moot Court Competition

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SPECIAL FEATURE

WINNER, BEST APPELLATE BRIEF IN THE 2016 NATIVE AMERICAN LAW STUDENT ASSOCIATION MOOT COURT COMPETITION

Ashley Akers * & *Maureen Orth* **

Questions Presented

I. Whether Michiconsin retains Public Law 280 jurisdiction to keep peace across the state and enforce a criminal prohibition of cannabis against the M-A Nation given that the Secretary of the Interior never accepted retrocession pursuant to federal procedures.

II. Whether The High End Hotel is entitled to sovereign immunity even though it serves merely business purposes and if not, whether Michiconsin state courts have jurisdiction to apply common law tort doctrine given the state's strong interest in providing recourse for tort victims.

Statement of the Case

I. Statement of Facts

This case is about preserving peace and safety across the state of Michiconsin by permitting Michiconsin to apply its criminal law to illegal behavior on the M-A Nation reservation and allowing tort victims to recover after being exposed to highly carcinogenic toxins. The M-A Nation is a federally recognized Indian tribe in the state of Michiconsin. R. at 1. In 1965, Michiconsin assumed jurisdiction to the fullest extent possible over Indian country within its borders pursuant to Section 7 of Public Law 280 (Pub. L. 280). R. at 1. Pub. L. 280 is codified at 18 U.S.C. § 1162 and grants state jurisdiction over offenses “committed by or against Indians in the areas of Indian country.” 18 U.S.C. § 1162(a) (2012). Thus, the criminal

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laws of Michiconsin have had the same “force and effect” within the M-A Nation’s territory as they have elsewhere in the state since Michiconsin assumed full jurisdiction in 1965. *See id.*; R. at 1. This includes Michiconsin criminal statutes MCL 5.43 and 4.20. *See* R. at 2. The Grant County Sheriff’s Office has been and continues to be responsible for providing law enforcement for the M-A Nation. R. at 1.

In 2000, after the Michiconsin legislature declined to retrocede its jurisdiction over the M-A Nation’s reservation, the Michiconsin Governor issued a proclamation retroceding the jurisdiction Michiconsin assumed in 1965 pursuant to Pub. L. 280. R. at 1. The proclamation was delivered to the U.S. Department of the Interior, but no official acceptance by the Secretary of the Interior was issued. R. at 1. After seven years of repeated inquiries, the Assistant Secretary for Indian Affairs advised the M-A Nation to treat the Secretary’s inaction as acquiescence of the retrocession, though, to date, the Secretary of the Interior has yet to formally accept the retrocession. R. at 1. The Tribe received a grant to support development of its own court and law enforcement capacity, but the local county sheriff has continued to assert criminal jurisdiction and protect peace on the reservation. R. at 1. In fact, the sheriff has made several public statements claiming jurisdiction over the M-A Nation reservation. R. at 1. This includes enforcing MCL 5.43 and 4.20 against the M-A Nation corporation’s officers, and its Tribal Council, who violated the Michiconsin laws by cultivating and selling high-tetrahydrocannabinol (high THC) marijuana at The High End Hotel. R. at 2.

Under Michiconsin law, the cultivation, sale, or distribution of any part of the cannabis plant in Michiconsin is considered a felony and carries a \$10,000 fine with up to five years of imprisonment. R. at 2; *see also* MCL 5.43. The Hemp Development Act, codified in MCL 4.20, permits the cultivation of low THC cannabis (hemp) in very limited circumstances. R. at 2. First, only higher education institutions may receive state authorization to cultivate hemp. R. at 2. Second, institutions may cultivate hemp only insofar as it is necessary for an agricultural pilot program or academic research regarding the growth, cultivation, or marketing of industrial hemp. R. at 2. Neither of these narrow exceptions permitting the cultivation of hemp are present in this case. As a general matter, cultivating industrial hemp is prohibited in Michiconsin under MCL 4.20 and violators are subject to criminal penalties. R. at 2. Penalties for violating the Hemp Development Act include “a penalty of up to \$10,000 and up to two years imprisonment.” R. at 2.

The M-A Nation is the sole owner of a section 17 economic development corporation chartered under the Indian Reorganization Act. R. at 2. The corporation is informally referred to as the MAIN EDC and owns several enterprises located on trust land in the M-A reservation, including a commercial fishery, hotel and restaurant, saw mill, four gas stations and convenience stores, and a 5,000 acre farm. R. at 2. In 2014, the MAIN EDC incorporated a new entity named “The High End Hotel.” R. at 3.

The Tribal Council and the MAIN EDC officers violated both MCL 5.43 and 4.20 when they cultivated, distributed, processed, produced, manufactured, and sold cannabis products at The High End Hotel. R. at 3. After The High End Hotel initiated its illegal cannabis operation, the Grant County Sherriff’s office conducted a raid of the hotel and seized 500 cannabis plants and seventy-five pounds of processed marijuana. R. at 3. The Grant County prosecutor charged the M-A Tribal Council and officers of the MAIN EDC for violating MCL 5.43 and 4.20. R. at 3.

During the seizure of the cannabis plants and processed marijuana, Charles Taylor, a local Grant County law enforcement officer, burned the cannabis in compliance with his official law enforcement duties. R. at 4. After burning the cannabis, Officer Taylor suffered injuries from inhalation of the highly carcinogenic pesticides used by The High End Hotel in the cultivation of the cannabis, including burns and ulcerations of the mouth, stomach, and lower GI tract. R. at 4. Only after Officer Taylor suffered these injures did the Michiconsin State Attorney General’s office discover the highly carcinogenic toxins came from a pesticide. R. at 4.

To recover against The High End Hotel for its tortious use of a pesticide containing highly carcinogenic toxins, the Michiconsin State Attorney General filed a tort claim in Michiconsin state court against The High End Hotel. R. at 4. The claim was filed on behalf of Officer Taylor and all of the state residents who experienced injury after burning the cannabis and being exposed to highly carcinogenic toxins. R. at 4.

