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TRIFEDERALISM IN THE AFTERMATH OF *TEAGUE*: THE INTERACTION OF STATE AND TRIBAL COURTS IN WISCONSIN

Carol Tebben*

Introduction

The interaction of state and tribal courts in Wisconsin, an ever changing dynamic, represents one component of the larger picture of system wide interaction among the national, state, and tribal governments occurring throughout the United States. These three kinds of constitutionally recognized limited sovereigns, interacting in a relationship of trifederalism, are continually adjusting their spheres of authority in light of the relatively recent growth in complexity and effectiveness of tribal courts.¹ A better understanding of the relationship of state courts and tribal courts in Wisconsin lends insight into the trisovereign or trifederal perspective of American government.

Eleven sovereign tribal governments operate in the state, including the Ho-Chunk, Menominee, Oneida, Forest County Potawatomi, Stockbridge-Munsee Band of Mohicans, and the Bad River, Lac Courte Oreilles, Lac du Flambeau, Red Cliff, Sokaogon (Mole Lake), and St. Croix Bands of Lake Superior Chippewa (or Ojibwe). This discussion attempts to give some clarification to the complex interrelationships among these twelve sovereigns within the State of Wisconsin and the eleven tribal or tribal band governments. A decision by the state supreme court, *Teague v. Bad River Band*,² highlights the ongoing interaction of Wisconsin courts and tribal courts, and how the decision itself impacts the dynamics of this interaction.

Public Law 280 and Concurrent Jurisdiction

Wisconsin is a mandatory Public Law 280 state, with federal law initially requiring the state to take varying degrees of both criminal and civil jurisdiction over all but one of the sovereign tribal governments located within the state.³ The purpose of Public Law 280 ostensibly was to help the tribes

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1. This principle is discussed in detail in Carol Tebben, *An American Trifederalism Based Upon the Constitutional Status of Tribal Nations*, 5 U. PA. J. CONST. L. (forthcoming Winter 2002-2003) (symposium issue).

2. 612 N.W.2d 709 (Wis. 2000).

3. 28 U.S.C. § 1360 (2000).

by applying state resources to provide judicial forums and law enforcement for tribes financially unprepared to maintain such a burden.⁴ The law was not intended to deprive sovereign tribes of inherent jurisdiction.⁵ Public Law 280 allows a state, even a mandatory state such as Wisconsin, to retrocede or withdraw from state jurisdiction over a tribe.⁶

The Menominee Tribe, with its unique termination and restoration history, was excepted from the coverage of Public Law 280. After strenuous litigation the Menominee Nation won a \$7.6 million settlement in the Court of Claims in 1951, but collection of this money from Congress was "spitefully" linked to termination of the tribe's legal relationship with the United States government.⁷ The Menominee Tribe was the first to suffer termination at the hands of Congress, and the first of the terminated tribes restored to legal status.⁸ During the termination period endured by the Menominee Nation, significant land holdings were lost, \$10 million in trust funds depleted, and the reservation transformed into Menominee County.⁹ The state does not have Public Law 280 jurisdiction over the Menominee Nation.

Menominee boundaries now constitute both a reservation of tribal land and a county within the state, with tribal government and county government coexisting in the same town of Keshena. Tribal citizens elect county officials within the county, with some additional participation by people in the county who are not tribal citizens. The legal relationship of the Menominee Nation to the State of Wisconsin is unique among the tribes located within the state.

For the other ten tribes, or in some cases tribal bands, that do fall under Public Law 280, cases arise in which both the State of Wisconsin and one of the tribes have concurrent jurisdiction over the same factual issue. A tribe has jurisdiction over civil and criminal matters based upon inherent sovereign authority. The state claims jurisdiction over aspects of tribal life based upon the congressional mandates of Public Law 280. The presumption of concurrent state/tribal jurisdiction over tribal citizens and tribal issues is problematic, however, because many of the original justifications for Public Law 280 are on the decline. Tribal governments and tribal courts have begun to flourish. Tribal resources are on the rise. In many cases, state jurisdiction over matters tribal has become (or continues to be) intrusive and disruptive upon tribal life. As inherent sovereigns in constant interaction with the states

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4. "Public Law 280 was not designed to deprive tribal courts of jurisdiction where they properly have it. Rather, its primary purpose was to respond to a problem of lawlessness on certain Indian reservations . . . 'and to redress the lack of adequate Indian forums for resolving private legal disputes' . . . ." *Teague*, 612 N.W.2d at 717.

5. However, it can be argued that this has been to some extent its unintended effect.

6. 25 U.S.C. § 1323 (2000).

7. 25 U.S.C. § 891 (1970) (repealed 1973); see also Stephen Herzberg, *The Menominee Indians: Termination to Restoration*, 6 AM. INDIAN L. REV. 158 (1978).

8. Menominee Restoration Act, Pub. L. No. 93-197, 87 Stat. 770 (1973).

9. See *supra* note 7.

and the national government, the tribes must continually defend their right to self-government.¹⁰ However, in some tribes there remains a need for state assistance with law enforcement and with adjudication on specific kinds of issues. The tribal courts in Wisconsin are at varying stages of development. For example, the St. Croix Band of Chippewa tribal court, which is located on a checkerboard reservation, interacts with several county governments and "is just beginning to flex its judicial muscles."¹¹ The tribal court at Lac du Flambeau, on the other hand, has been steadily developing a working relationship with state judges in Vilas County for nearly two decades.