II. Statement of Proceedings

In the criminal trial against the M-A Tribal Council and the MAIN EDC officers, the Grant County Court found that Michiconsin had criminal jurisdiction over the defendants for cultivating, selling, and distributing cannabis in violation of MCL 5.43 and 4.20, and concluded the defendants were guilty under both statutes. R. at 3. All of the defendants received the maximum sentence. R. at 3. The Michiconsin Court of Appeals and the State of Michiconsin Supreme Court affirmed the decision. R. at 3. The United States Supreme Court granted certiorari to decide two issues: (1)

whether the state of Michiconsin has criminal jurisdiction over the actions of the M-A Tribal Council and MAIN EDC officers within the M-A Nation's Indian Country; and (2) if the state of Michiconsin has criminal jurisdiction over the defendants, whether prosecution of the defendants under MCL 5.43 and 4.20 is nevertheless barred as an impermissible exercise of civil regulatory jurisdiction over the defendants. R. at 3.

Before hearing the merits of the State Attorney General's tort case against The High End Hotel, the Michiconsin state court dismissed the case on the theory that the M-A Nation's tribal sovereign immunity applied to The High End Hotel. R. at 4. The court also noted that Michiconsin lacked jurisdiction to apply its state common law tort doctrine to the on-reservation activities of the MAIN EDC. R. at 4. The Michiconsin State Attorney General appealed the ruling and both the Michiconsin Court of Appeals and the State of Michiconsin Supreme Court affirmed. R. at 4. The United States Supreme Court granted certiorari to decide two issues: (1) whether The High End Hotel has sovereign immunity thereby depriving Michiconsin courts of jurisdiction over the case; and (2) if The High End Hotel does not enjoy sovereign immunity, whether Michiconsin state courts have jurisdiction to apply state common law tort doctrine to the MAIN EDC's on-reservation activities. R. at 4.

Summary of Argument

This case is about ensuring the safety of residents across the state of Michiconsin. The state asserts valid criminal jurisdiction under Pub. L. 280 to enforce MCL 5.43 and 4.20 over the M-A Nation to protect its residents and prohibit the manufacturing, distribution, and sale of cannabis. Furthermore, the state seeks to hold The High End Hotel accountable to law enforcement officer Charles Taylor and state residents who experienced injury from breathing highly carcinogenic toxins elicited by the burning of cannabis manufactured on the M-A Nation's reservation.

Michiconsin retains jurisdiction under Pub. L. 280 to enforce MCL 5.43 and 4.20 against the MAIN EDC and the M-A Tribal Council because specific federal procedures for retrocession have not been met. Retrocession of Pub. L. 280 jurisdiction is a federal question. *See Oliphant v. Schlie*, 544 F.2d 1007 (9th Cir. 1976), *rev'd on other grounds*, 435 U.S. 191 (1978). The federal government has outlined specific procedures for state retrocession of Pub. L. 280 jurisdiction. *See* Exec. Order No. 11,435, 33 Fed. Reg. 1739. For example, the Secretary of the Interior must formally accept the retrocession. Until the specific federal procedures have been met,

Michiconsin retains Pub. L. 280 jurisdiction. In this case, the Secretary of the Interior has not accepted Michiconsin retrocession and therefore Michiconsin retains authority to enforce its criminal laws over the M-A Nation.

MCL 5.43 and 4.20 are criminal laws because, as a general matter, they prohibit, and do not regulate, the manufacturing, distribution, and sale of cannabis. Even if, however, the Court finds that Pub. L. 280 jurisdiction has been retroceded or that MCL 5.43 and 4.20 are regulatory, Michiconsin has jurisdiction to enforce MCL 5.43 and 4.20 because state law is neither pre-empted by federal law nor inconsistent with tribal interests reflected in federal law. Additionally, state interest in protecting its citizens from the harmful effects of cannabis and ensuring safety across the state outweighs tribal interest in raising revenue because the Tribe is engaged in several profitable enterprises.

In addition to having jurisdiction to enforce MCL 5.43 and 4.20, the Michiconsin State Attorney General can bring a tort action against The High End Hotel for its tortious conduct in exposing law enforcement personnel and state residents to highly carcinogenic toxins. The High End Hotel does not enjoy tribal sovereign immunity because it is not an arm of the M-A Nation; it functions solely as a profit-making enterprise seeking to capitalize in an otherwise illegal market. Furthermore, the policies of sovereign immunity are not served when this immunity is extended to protect a corporate entity from its freely assumed enterprises. Lastly, sovereign immunity should not protect corporate entities in tort cases because injured victims will be left without recourse.

Because The High End Hotel does not enjoy tribal sovereign immunity, the State Attorney General can bring a tort action against the hotel and Michiconsin state courts have jurisdiction to apply its common law tort doctrine. Michiconsin common law tort doctrine is generally applicable because regulating tort cases is in the purview of state governance. Furthermore, Michiconsin common law tort doctrine is not pre-empted by federal law and does not infringe on tribal interests of self-determination or self-government reflected in federal law. Lastly, Michiconsin has a strong interest in providing recourse to state residents that were victimized after being exposed to highly carcinogenic toxins in Michiconsin because of The High End Hotel's tortious conduct.

*Argument**I. Michiconsin has criminal jurisdiction under Pub. L. 280 to enforce its criminal laws over the M-A Nation including MCL 5.43 and 4.20.*

Michiconsin retains the jurisdiction it assumed under Pub. L. 280 over the M-A Nation in 1965. Michiconsin retains criminal jurisdiction to enforce MCL 5.43 and 4.20 because the Secretary of the Interior has not accepted Michiconsin's retrocession of Pub. L. 280. Because retrocession is a federal question, until the specific federal procedures for retrocession have been met Michiconsin may enforce its criminal laws over the M-A Nation.

Additionally, Michiconsin properly exercised jurisdiction in charging the M-A Tribal Council and MAIN EDC officers for violating MCL 5.43 and 4.20. Enforcing MCL 5.43 and 4.20 represents a permissible exercise of criminal jurisdiction under Pub. L. 280 because the laws are primarily prohibitory, not regulatory, in nature. Finally, even if the Court finds that Pub. L. 280 jurisdiction has been retroceded or that MCL 5.43 and 4.20 are regulatory, the state has jurisdiction to regulate the M-A Nation through MCL 5.43 and 4.20 because the state law is not pre-empted by federal law and state interest in ensuring law and order across Michiconsin outweighs tribal interest in selling cannabis.

A. Pub. L. 280 retrocession is a federal question.

Congress alone has plenary and exclusive power over Indian affairs. *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470 (1979). Thus, when "Congress has expressly provided," state laws are "applied to tribal Indians on their reservations." *California v. Cabazon Band of Miss. Indians*, 480 U.S. 202, 207, 214 (1987). By enacting Pub. L. 280, Congress expressly provided "federal consent" to state assumption of criminal jurisdiction over Indian country. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 879 (1986).

When enacting Pub. L. 280, Congress outlined specific procedures for states to assume jurisdiction over Indian country and outlined how states may later petition the federal government to accept retrocession of jurisdiction. *Id.*; see also 25 U.S.C. § 1323 (2012). Therefore, retrocession is a question of federal law involving specific federal procedures and federal considerations. See *Oliphant*, 544 F.2d at 1007. Because the federal government has not accepted retrocession of Michiconsin's jurisdiction pursuant to the federal procedures, the state retains criminal jurisdiction

over the M-A Nation's Indian country to enforce MCL 5.43 and 4.20 and preserve peace throughout the state.

1. The federal procedures for Pub. L. 280 retrocession have not been met.

Because the Secretary of the Interior has yet to accept Michiconsin's proclamation of retrocession, Michiconsin retains criminal jurisdiction over the M-A Nation's Indian country. Congress authorized states to retrocede Pub. L. 280 jurisdiction by petitioning the Secretary of the Interior. *See* 25 U.S.C. § 1323; *see also* Exec. Order No. 11,435, 33 Fed. Reg. 1739. Furthermore, the Secretary must consult with the Attorney General before accepting retrocession and then publish retrocession in the federal register. *See* Exec. Order No. 11435, 33 Fed. Reg. 1739. Therefore, a state retains criminal jurisdiction over Indian country pursuant to Pub. L. 280 until the Secretary of the Interior consults with the Attorney General, accepts the retrocession, and publishes notice of retrocession in the federal register. *See United States v. Lawrence*, 595 F.2d 1149, 1151 (1979) (describing how the Secretary of the Interior accepted the retrocession proclamation of the Governor of Washington).

Key to these procedures is the fact that nothing in § 1323 nor Executive Order 11435 requires the Secretary to accept retrocession. *See* Exec. Order No. 11,435, 33 Fed. Reg. 1739; *see also* 25 U.S.C. § 1323. Instead, the Secretary of the Interior will consult with the Attorney General about several important considerations to decide whether to transfer jurisdiction from the enforcing state back to the federal government. *See* Exec. Order No. 11,435, 33 Fed. Reg. 1739. The Secretary of the Interior will consider factors such as whether the Native council is prepared to exercise effective jurisdiction, and whether the Tribe has satisfactory law enforcement provisions in place to manage additional peace-keeping responsibilities. *See* File No. 366-131-861985 WL 70193, at *1 (Alaska A.G. Oct. 16, 1985) (explaining the Secretary of the Interior's considerations for accepting retrocession). In other words, the Secretary of Interior's acceptance of retrocession is not merely a formality, but a careful consideration of federal, state, and tribal interests in law and order that cannot be passed over or "acquiesced by silence" as the M-A Nation asserts.

Although the Michiconsin governor issued a proclamation retroceding jurisdiction from the state back to the federal government, the proclamation was never accepted by the Secretary of the Interior. The Secretary of the Interior never consulted with the Attorney General nor weighed the important considerations of transferring jurisdiction. After seven years of

silence from the Department, the only notice the M-A Nation received was from the Assistant Secretary for Indian Affairs, not the Secretary of the Interior. The Assistant Secretary directed the Tribe to treat the Department's inaction as acquiescence, yet the Secretary never formally accepted retrocession nor published retrocession in the federal register. Therefore, Michiconsin has continued to properly assert criminal jurisdiction over the M-A Nation's Indian country and to preserve peace across the state.

2. *Michiconsin retains jurisdiction consistent with federal policy.*

Pub. L. 280 and its subsequent amendments represent specific concerns and considerations for the balance of federal, tribal, and state interests. According to this Court in *Yakima*, Pub. L. 280 reflects Congressional concern over "law-and-order problems" in Indian country as well as "financial burdens" associated with federal jurisdictional responsibilities on Indian lands. *Yakima*, 439 U.S. at 488. Therefore, at the outset, Pub. L. 280 "was intended to facilitate, not to impede, the transfer of jurisdictional responsibility to the states." *Id.* at 490.

Congress's policy toward Indian tribes is now one of self-determination and self-government, as reflected in Congress's amendments to Pub. L. 280. *See Cabazon*, 480 U.S. at 216. Since 1968, Congress has required consent from tribes before a state may assume jurisdiction. *See Kennerly v. Dist. Court of Ninth Judicial Dist. of Mont.*, 400 U.S. 423, 425 (1971). Additionally, in 1968, Congress provided specific provisions for retrocession of state jurisdiction. *See Three Affiliated Tribes*, 476 U.S. at 877. But Congress has created no retrocession provision for states that assumed jurisdiction after 1968. *See id.* Congress recognized no need for retrocession in instances where jurisdiction was lawful to the extent it was "consistent with Indian tribal sovereignty and self-government." *Id.* at 877.