For the tribes who are seeing an increase in the number and variety of cases coming to tribal court, an ongoing "constructive retrocession" seems to be occurring increasingly at the local levels of government. This gradual and partial withdrawal of state jurisdiction is constructive in the sense that it is "constructed" by the actions of state and tribal judges, as opposed to an official retrocession by state legislative mandate. As each unique and changing 280 tribe continues to expand its judicial and law enforcement capabilities, civil and criminal jurisdiction are appropriately beginning to return to the sovereign tribal governments.

The Teague Case

The *Teague* case involved the judicial collision of two sovereign governments, the State of Wisconsin and the Bad River Band of the Lake Superior Tribe of Chippewa Indians. In this litigation a state trial court found in favor of the plaintiff, a former tribal employee, seeking monetary damages against the Band. The tribal court found in favor of the defendant Band declaring the employment contracts invalid. When the action was initiated, the state court rejected an assertion of tribal sovereign immunity from suit and a request for dismissal of the case.¹² The Band then entered tribal court to seek a declaratory judgment on whether the employment contracts were valid, and requested the state court to stay its proceedings until the tribal court concluded its case. The state court refused to stay its proceedings with the observation that even if the tribal court declared the contracts invalid, the plaintiff retained the argument of "apparent authority" of the contract. The Band amended its complaint in tribal court to add the issue of whether the plaintiff employee could reasonably rely upon the apparent authority of the contract.

Teague accepted service of the tribal court proceeding, and fully participated in the discovery process, however, he did not challenge the tribal

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10. See *supra* note 1.

11. Interview with George Morrison, Tribal Prosecutor, St. Croix Band of Chippewa Tribe, in Hertel, Wis. (July 2000).

12. The trial court determined that the Band had waived its sovereign immunity by including an arbitration clause in the contract, and because the Band's corporate charter contained a "sue and be sued" provision. *Teague v. Bad River Band*, 612 N.W.2d 709, 711-12 (2000).

court's personal or subject matter jurisdiction, did not request a stay of the tribal court proceeding, did not appear in the tribal court proceedings, and did not appeal to the tribal appellate court. The tribal court determined that the contracts were invalid because they lacked authorization from the tribal council, and that, because of his extensive experience with the Band, Teague could not have reasonably believed in the apparent authority of the contracts. The decision by the tribal court was presented to the state court judge handling Teague's case, with the request that the tribal court's determination be given full faith and credit under Wisconsin law, which requires recognition of tribal judgments meeting certain statutory guidelines.¹³ Teague argued that the tribal court decision did not satisfy the condition of being a valid judgment. Teague claimed that the tribal court lacked personal jurisdiction over him, the decision was not based on the merits of the case, and the tribal court decision was procured by fraud and coercion.¹⁴ In addition, Teague argued that section 806.245, the state's tribal full faith and credit statute, incorporated the Wisconsin common law "prior action pending" rule.¹⁵ This rule prohibits a second court in the state from hearing a case that is already

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13. Section 806.245(1) of the Wisconsin Statutes states:

(1) The judicial records, orders, and judgments of an Indian tribal court in Wisconsin and acts of an Indian tribal legislative body shall have the same full faith and credit in the courts of this state as do the acts, records, orders and judgments as any other governmental entity, if all of the following conditions are met:

(a) The tribe, which creates the tribal court and tribal legislative body, is organized under 25 USC 461 to 479.

(b) The tribal documents are authenticated under sub. 2.

(c) The tribal court is a court of record.

(d) The tribal court judgment offered in evidence is a valid judgment.

(e) The tribal court certifies that it grants full faith and credit to the judicial records, orders and judgments of the courts of this state and to the acts of other governmental entities of this state.

WIS. STAT. ANN. § 806.245 (West 1994).

14. Section 806.245(4) states:

(4) In determining whether a tribal court judgment is a valid judgment, the circuit court on its own motion, or on the motion of a party, may examine the trial court record to assure that:

(a) The tribal court had jurisdiction of the subject matter and over the person named in the judgment.

(b) The judgment is final under the laws of the rendering court.

(c) The judgment is on the merits.

(d) The judgment was procured without fraud, duress or coercion.

(e) The judgment was procured in compliance with procedures required by the rendering court.

(f) The proceedings of the tribal court comply with the Indian Civil Rights Act of 1968 under 25 USC 1301 to 1341.

Id. § 806.245(4).

15. *Syver v. Hahn*, 94 N.W.2d 161 (Wis. 1959).

being litigated in a Wisconsin court. The state trial court in the *Teague* case agreed with these assertions by the plaintiff, except that it did not reach the issue of personal jurisdiction. Full faith and credit of the tribal court decision was denied, effectively based upon the "prior action pending" rule, and the contract issue was submitted for arbitration according to the terms of the employment contract. As a result, the state court entered judgment in favor of Teague for \$390,199.42, the amount of the arbitration award.