To strike a balance between tribal self-government and law and order, the federal government provided very specific provisions for retroceding jurisdiction assumed prior to 1968—this includes Michiconsin. *See id.* These retrocession provisions reflect Congress's policy toward self-determination and self-government by providing specific procedures that account for concerns over law and order in Indian country. Therefore, the Secretary of the Interior will accept retrocession only after specifically considering the interests of the tribe, state, and federal government in transferring state jurisdiction. *See* File No. 366-131-861985 WL 70193, at *1 (Alaska A.G. Oct. 16, 1985) (explaining the Secretary of the Interior's considerations for accepting retrocession).

As of this time, the only action taken toward Michiconsin's retrocession of Pub. L. 280 jurisdiction is the Michiconsin Governor's proclamation. The Secretary of the Interior has remained silent. The specific federal considerations that protect the balance of "law and order" as well as "tribal self-determination" have not been taken into account. While the M-A Nation may have received a grant to improve their tribal court and law enforcement capacity, it is up to the Secretary of the Interior to determine whether the Tribe is prepared to assume full jurisdiction with no state assistance. Yet the Department of the Interior has merely instructed the Tribe to treat silence as "acquiescence." Recognizing retrocession where the Secretary of the Interior has not formally accepted state retrocession runs afoul of Congressional interests. Without ensuring that a tribe is equipped to enforce law and order on its own, there is a risk that tribal law enforcement will be unsuccessful. Therefore, recognizing retrocession without following federal procedure undermines, rather than promotes, Congress's policy of tribal self-determination and self-government.

B. Michiconsin properly enforced MCL 5.43 and 4.20.

Because MCL 5.43 and 4.20 are criminal, prohibitory laws, Michiconsin properly prosecuted the M-A Tribal Council and the MAIN EDC officers. MCL 5.43 and 4.20 are criminal because they prohibit, rather than regulate, the cultivation, sale, and distribution of any part of the cannabis plant. Additionally, even if the Court finds that Pub. L. 280 jurisdiction has been retroceded or that MCL 5.43 and 4.20 are regulatory, MCL 5.43 and 4.20 still apply in this case. MCL 5.43 and 4.20 apply because state law is not pre-empted by federal law and state interests in preventing drug trafficking across the state outweighs any tribal interest at stake.

1. MCL 5.43 and 4.20 are criminal laws and thus enforceable.

The first step in determining whether a state law applies under Pub. L. 280 is to determine whether the law is "criminal/prohibitory" in nature. *Cabazon*, 480 U.S. at 209. The Court distinguished between "criminal/prohibitory" and "civil/regulatory" in *Cabazon*. *Id.* If the state law generally "prohibit[s] certain conduct," then it falls within Pub. L. 280's "grant of criminal jurisdiction." *Id.* The state law is civil/regulatory and falls outside the grant of criminal jurisdiction if the law "generally permits" the conduct at issue. *Id.*; see also *Quechan Indian Tribe v. McMullen*, 984 F.2d 304, 308 (9th Cir. 1993) (holding that a law prohibiting dangerous fireworks except in the hands of licensed professionals was criminal/prohibitory in nature).

Here, there is little question that MCL 5.43 is criminal/prohibitory in nature because it prohibits the cultivation, sale, and distribution of any amount of cannabis in Michiconsin. The violation of MCL 5.43 is considered a felony and carries a \$10,000 fine with up to five years imprisonment.

Similarly, the Hemp Development Act generally prohibits all cultivation of cannabis and thus MCL 4.20 is also prohibitive in nature. Michiconsin prohibits cultivation of all hemp except in two limited circumstances. First, Michiconsin only authorizes higher institutions to cultivate industrial hemp. *See* MCL 4.20. Second, the cultivation must be necessary for an agricultural pilot program or academic research. *See id.* This is a marked contrast from the regulatory law at issue in *Cabazon*.

In *Cabazon*, the Court found a law was civil/regulatory in nature because the state, as a general matter, encouraged the conduct at issue. *See Cabazon*, 480 U.S. at 210. California sought to enforce a state regulatory law that permitted bingo games as long as they were operated by charitable organizations. *Id.* at 205. Key to the Court's holding in *Cabazon* was that California by no means prohibited all forms of gambling—in fact, California promoted and encouraged its citizens to participate in a state lottery. *Id.* at 210. Additionally, the Court found that although California prohibited some forms of gambling, many forms of unenumerated games were permissible and operated in facilities statewide. *Id.* Finally, California did not make any effort to forbid playing bingo by anyone over eighteen years old. *Id.* at 211. Thus, the Court concluded that the California statute regulated, rather than prohibited, bingo. *Id.*

In direct contrast, Michiconsin prohibits all cultivation of hemp and cannabis through MCL 5.43 and 4.20. Michiconsin in no way promotes or encourages its citizens to cultivate or use hemp or cannabis because the cultivation or sale of any amount of cannabis carries a \$10,000 fine and up to ten years imprisonment. The cultivation of low-THC cannabis, or hemp, is only permissible in limited circumstances by higher education institutions as part of agricultural research. Additionally, even institutions require specific state authorization to ensure cultivation is associated with agricultural growth, cultivation, or marketing research and there is no higher education research present here. Therefore, while California generally permitted bingo but regulated it in limited circumstances, here, Michiconsin generally prohibits all cultivation and use of cannabis except in very limited circumstances, none of which are applicable here. Therefore, MCL 5.43 and 4.20 are criminal/prohibitory in nature and

Michiconsin had proper jurisdiction to apply the laws to the M-A Tribal Council and MAIN EDC officers under Pub. L. 280.