On review, the Wisconsin Court of Appeals reversed the decision of the trial court. The appellate court determined that the "prior action pending" rule did not apply to a tribal court decision because it was the court of a separate sovereign, and rejected Teague's contentions that the tribal court decision was based on fraud and coercion.¹⁶

The Wisconsin Supreme Court agreed with the state appellate court that the "prior action pending" rule did not apply to a tribal court decision because, "although the tribal court is located within the geographic boundaries of the state, it is not a Wisconsin court; it is the court of an independent sovereign."¹⁷ However, the court then reasoned that full faith and credit of the tribal court judgment in this case was inappropriate because the tribal full faith and credit statute was silent on what should occur under these specific circumstances, and a "judicial allocation of jurisdiction pursuant to principles of comity" should occur before full faith and credit is considered.¹⁸ Noting the need for the development of state/tribal protocols for the allocation of jurisdiction for cases in which the state and a tribe have concurrent jurisdiction, the state supreme court opted for judge-to-judge allocation of jurisdiction until protocols could be formulated. The case was remanded to the state trial court judge with instructions to hold a conference with the tribal judge to determine, under principles of comity and tribal exhaustion, which court should appropriately maintain jurisdiction of the litigation.¹⁹

The meeting between the state trial court judge and tribal court judge involved in *Teague* did not result in an agreement on the allocation of jurisdiction. That kind of agreement is difficult, if not impossible, when the allocation of jurisdiction conference occurs *after* the case is litigated in both state and tribal court. The result of "no agreement" has the potential for the Wisconsin Supreme Court to hear *Teague II* on a second appeal. The question remaining for the court is whether a determination of full faith and credit will

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16. See *supra* note 2.

17. *Teague*, 612 N.W.2d at 717.

18. The state supreme court thought that application of full faith and credit in *Teague* would promote "competition between state and tribal courts," waste "judicial resources," and create "an adversarial atmosphere." *Id.* at 717-18. Competition and adversarial atmosphere could be avoided if the tribal full faith and credit statute were specific on the issue of "prior judgment" and if it were in a more mandatory language. Respect for tribal sovereignty was considered of less significant value than the avoidance wasting judicial resources.

19. *Id.* at 720.

proceed without an agreement between the state court judge and the tribal court judge on the allocation of jurisdiction.²⁰ The Wisconsin Supreme Court deftly avoided the issue of full faith and credit regarding the tribal court decision in *Teague* when it focused instead on the allocation of jurisdiction issue. Thus far the state supreme court has not returned to the full faith and credit issue, even though the judges completed their nonproductive allocation of jurisdiction conference.

Wisconsin State/Tribal/Federal Court Forum and the Teague Protocol

The work of establishing state/tribal protocols has quietly moved forward independently from the appellate court process primarily because of the establishment of the Wisconsin State/Tribal/Federal Court Forum (the Forum). The idea of a forum has an informal origin. In one area of the state, the chief judge of the Stockbridge-Munsee Tribal Court felt a need for better communication with neighboring state court judges, so with an offer of sweet rolls he invited himself and two colleagues for coffee and informal discussion at the neighboring Shawano County District Court.²¹ The Chief Judge of the Forest County Potawatomi scheduled a similar informal visit with neighboring district court judges.²² In 1998 these kinds of casual discussions became more formalized when the Wisconsin Tribal Judges Association joined with the Wisconsin Supreme Court to sponsor the official establishment of the State/Tribal/Federal Court Forum, consisting of federal, state, and tribal judges meeting on a regular basis to discuss issues and to get to know one another.

In an address to a Wisconsin Tribal Judges Association training session, Wisconsin Supreme Court Chief Justice Shirley Abrahamson outlined four ongoing projects being tackled by the Forum, namely:

- (1) Institutionalized lines of communication.
- (2) Education of state and tribal judges and attorneys.
- (3) Periodic statewide conference of federal/state/tribal judges.
- (4) Establishment of an Internet clearinghouse for tribal constitutions, codes, and case law.²³

The first project, institutionalized lines of communication, has come to life in the form of informal regional judicial conferencing among state and tribal

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20. "Full faith and credit under Wis. Stat. § 806.245 cannot properly be considered until the jurisdictional conflict is resolved before the courts." *Id.*

21. Interview with Dave Raasch, Chief Judge, Stockbridge-Munsee Tribal Court, on the Mohican Reservation (July 13, 2001); Interview with Dave Raasch, Chief Judge, Stockbridge-Munsee Tribal Court, on the Menominee Reservation (Jan. 10, 2002).

22. Interview with Eugene Whitefish, Chief Judge, Forest County Potawatomi Tribal Court, on the Mohican Reservation (July 13, 2001); Interview with Joe Martin, Chief Judge, Menominee Tribal Court, on the Menominee Reservation (Jan. 10, 2002).

23. Interview with Shirley Abrahamson, Chief Justice, Wisconsin Supreme Court, on the Oneida Reservation, Green Bay, Wis. (Jan. 17, 2001).

judges working within the same state judicial district.²⁴ The option of having regional judicial conferences was preferred by the Forum as a more effective means of communication than statewide conferences alone. Regional conferences for judicial districts across the state continue to be scheduled. Unlike other states that opted to establish similar judicial forums, but on a temporary basis, the Forum in Wisconsin was established with the intention that it is to remain a permanent trijudicial endeavor.

The second project identified by Chief Justice Abrahamson, the ongoing education of state and tribal judges, state and tribal attorneys, and other relevant government officials, is coming to fruition in the form of classes, workshops, and presentations. For example, in 2001 forty state attorneys attended an educational conference on issues of state/tribal sovereignty at Lac du Flambeau Reservation sponsored by the Indian Law Section of the Wisconsin State Bar Association. The Wisconsin Tribal Judges Association holds training sessions every three months on issues related to state/tribal court interaction. At a tribal judges conference in July 2001 held on the Stockbridge-Munsee Reservation, several state judges were invited to attend and participate in a discussion of state/tribal sovereignty issues. State judges were invited to attend and participate in a conference of the National American Indian Court Judges Association in Green Bay in September 2001. Many other educational projects are scheduled, and will continue to be scheduled for the future.