2. *State law applies even if the Court finds Pub. L. 280 jurisdiction has been retroceded or that MCL 5.43 and 4.20 are regulatory.*

There is no *per se* rule precluding state jurisdiction over tribes and tribal members absent congressional consent. *Cabazon*, 480 U.S. at 215. In fact, a state may validly assert authority over a tribe and tribal members provided state law is not pre-empted by federal law and is not incompatible with federal law and policy toward tribal interests. *See id.* at 216. Even if state law is incompatible, the Court will consider whether the state interests at stake are sufficient to justify the assertion of state authority. *Id.* (citing *Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983)). Therefore, even if the Court finds that Pub. L. 280 jurisdiction has been retroceded or that MCL 5.43 and 4.20 are regulatory, Michiconsin properly enforced MCL 5.43 and 4.20 against the MAIN EDC officers and Tribal Council.

a) *Michiconsin law is not pre-empted by federal law or tribal interests.*

Recent cases have established a trend “away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption.” *Rice v. Rehner*, 463 U.S. 713, 718 (1983) (quoting *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 172 (1973)). In its pre-emption analysis, the Court does not require that Congress “explicitly pre-empt assertion of state authority” in Indian Country. *Rice*, 463 U.S. at 719. Instead, the Court recognizes that any applicable state regulatory interest “must be given weight” against a “backdrop” of tribal sovereignty. *Id.* Additionally, if the Court finds that the balance of state, federal, and tribal interests “so requires,” the backdrop of tribal sovereignty should be given less weight. *Id.* at 720.

In the record, there is no evidence that Michiconsin state law is preempted by federal law. In fact, Michiconsin law is consistent with federal law because cannabis is illegal under both. 21 U.S.C. § 812, § 841 (2012) (stating that marijuana is a Schedule I controlled substance and it is illegal under federal law to manufacture or distribute). Therefore, the inquiry becomes whether the state law is compatible with federal and tribal interests reflected in federal law, “unless the state interests at stake are sufficient to justify assertion of state authority.” *Cabazon*, 480 U.S. at 216.

Through its pre-emption analysis, the Court weighs the congressional goal of Indian self-government against state interests in asserting authority. *See id.* Congress’s “overriding goal” is encouraging tribal self-sufficiency

and economic development. *Id.* (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983)). Here, however, there are no federal interests in supporting tribal self-government or economic development that outweigh Michiconsin's interests in preventing the cultivation of cannabis because the Tribe has numerous ways to raise revenue.

In *Cabazon*, the Court found that state interest in regulating bingo did not justify applying state law to the Tribe. Yet key to the Court's holding was federal governmental approval of tribal gaming and the lack of other means the Tribe had to raise revenue. *See id.* at 219. The situation here is markedly different; not only is there no evidence that the federal government approves of the cultivation, distribution, or sale of cannabis, there is also nothing to suggest that selling cannabis is the Tribe's only way to raise revenue. *See* 21 U.S.C. § 812, § 841. The MAIN EDC owns several enterprises including a commercial fishery, hotel and restaurant, saw mill, four gas stations and convenience stores, and a 5,000 acre farm. Given the numerous profit bearing enterprises of the M-A Nation, selling cannabis is not necessary for the Tribe to raise revenue and thus not essential to Indian self-government.

b) State interest necessitates regulation.

Even if the Court finds some tribal interests in self-sufficiency are at stake, the Court will also consider whether state interests at issue justify assertion of authority. *See Cabazon*, 480 U.S. at 216. The Court has recognized that "[w]hen . . . state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land. . . ." *Nevada v. Hicks*, 533 U.S. 353, 362 (2001); *see also Cabazon*, 480 U.S. at 216 (quoting *Mescalero Apache Tribe*, 462 U.S. at 333).

In *Rice*, the Court justified state jurisdiction over on-reservation liquor sales because of state interests in inevitable "spillover." *See* 463 U.S. at 724. The Court recognized that the unique off-reservation effects of liquor sales, such as alcoholic beverages making their way into the hands of those whom the state did not wish to have alcoholic beverages, necessitated state jurisdiction. *See id.*

Similarly, here cannabis sales present unique spillover risks which necessitate Michiconsin jurisdiction. Michiconsin has tremendous interest in preventing the cultivation, distribution, and sale of cannabis within its borders. Drug cultivation and distribution brings increased rates of crime and gang related activity. *See Hearing on Addressing the Harmful Effects of Dangerous Drugs in Native Communities Before the United States Sen.*

Committee on Indian Affairs (Mar. 31, 2015) (Testimony of Darren Cruzan, Director, Office of Justice Services, Bureau of Indian Affairs). When drugs are cultivated, manufactured, and sold on the reservation, the effects are felt across Michiconsin as smugglers attempt to capitalize on the burgeoning reservation drug market where cannabis is otherwise illegal. The Court must recognize that the MAIN EDC's activity stands to have a substantial impact beyond the reservation. State interest in preserving peace and safety across Michiconsin justifies state authority in regulating cannabis in the M-A Nation. Accordingly, the decision of the Supreme Court of Michiconsin should be affirmed.

II. Michiconsin's claim against The High End Hotel is not barred by tribal sovereign immunity and Michiconsin state courts have jurisdiction to apply its state common law tort doctrine.

The Michiconsin state court should reach the merits of *Michiconsin v. The High End Hotel* because The High End Hotel does not enjoy the M-A Nation's tribal sovereign immunity. The High End Hotel is an entity legally distinct from the Tribe. Sovereign immunity does not protect The High End Hotel from its tortious conduct because it is not an arm of the M-A Nation, the policies of sovereign immunity are not served in this case, and sovereign immunity should not protect entities in tort cases. Thus, The High End Hotel should be held accountable for its actions including liability for exposing a state officer and state residents to highly carcinogenic toxins.

Furthermore, Michiconsin has jurisdiction to apply its state common law tort doctrine. When a state assumes adjudicatory jurisdiction over a case involving non-Indians and an Indian entity, it may apply its own law so long as it is not pre-empted by federal law or by tribal interests of self-determination and self-government reflected in federal law. *See Rice*, 463 U.S. at 718. Here, state common law tort doctrine is not pre-empted by either. Furthermore, Michiconsin has a substantial interest in protecting citizens across the state from the effects of The High End Hotel's dangerous enterprise.