An outcome of the third project was the pioneering of a statewide conference of tribal/state/federal judges in 1999, shortly after the Forum was established, to outline potential issues of concern. A list of sixty potential issues pertaining to state and tribal jurisdiction were identified at this initial statewide conference.²⁵ Another statewide judicial conference is planned in the future to monitor progress in addressing these issues.

The fourth project is in the process of being completed by the tribes themselves. Although state judges had anticipated an electronic clearinghouse of tribal law based in Wisconsin Judicare or a similar organization, three tribes created websites on their own, and one tribe posted its constitution and codes on a website associated with the Native American Rights Fund. The remaining tribes are moving forward in the process to digitalize their tribal legal libraries. The Forum is strongly supportive of this endeavor, but a severe lack of funding has impeded efforts to aid in establishing the clearinghouse.

The Forum had just begun to function when the *Teague* decision came down. In a footnote in that case, the Wisconsin Supreme Court made reference to the Forum when discussing the need for state/tribal protocols for

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24. The first historic regional state/tribal judicial conference occurred in the Tenth Judicial District at the Lac Courte Oreilles Reservation in August 2000.

25. See app. A.

allocation of jurisdiction in cases where the state and the tribe have concurrent jurisdiction. In referring to this forum, the court observed, "We believe that this is a logical forum for the development of protocols governing the exercise of jurisdiction between the state and tribal courts."²⁶ In response to this assertion by the state's high court, the Forum requested proposed protocol statements from a variety of sources,²⁷ selected a subcommittee of the Forum to discuss these proposed protocols, and conducted a regional judicial conference in the state judicial district where the *Teague* case was decided.²⁸ At this regional judicial conference a detailed draft was discussed, amended, and disseminated to the state judges within the district and to the tribes through the Wisconsin Tribal Judges Association for further discussion and potential approval.

In December 2001, the Tenth Judicial District, the same district in which the *Teague* case was decided, signed a protocol for the allocation of state/tribal jurisdiction with the four tribal nations located within that district.²⁹ In a pioneering effort to enhance tribal/state interaction, the Bad River, Lac Courte Oreilles, Red Cliff, and St. Croix Bands of Chippewa each agreed to the protocol agreement with the state judicial district. Other tribal nations in the state are paying attention to the effect of this protocol upon the sovereign rights of the tribes within the Tenth Judicial District. Similar protocols may be adopted in the future between other state judicial districts and other tribal nations in Wisconsin, but the first such protocol in the state is serving as a closely watched experiment.

The Doctrine of Full Faith and Credit Versus the Doctrine of Comity

Various sources of the doctrine of full faith and credit exist in the United States. The Constitution requires each state to honor the public acts, records, and judicial proceedings of all other states.³⁰ Federal law extends the requirements of full faith and credit beyond the states to territories and possessions of the United States, but because tribes are inherently sovereign they do not fall within either category.³¹ Wisconsin's tribal full faith and credit statute encourages state court judges to honor decisions made in tribal courts, but allows state judges to evaluate tribal courts and to grant full faith and credit on a discretionary basis.³² In this sense, the statute is not written in the words of a full faith and credit requirement. Some legal commentators

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26. *Teague*, 612 N.W.2d at 718 n.11.

27. Scott Idleman, Marquette University Law School; Kevin Osterbauer, Bad River tribal attorney; Wisconsin Tribal Judges Association.

28. The judicial conference was held on the Bad River Reservation on March 23, 2001.

29. See app. B.

30. U.S. CONST. art. IV, § 1.

31. 28 U.S.C. § 1738 (2000).

32. See *supra* notes 13-14.

cited by the Wisconsin Supreme Court in *Teague*, regard this law to be more like a comity statute than a statutory requirement of full faith and credit.³³

In contrast to either a stringent constitutional or statutory requirement of full faith and credit, comity is a matter of judicial discretion, and is basically the doctrine of one sovereign voluntarily respecting the sovereignty of another. In spite of the emasculation of tribal full faith and credit in the *Teague* case, the Wisconsin Supreme Court has encouraged state court judges to apply the principle of comity to tribal court decisions with the declaration that "jurisdictional disputes between state and tribal courts" should be resolved with "communication, cooperation, and comity."³⁴

The doctrine of comity by state judges toward tribal courts (or in reverse by tribal judges toward state courts) takes on many forms of giving respect to another sovereign government. As in the *Teague* case, a state court and a tribal court can both claim jurisdiction over the same litigation. One option in this circumstance, an option not used in *Teague*, is judicial abstention from the case by the state in deference to a tribal court, even though state jurisdictional requirements are met. Another example of comity, with serious potential for enhancing the respect given to tribal nation sovereignty, is the state court certification of an issue of tribal law to a tribal court for clarification.³⁵ This option could be appealing to the state, because the state would maintain jurisdiction of the case. Certification also could be appealing to the tribe, because the tribe rather than the state could decide specific matters related to tribal life or tribal sovereignty. In *Teague*, for example, the issue of whether the tribe had waived sovereign immunity could have been certified to the tribal court for resolution. Other examples of comity are issuing a stay of state proceedings until exhaustion of tribal remedies,³⁶ and even a phone call between state and tribal judges.³⁷ This list is not exhaustive and other variations of comity may be created as the need arises. All variations of comity have the potential to support and protect the sovereign tribal right of self-government.

Tribal courts need to consider some caveats when facing the issues of comity and full faith and credit. Principles of comity are often used between states as sister sovereigns within the United States. However, comity between

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33. *Teague v. Bad River Band*, 612 N.W.2d 709, 716 (2000).

34. *Id.* at 720.

35. It has become commonplace for federal courts to certify an issue of state law to state courts of last resort for clarification in *Erie* cases to avoid casual predictions of state law. John Winkle III & David Roebuck, *Toward Judicial Comity: Certification in the Courts*, PUBLIUS, Winter 1992, at 83.

36. Exhaustion of tribal remedies was required in *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), and *National Farmers Union Insurance v. Crow Tribe*, 471 U.S. 845 (1985).

37. Interview with Ernest St. Germain, Chief Judge, Lac du Flambeau Tribal Court, on Lac du Flambeau Reservation (July 21, 2000); Interview with James Mohr, Chief Judge, Ninth Judicial District, Vilas County, Wis., on Lac du Flambeau Reservation (July 21, 2000).

states has a more sure foundation than between state and tribe because state-to-state comity occurs against the backdrop of a constitutional full faith and credit mandate. There is no constitutional mandate for the full faith and credit of tribal court decisions. Although Wisconsin has a tribal full faith and credit statute on the books, it is written in a way that allows for the discretion of state court judges, and it has little force. State judges seem to have little incentive to apply principles of a discretionary judicial comity to accede to tribal court decisions without a strong underlying mandatory full faith and credit statute requiring recognition of tribal court decisions. One alternative that may strengthen the sovereign position of tribal governments would be to amend the existing tribal full faith and credit legislation in Wisconsin with stronger language. This kind of statute could enhance the application of both the doctrine of full faith and credit and the doctrine of comity to tribes, just as the constitutional mandate for full faith and credit among the states seems to have fostered comity among the states.

Another danger when considering jurisdictional issues in a Public Law 280 state is that the state may assume jurisdiction over matters in which the tribe has, or should have, exclusive jurisdiction.³⁸ When this happens the tribal court should inform the state court that the tribe has exclusive jurisdiction. For the protection of tribal sovereignty, an even stronger alternative than full faith and credit is for the tribe to hold the power to enforce tribal court decisions without help or recognition from the state. This requires an effective tribal government, including tribal police, with requisite funding capability. Even self-enforcement of tribal court decisions, though, does not prevent the possibility of conflicting state and tribal court decisions. On the other hand, it could make these conflicts less likely to occur.

Although conflicts over state/tribal authority can and are being solved on a one-to-one, sometimes face-to-face, basis, there is the potential that state judicial personalities who are cooperative and willing to defer to tribal authority are easily replaced at election time with people who are less sympathetic, or even hostile, to state/tribal cooperation. Another concern is that usurpation of tribal authority may go undetected when it is done in the name of friendship, especially a benign usurpation of power. Comity may or may not work well for tribes, depending to a great extent upon the people involved.

One of the most troubling aspects of the *Teague* decision is that it rendered the tribal full faith and credit clause in Wisconsin ineffective. A stronger full

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38. *Bowen v. Doyle*, 230 F.3d 525 (2d Cir. 2000) (refusing to apply "tribal exhaustion rule" to state court litigation over tribal issue, and stating that the Tribe had a right to take issue of exclusive tribal jurisdiction to federal court in case about membership of tribal council with habeas corpus petition); *Wampanoag v. Mass. Comm'n Against Discrimination*, 63 F. Supp. 2d 119 (D. Mass. 1999) (holding that the tribe's sovereign immunity prohibited suit by state against the tribe based on state law).

faith and credit statute (or more accurately, an actual full faith and credit statute) would strengthen the position of sovereign tribal governments, and is a goal that merits tribal consideration. This goal does not detract from the reality that state and tribal judges in Wisconsin are in the process of creating a more interactive comity relationship. The significant potential for greater recognition by the state of the inherent sovereign authority of tribal courts has thrust Wisconsin tribal judges into a national leadership role concerning tribal/state court relations.³⁹ State court judges are being watched as well. A crucial reality is that judges wield a great deal of influence both in and out of the courtroom. If state court judges continue to take the lead in displaying understanding and respect for tribal sovereign rights, as they are beginning to do, the attitudes of others may be influenced also.

The Relevance of Due Process in Indian Country

A significant connection exists between the principle of due process of law and the doctrines of full faith and credit and comity. A Wisconsin state judge, for example, has authority from the state legislature to make an inquiry as to whether a tribal court satisfies due process before full faith and credit is extended.⁴⁰ A federal court addressing the issue of whether to give full faith and credit to a tribal judgment decided that if due process was lacking, the tribal court judgment was not entitled to full faith and credit.⁴¹ Due process as a condition precedent puts pressure on tribal courts to maintain standards of due process acceptable to state and federal court judges, while at the same time tribal court judges represent a separate sovereign with an inherent right to apply conceptions of due process that differ from the state. Although due process must be present in tribal courts to justify an expectation of full faith and credit or comity, tribal due process need not be identical to the due process applied by state and federal tribunals.