A. The High End Hotel does not enjoy tribal sovereign immunity.

Tribal immunity is "settled law" and an important protection of Indian sovereignty. *See Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 756 (1998). Yet it was "developed almost by accident" and is not limitless. *Id.* For example, this Court has "never held that corporations affiliated with an Indian tribe have sovereign immunity." *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 24 N.Y.3d 538, 548 (2014). As such, this Court has yet

to articulate a test indicating when, if ever, corporations share in tribal immunity. Furthermore, while it is within Congress's plenary power to abrogate sovereign immunity of a tribe, *see Bay Mills*, 134 S. Ct. at 2031, "[i]t is clear from the cases involving tribal entities that such entities have no inherent immunity of their own." *Am. Prop. Mgmt. Corp. v. Superior Court*, 206 Cal. App. 4th 491, 500 (2012) (quoting *Trudgeon v. Fantasy Springs Casino* 71 Cal. App. 4th 632, 639 (1999)).

1. *The High End Hotel is not an "arm of the tribe."*

A tribal entity only enjoys tribal immunity if it serves as an "arm" of the tribe. *See, e.g., Inyo Cty. v. Paiute-Shoshone Indians of Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 705 fn. 1 (2003); *Breakthrough Mgmt. Group v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1181 (10th Cir. 2010) (explaining that "[t]ribal sovereign immunity may extend to subdivisions of a tribe . . . provided that the relationship between the tribe and the entity is sufficiently close"). When determining whether an entity is an arm of the tribe, lower courts consider the following factors: whether the corporation was formed "solely for business purposes and without any declared objective of promoting the [tribe's] general tribal or economic development," *Breakthrough Mgmt.*, 629 F.3d at 1181 (quoting *Trudgeon v. Fantasy Springs Casino*, 71 Cal. App. 4th 632,640 (1999)), the "tribal involvement in the creation and control of the entity, tribal intent to clothe the entity with immunity, and [consideration of] whether the entity serves tribal sovereign interests." *See* Felix Cohen, *Handbook of Federal Indian Law*, § 7.05(1)(a) (2005 ed.); *see also Allen v. Gold Country Casino*, 464 F.3d 1044 (9th Cir. 2006); *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040 (8th Cir. 2000). Although lower courts have extended tribal immunity to some tribal entities, The High End Hotel is distinguishable in many regards.

Entities that operate solely for a business purpose are not an arm of the tribe and therefore do not enjoy tribal sovereign immunity. *See, e.g., Dixon v. Picopa Constr. Co.*, 772 P.2d 1104, 1111 (Ariz. 1989) (finding a corporation has no sovereign immunity because there was no proof it was created to conduct tribal business); *Breakthrough Mgmt.*, 629 F.3d at 1184 (explaining that entities with a distinct, non-governmental character are not immune from suit). Entities are only protected by tribal sovereign immunity when the entity furthers "governmental objectives, such as providing housing, health and welfare services." *Ransom v. St. Regis Mohawk Educ. & Comm. Fund*, 86 N.Y.2d 553, 558-59 (N.Y. 1995). The operation of The High End Hotel and its cannabis distribution center is not within the ambit

of a governmental objective or purpose. The dangerous properties of the cannabis do not further the health or welfare of the Tribe. Therefore, rather than promoting governmental objectives like health, welfare and housing, The High End Hotel is merely a corporation capitalizing on a quasi-criminal industry.

Because tribal governments often participate in commercial activities more so than other governments, the extent of tribal control over a corporation is indicative of whether it is an arm of the tribe. *See Breakthrough*, 629 F.3d at 1181. The High End Hotel is two steps removed from the tribe; it is a subsidiary of a Section 17 economic development corporation. The creation of an economic development corporation and its subsidiary are affirmative steps to distinguish the corporation from the tribe. Thus, the connection, and the extent to which the M-A Nation controls The High End Hotel, is attenuated. Furthermore, there are no facts in the record to suggest the M-A Nation intended The High End Hotel to share its immunity.

If an entity does not possess attributes of tribal sovereignty, it should not enjoy the tribe's immunity. Tribal sovereign interests include the ability to exercise sovereignty over its members and territory, the powers of self-government over members of a tribe, and the power to exercise authority over non-Indians on reservation lands when their conduct affects the political integrity, economic security, health, or welfare of the tribe. *See Montana v. United States*, 450 U.S. 544, 563 (1981). Here, the record is absent of any reference to improving the quality of life on the M-A Nation reservation. It can hardly be said that distributing a dangerous drug promotes the political, educational, or economic welfare of the Tribe, or preserves the cultural autonomy of the Tribe. In fact, because cultivating and distributing cannabis as a recreational drug stands to harm tribal members and non-members alike, distribution runs contrary to tribal interests. Therefore, because no evidence exists that The High End Hotel serves tribal sovereign interests as opposed to merely operating as a profitable cannabis business, it is not an arm of the Tribe and should not enjoy sovereign immunity.

2. The policies of sovereign immunity are not served by extending immunity to The High End Hotel.

In addition to identifying whether the entity is an arm of the tribe, courts consider the policies underlying sovereign immunity to determine whether those policies are served by extending sovereign immunity to tribal entities. *See Dixon*, 772 P.2d at 1111; *Cabazon*, 480 U.S. at 216 (the inquiry into

sovereign immunity must “proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government”). The purpose of tribal sovereign immunity is to serve as a “corollary to Indian sovereignty and self-governance.” *Three Affiliated Tribes*, 476 U.S. at 890. Therefore, if immunity is not critical to sovereignty and self-governance, then immunity should not apply.

The sole purpose of incorporating The High End Hotel was to make money. It created a loophole to market and distribute cannabis that was otherwise illegal in Michiconsin. *See* MCL 5.43, 4.20. Nothing in the record suggests that The High End Hotel and its cannabis operation was initiated to promote, develop, or protect the Tribe’s sovereignty, culture, or ability to self-govern. Nothing suggests the M-A Nation’s self-determination would be imperiled by declining to extend sovereign immunity to The High End Hotel. Although The High End Hotel presumably profited the M-A Nation to some extent, The High End Hotel is but one of many of the tribal corporations. *See* R. at 2 (the M-A Nation operates a commercial fishery, hotel, restaurant, saw mill, four gas stations and convenience stores, and a 5,000 acre farm).