Important principles that often have application in tribal court may not be familiar, for example, to Wisconsin judges or other state personnel attempting to evaluate the standard of due process in Indian country. Examples of these differences may include the use of peacemakers to determine the outcome of a case, tribal values based on custom and tradition that are often unwritten,

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39. State court and tribal court judges from Wisconsin presented a discussion of state/tribal court interaction at the Federal Bar Association Indian Law Conference, Albuquerque, N.M., April 2001. In addition, President Raasch, Wisconsin Tribal Judges Association, spoke about tribal/state judicial interaction at the California State/Tribal Law Enforcement Conference in Palm Springs, Cal., January 2001, and at the Alaskan Intertribal Council in Anchorage, Alaska, Fall 2001. Chief Judge Joe Martin, Menominee Nation, spoke about state/tribal relations at the national meeting of State Chief Justices in Tucson, Ariz., Winter 2002.

40. One of the basic requirements imposed upon tribal courts is the principle of due process of law. Indian Civil Rights Act of 1968 § 25, 25 U.S.C. §§ 1301-1303 (2000).

41. *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997).

restorative justice, and perceptions about the relationship of the individual to society. In some tribal cases the central goal for the court may be to preserve and strengthen the family or the tribe, yet the central value in a nontribal court may be to preserve property or to punish. Because the Indian Civil Rights Act does not forbid tribal establishment of religion, and because religious practices and religious perspectives are often an integral aspect of tribal life, state court judges may not be familiar with the role of religion in the tribal courtroom or in a tribal court decision.⁴² One Mohawk scholar described the difference between an Anglo concept of due process and a traditional concept of due process by stating that, "In the Anglo tradition judges use precedent; according to Native traditional ways judges think with each case."⁴³

Many expectations of due process in Indian country include values basic to courts in general. Tribal governments are making efforts to have more clear and precise laws, impartial judges, fair procedures, notice and hearing, and a record of proceedings. Lay advocates may be provided to help tribal litigants, and instructions and pleadings can be presented in plain, and even traditional, language. Tribal judges have a particular challenge to avoid *ex parte* communication with tribal citizens. Members of the tribal council may wish to discuss a case, or an individual may begin to discuss a case with the judge with no warning. Tribal judges must add the opposing party to the discussion or stop the communication immediately, disclose and record any *ex parte* discussion, and educate tribal citizens about negative consequences of such discussions to maintain an appropriate standard of due process.⁴⁴ One tribal judge commenting upon the importance of protecting the principle of due process for every litigant, compared it to sitting down to a feast at a round table, explaining, "It is difficult to pass the food if someone is left out."⁴⁵

Systemic Interaction

Each tribe or tribal band in Wisconsin is at a different level of interaction with the state government. In Vilas County, for example, the chief judge of the state judicial district travels voluntarily to the Lac du Flambeau

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42. An example of this could be the distribution of property upon the dissolution of marriage that includes a sacred eagle feather.

43. Professor John Mohawk, Historical and Traditional Concepts of Due Process for Native American People: Address at the Wisconsin Tribal Judges Ass'n Training Session, Oneida Reservation (Jan. 17, 2001).

44. Mark Butterfield, Chief Judge, Ho-Chunk Tribal Court, Ex Parte Communications: Address at the Wisconsin Tribal Judges Ass'n Training Session, Oneida Reservation (Jan. 18, 2001).

45. Carrie Garrow, Chief Judge, St. Regis Mohawk, Ensuring the Rights of the Parties from Pleadings to Post Trial: Address at the Wisconsin Tribal Judges Ass'n Training Session, Oneida Reservation (Jan. 18, 2001).

reservation, about forty-five miles each way, to hold court at the tribal court for the convenience of tribal members.⁴⁶ This has been going on for about fifteen years. Within the same state judicial district, a difficulty arose because, according to state law, the state court was expected to issue temporary restraining orders for cases of domestic abuse on the reservation. This proved problematic for tribal victims of abuse, and problematic for tribal judges at Lac du Flambeau reservation, who according to state law did not have authority to issue the injunctions even though requested to do so. The chief judges from the reservation and the state judicial district worked together to influence the state legislature to change the law so that the state now appropriately recognizes the power of tribal courts to issue restraining orders in such cases.⁴⁷ Under this law the state recognizes the inherent right of the tribe to take exclusive jurisdiction of these cases if it chooses.⁴⁸ (Congress has also entered this arena, by requiring that state officials give full faith and credit to tribal restraining orders in domestic abuse cases.⁴⁹) Also in the same state judicial district, the Lac du Flambeau tribal court has taken over all child support cases of their own tribal citizens in Vilas County. The tribal court is more successful in collecting money for the children than the state court because, for example, rather than pay money to the state for contempt of the child support order, the parent can provide wood or game to the tribe, then give the money from per capita payments to the child.

In order to render the appropriate resolution of a case, tribal courts often find it necessary to take advantage of state facilities. A defendant may need alcohol or drug treatment only available in state sponsored facilities. Wisconsin law provides for the incarceration of tribal prisoners who are sentenced in tribal courts to be carried out in state (or county) facilities.⁵⁰ An Indian child in need of protective services may need to be placed in state foster care when tribal care is not available, or a child may need to be placed in tribal foster care that is subsidized by state funding.⁵¹ One of the problems under Wisconsin law is that money for child placement is allocated from the state to the county, and the tribe has to get the funding from the county in competition with other county needs, rather than receiving funds directly from

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46. Interview with James Mohr, *supra* note 37.