This is not a case about protecting the Tribe’s health, welfare, or cultural rights. This is a case involving a hotel trying to make a quick dollar in an otherwise impenetrable market. The High End Hotel is a business entity—not a governmental entity and not an entity that needs protection from exposing innocent people to highly carcinogenic toxins. It is not enough to merely be incorporated under tribal law; the policies of sovereign immunity must be served before sovereign immunity is extended. Therefore, The High End Hotel should not be protected by the M-A Nation’s immunity because declining to extend tribal immunity in this case does not threaten the Tribe’s sovereignty or ability to self-govern.

3. Sovereign immunity should not apply to tort claims.

Finally, sovereign immunity should not extend to tribal entities in tort cases—particularly involving dangerous drug use—because it is inherently unjust to tort victims. *See Three Affiliated Tribes*, 476 U.S. at 890; *Kiowa*, 523 U.S. at 758; *Bay Mills*, 134 S. Ct. at 2036. Tribal sovereign immunity harms tort victims “who have no opportunity to negotiate for a waiver” but come under its pretense by pure accident. *Kiowa*, 523 U.S. at 766 (explaining tort victims are adversely affected by tribal immunity because those victims may be unaware they are dealing with the tribe, do not know of tribal immunity, or had no choice in the matter). In fact, many justices on this Court have noted that the justifications and rationales of sovereign

immunity do not support extending immunity to tort suits. *See Bay Mills*, 134 S. Ct. at 2036; *Kiowa*, 523 U.S. at 758. This Court questioned whether “immunity should apply in the ordinary way if a tort victim . . . has no alternative way to obtain relief,” and explained that such a case would present a “‘special justification’ for abandoning [sovereign immunity] precedent.” *Bay Mills*, 134 S. Ct. at 2036, n.8. The doctrine of tribal immunity was intended to shield Indian tribes from exploitation by outsiders, but is not, and never has been, intended as a “sword tribes may wield to victimize outsiders.” *Ex parte Poarch Band of Creek Indians*, 155 So. 3d 224, 230 (Ala. 2014); *see also* Matthew L.M. Fletcher, *(Re)Solving the Tribal No-Forum Conundrum: Michigan v. Bay Mills Indian Community*, 123 Yale L.J. Online 311, 314 (2013).

This case illustrates the injustice of extending sovereign immunity to corporations in tort cases. The High End Hotel took advantage of its tribal status by obtaining a license to sell cannabis, an activity illegal for any other Michiconsin business. *See* MCL 5.43, 4.20. Already at an economic advantage, The High End Hotel incentivized non-Indians to travel onto the reservation, stay at its hotel, and purchase its cannabis by creating an island for an otherwise illegal product. In creating this island of illegality where state residents can purchase cannabis and take it elsewhere in the state, The High End Hotel exposed every state resident to carcinogenic toxins when the cannabis was burned. Only after the state residents were exposed to carcinogenic toxins did The High End Hotel move to dismiss the victims’ claims on the basis of sovereign immunity. The High End Hotel seeks all the benefits of its cannabis enterprise but none of the consequences. Extending immunity to a corporation two steps removed from the Tribe is improper because it fulfills none of the purposes of the doctrine of tribal sovereign immunity and leaves tort victims without recourse for their injuries. Therefore, sovereign immunity should not apply in this case.

B. Michiconsin state court may apply its state common law tort doctrine to the MAIN EDC’s activities.

Michiconsin state courts have adjudicatory jurisdiction over the case against The High End Hotel and have jurisdiction to apply its own common law to protect tort victims. State courts with contacts relevant to the suit and with a substantial interest in the case have adjudicatory jurisdiction over the case so long as tribal self-government is not affected. *See, e.g., Fort Mojave Tribe v. Cty. of San Bernardino*, 543 F.2d 1253, 1256 (9th Cir. 1976); *Smith Plumbing Co. v. Aetna Cas. & Sur. Co.*, 149 Ariz. 524, 519 (Ariz. 1986).

Not only does Michiconsin have jurisdiction to hear this case, its common law tort doctrine may be applied.

There is no rigid rule “to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members.” *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). In some cases, the exercise of state jurisdiction and application of state law has been limited to conduct occurring off reservations. *See id.* But this Court has made “repeated statements [] to the effect that, even on reservations, state laws may be applied.” *Mescalero Apache Tribe*, 411 U.S. at 148; *Organized Village of Kake v. Egan*, 369 U.S. 60, 67-70 (1962); *Hicks*, 533 U.S. at 362. In fact, this Court stated that “[w]hen . . . state interests outside the reservation are implicated, states may regulate the activities even of tribe members on tribal land.” *Hicks*, 533 U.S. at 362.

Whether Michiconsin has jurisdiction to apply its own law turns on whether it is “pre-empted by the operation of federal law” or it “interferes or is incompatible with . . . tribal interests reflected in federal law. . . .” *See Mescalero Apache Tribe*, 462 U.S. at 324. Even if state law is pre-empted, if the “state interests at stake are sufficient to justify” the application of state law, the state may do so. *Id.* In this case, Michiconsin may exercise jurisdiction to apply its common law tort doctrine over activity that took place on the M-A Nation’s reservation because state tort law is not pre-empted by federal law or tribal interests reflected in federal law, and its application will not jeopardize the M-A Nation’s ability to self-govern. *See White Mountain Apache Tribe*, 448 U.S. at 142. Furthermore, state interest in applying common law tort doctrine to injuries involving this dangerous recreational drug justifies assertion of state authority.