47. Interview with Ernest St. Germain, *supra* note 37; Interview with James Mohr, *supra* note 37.

48. Chief Judge James Mohr, On Common Ground: Address at the First Statewide Forum Conference (1999).

49. Violence Against Women Act, 18 U.S.C. § 2265 (2000).

50. WIS. STAT. ANN. § 302.446 (West 1999).

51. Federal reimbursement is also available to the tribe for the foster care and adoption of tribal children. 42 U.S.C. §§ 672-679 (2000).

the state.⁵² This legislation is in the process of being reviewed to allow child placement funding to go directly to the tribe.

On the other hand, a state court may decide that a defendant should get treatment at a tribal facility, or in the alternative, turn the case over for resolution by the tribal court knowing the tribe can handle the case closer to home. In one serious sex offender case, the state court judge called the reservation to see if the tribal court wanted to take the case. The tribal judge responded that the tribe was not prepared to take that kind of case at this time, but hoped to be able to do so in the future. As a result of this discussion, an example of comity in action, the case remained with the state court.⁵³

A common kind of cooperative effort in Wisconsin between sovereign state and sovereign tribal law enforcement is the cross deputizing of tribal police. This procedure qualifies officers to enforce tribal and state laws, bring offenders to tribal or state court, and to access needed information from state data bases. It also provides a creative method for the cooperative state/tribal funding of a more adequate tribal police force.

State and tribal courts can each prosecute a criminal defendant for the same offense without violating double jeopardy because the two are separate sovereigns.⁵⁴ Double state/tribal prosecutions waste judicial resources, and both tribal and state courts attempt to avoid double prosecution when possible. However, the legal principle that a state and a tribe may both prosecute an individual for the same offense because they are separate sovereigns is a positive doctrine for tribes because of the recognition of tribal sovereign rights. In one case, for example, an offender was prosecuted in state court for serious harm done to tribal members and given a mild sentence. After sentencing by the state court, the tribal court also tried the individual for the same crime, rendering a sentence of banishment.⁵⁵

The Indian Child Welfare Act of 1978 (ICWA) requires a state to remove cases involving the placement of Indian children for adoption or foster care to tribal court if requested by the tribe.⁵⁶ State/tribal conflict can arise in such cases regarding the state court's determination of whether the child is an Indian, thereby triggering the requirement of tribal notification. Conflicts also arise when state courts retain jurisdiction by finding that special circumstances exist, such as a disabled or endangered child. Timeliness of notice to the tribe can be another area of contention as state and tribal courts continually interact in ICWA cases. Tribal judges recognize a critical need for state and tribal

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52. State money is available to the tribe for children if a state/tribal agreement exists. WIS. STAT. ANN. § 165.90 (West 1997).

53. See *supra* note 46.

54. *United States v. Wheeler*, 435 U.S. 313 (1978).

55. Interview with Ernest St. Germain, *supra* note 37.

56. 25 U.S.C. § 1903 (2000).

courts to more fully cooperate on ICWA cases to assure greater care for tribal children, and to protect the tribal sovereign right to decide these cases. The result of the Indian Child Welfare Act has been a mandated retrocession by the state, or at least a partial retrocession, of tribal child custody issues. The technical definition of retrocession refers to a state giving up jurisdiction over tribal matters and "returning" that jurisdiction back to the national government. As a result of the recent and ongoing expansion in the effectiveness of tribal governments and tribal courts, retrocession in effect is more accurately defined as a state returning jurisdiction over tribal matters to the inherent sovereign jurisdiction of the tribe. In Wisconsin, at least to some extent, ICWA cases have served as a model for returning cases to the tribe for determination.

Conclusion: The Introduction of Cooperation

Changes in the ways that state courts and tribal courts interact are occurring rapidly in Wisconsin. Some changes are occurring as a result of federal mandate, such as the requirement under ICWA that state courts relinquish jurisdiction of the placement of tribal children to the sovereign authority of tribal courts,⁵⁷ Clean Water Act requirements that the tribes be treated as states for the purposes of setting tribal clean water standards,⁵⁸ and the Violence Against Women Act's provision for full faith and credit of tribal court decisions.⁵⁹ Some changes are occurring because of the leadership of the Wisconsin Tribal Judges Association and the Wisconsin Supreme Court through the formation of the Forum that brings together state and tribal judges (and occasionally a federal judge) to discuss concerns.

Most of the effective changes in state/tribal court relations are occurring at the local levels of government, county by county, tribe by tribe, and person by person. State court judges are beginning to gain a greater understanding of the principle of tribal sovereignty. In some jurisdictions, state court judges are beginning to more routinely honor tribal court orders, and also are beginning to turn more cases over to the expertise of tribal courts. Full faith and credit and comity for tribal court decisions are beginning to become more common topics of discussion by state court judges. Judges from both state and tribal courts continue to be educated about due process in Indian country. Cross-jurisdictional cooperation is employed to create solutions to problems such as children in need of protective services, criminal apprehension,

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57. *Id.*

58. See 33 U.S.C. § 1365(a) (2000); see also Joseph Mazurek, Two Approaches Toward Environmental Regulation Within Indian Country: Jurisdictional Wrangling or Principled Cooperation: Address Before the Twenty-third Annual Federal Bar Ass'n Indian Law Conference, Albuquerque, N.M. (Apr. 1998).

59. 18 U.S.C. § 2265(a) (2000).

domestic violence, collection of child support payments, truancy, drug and alcohol abuse, and alternative sentencing choices.