1. Michiconsin has jurisdiction to hear this case.

In cases involving Indian entities and non-Indians, the rights of both the tribe and the state are implicated. Although Indian tribes remain a separate people with power to make and enforce substantive laws in their own courts, *see Williams v. Lee*, 358 U.S. 217, 223 (1959), state courts also have adjudicatory jurisdiction to hear cases involving tribal entities where the state has a substantial interest. *See, e.g., Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (state courts have jurisdiction to hear causes of action when, absent federal law to the contrary, the commercial activities of Indian entities go beyond reservation boundaries). In fact, “[t]ribal court is not always the appropriate forum for adjudicating occurrences on tribal land.” *Smith Plumbing*, 149 Ariz. at 529. As the “activity in question moves off the reservation the State’s governmental and regulatory interest increases

dramatically, and federal protectiveness of Indian sovereignty lessens.” *Id.* (holding an Arizona state court properly exercised adjudicatory jurisdiction after the tribe’s activities reached outside the confines of the reservation); *see also Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962).

The High End Hotel’s commercial cannabis activities reached far beyond the M-A Nation’s reservation. Michiconsin residents are enticed to travel onto the M-A Nation’s reservation, buy cannabis that is illegal in all other parts of the state, and use it off the reservation. The injuries incurred were suffered and will continue to be suffered in the state of Michiconsin, not merely in the boundaries of the reservation. Michiconsin has a strong interest in interjecting itself into this suit because the victims of The High End Hotel’s actions are Michiconsin residents and the effects of the cannabis enterprise are felt in Michiconsin. Because of Michiconsin’s substantial interest in hearing this case, and the lack of federal law to the contrary, Michiconsin state courts have adjudicatory jurisdiction in this matter.

Additionally, there is little question the Michiconsin courts have personal jurisdiction over the MAIN EDC and High End Hotel because the entities are incorporated within its borders. *See Int’l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310 (1945). Therefore, the only question left is whether the Michiconsin courts can apply common law state tort doctrine.

2. Michiconsin law is not pre-empted by federal law or tribal interests of self-determination and self-government reflected in federal law.

The first step in determining whether state law is pre-empted by federal law is determining whether there is a federal regulatory scheme in place. *See Mescalero Apache Tribe*, 462 U.S. at 341. To determine whether a federal regulatory scheme exists, this Court must look “to the applicable treaties and statutes which define the limits of state power.” *McClanahan v. Ariz. Tax Comm’n*, 411 U.S. 164, 172 (1973). Here, there is no applicable treaty or statute which deprives Michiconsin courts of jurisdiction to apply its common law tort doctrine. Furthermore, this is within the scope of Michiconsin’s state power because providing a tort remedy is one of the most basic and traditional state functions.

Next, the Court must consider whether state authority is pre-empted by tribal interests reflected in federal law. *Mescalero Apache Tribe*, 462 U.S. at 334. In other words, as long as the state law does not interfere with federal goals of tribal self-government and self-determination, the state law is not pre-empted. *Id.*

In *Rice*, this Court considered whether state interests in regulating liquor sales were pre-empted by interests in Indian self-governance. 463 U.S. 713. In holding that the state had authority to apply its law, the Court emphasized that tribal liquor regulation was not a “fundamental attribute of sovereignty.” *Id.* at 722. According to this Court, “tradition simply has not recognized a sovereign immunity or inherent authority in favor of liquor regulation by Indians.” *Id.*

Similarly, manufacturing and distributing a dangerous and quasi-illegal substance cannot be said to be a fundamental attribute of sovereignty. There is no tradition of permitting tribes to create and sell cannabis when it is illegal elsewhere in the state. Further, “because of the lack of tradition of tribal self-government” in the area of distributing drugs, “it is not necessary that Congress indicate expressly that the State has jurisdiction.” *See id.* at 731. Therefore, The High End Hotel’s tortious use of carcinogenic pesticides on cannabis that injured Michiconsin residents falls outside of the M-A Nation’s interests in self-government and within Michiconsin’s interests in protecting its residents. Thus, Michiconsin has jurisdiction to apply its common law tort doctrine.

3. Michiconsin’s interest in providing recourse for tort victims justifies assertion of state authority.

Finally, the Court should consider if there are state interests in “off-reservation effects that warrant State intervention.” *Mescalero Apache Tribe*, 462 U.S. at 342; *see also Rice*, 463 U.S. at 725. A state’s interest will be “particularly substantial if the state can point to off-reservation effects that necessitate State intervention.” *Mescalero Apache Tribe*, 462 U.S. at 336; *see also Rice*, 463 U.S. at 725 (finding that the state had an interest in the spillover effect from on-reservation liquor sales).

Michiconsin’s interest in preventing off-reservation effects of cannabis necessitates applying its common law tort doctrine in this case. As in *Rice* where the Court noted that the state had an “unquestionable interest in the liquor traffic that occur[ed] within its borders,” Michiconsin has an unquestionable interest in providing recourse for its citizens harmed by the dangerous effects of burning cannabis. *See Rice*, 463 U.S. at 724. There is no question that cannabis sold on the reservation will easily find its way into the hands of Michiconsin citizens off the reservation. The High End Hotel has created a pocket for an otherwise illegal enterprise that will attract tribal members and nonmembers alike, and the tortious effects from burning the cannabis for a recreational high will have a substantial impact across the state of Michiconsin. Furthermore, Michiconsin has a strong

interest in deterring the use of carcinogenic pesticides on products that will inevitably be burned by consumers. Therefore, the state's interests in applying its tort law to recompense victims outside the reservation are implicated in such a way that state authority is justified. *See Hicks*, 533 U.S. at 362. Accordingly, the judgment of the Supreme Court of Michiconsin should be reversed.

Conclusion

For the foregoing reasons, the Michiconsin Supreme Court's judgment in *People of Grant County v. Tribal Chairperson Nimkee Chippewa et al.* should be affirmed and the Michiconsin Supreme Court's judgment in *Michiconsin v. The High End Hotel* should be reversed.