Although the states and the tribal nations have a long history of litigation over the limits of state and tribal sovereign authority, and such litigation will undoubtedly continue, behind-the-scenes efforts at cooperation are also producing positive results. This cooperation has the effect of promoting mutual respect for state and tribal sovereign authority, enabling both kinds of courts to better serve their citizens.

Tribal/state cooperation has also encouraged the growth and development of tribal court capabilities in dealing with tribal issues. The budding deference by Wisconsin state court judges to tribal autonomy is beginning to foster an expanding "constructive retrocession" of the state's criminal and civil jurisdiction over matters of inherent sovereign tribal authority. Criminal and civil issues are beginning to return to the domain of the tribes on a selective basis.

Local authorities are learning by firsthand experience that government in the United States is an interaction of three kinds of constitutionally recognized limited sovereign governments: the national government, the states, and the tribal nations.⁶⁰ The relationship among these three sovereigns is emphatically a systemic one, with innumerable points of interaction continually manifesting the intricate trifederal character of government within the United States. This relationship is in constant flux. The interaction of state and tribal courts within the State of Wisconsin, indicative of this systemic relationship among tribe, state, and Union, is taking on a refreshing sense of communication, cooperation, and mutual respect. At the same time each sovereign struggles to protect inherent decision-making power.

The Wisconsin Supreme Court in its 2000 *Teague* decision encouraged state and tribal judges to solve state/tribal jurisdictional conflicts in an atmosphere of comity, or mutual respect. The ongoing work of the Forum has fostered the creation of a state/tribal protocol for the allocation of jurisdiction within the Tenth Judicial District, a protocol that has yet to be tested. Many other issues relevant to the vitality of sovereign tribal authority remain to be addressed, particularly the ineffectiveness of Wisconsin's tribal full faith and credit statute.

The fact that state and tribal judges are talking, working, and laughing together has increased the potential for positive action in support of sovereign tribal authority. It is a beginning.

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60. See *supra* note 1.

APPENDIX A

STATE OF WISCONSIN
TENTH JUDICIAL ADMINISTRATIVE DISTRICT

In re the Matter of
TRIBAL-STATE COURT JUDICIAL PROTOCOLS

WHEREAS:

1. Public Law 280 67 Stat. 588 (1953), 25 U.S.C. SS 1322(a) authorizes the State of Wisconsin to assume jurisdiction over civil causes of action arising within such Indian Country located within its borders.

2. Public Law 280 67 Stat. 588 (1953), 25 U.S.C. SS 1322(c) recognizes that any tribal ordinance or custom adopted by the Band not inconsistent with any applicable state civil law shall be given full force and effect in determination of civil causes of action.

3. *Teague v. Bad River Band*, 236 Wis. 2nd 384, 612 NW 2d 709 (2000) recommends that Trial Court and Tribal Court effectuate inter court protocols to resolve in a cooperative manner jurisdictional issues,

4. Wisconsin Rules of Court Section 753.35(2) authorizes the Chief Judge of the Judicial Administrative District to adopt local rules concerning court administration.

5. There is a need to effectively and efficiently allocate jurisdiction among the Tribal and District Courts in the Tenth Judicial District so that a case in controversy might be heard by the Court best suited to decide a matter.

6. A protocol has been developed by the State Court-Tribal Court Forum of the Tenth Judicial District which addresses criteria to be used by Tribal and State Court Judges in allocating jurisdiction where both the Tribal and State Courts have jurisdiction over a civil matter.

THEREFORE, IT IS ORDERED that the 13 Circuit Courts of the Tenth Administrative District [Ashland, Barron, Bayfield, Burnett, Chippewa, Douglas, Dune, Eau Claire, Polk, Rusk, St. Croix, Sawyer and Washburn] will utilize the attached protocol in resolving jurisdictional issues between the Circuit Court and the four Tribal Courts of the district [Bad River, Lac Courte Oreilles, Red Cliff and St. Croix.]

Dated: *December 7, 2001*

Tribal/State Protocol for the Judicial Allocation
of Jurisdiction Between the Four

Sec. 1. Purpose.

The purpose of this Tribal/State Court Protocol is to effectively and efficiently allocate judicial resources by providing a legal mechanism which clearly outlines the path a legal dispute will follow when both a tribal court and a circuit court have jurisdiction over a matter. This protocol does not apply to any case in which controlling law commits exclusive jurisdiction to either the tribal court or the circuit court.

Sec. 2. Scope.

This Protocol applies to each Circuit Court within the Tenth Judicial Administrative District of the State of Wisconsin approving the Protocol by Local Rule and to each Tribal Court approving the Protocol by appropriate authority.

Sec. 3. Authority.

This protocol is promulgated to effectuate the holding set forth in *Teague v. Bad River Band*, 236 Wis. 2d 384, 612 N.W. 2d 709 (2000). It is authorized by Local Rules as adopted by the Circuit Courts and appropriate approvals by the Tribal Courts.

Sec. 4. Applicability.

(a) Every party in every action commenced in any circuit court shall in the first pleading filed by the party, or in an attached affidavit, disclose under oath whenever a party is a party in any related action in any tribal court. Every party in every action commenced in any tribal court shall in the first pleading filed by the party, or in an attached affidavit, disclose under oath whenever a party is a party in any related action in any circuit court. If a party is required under this paragraph to disclose the existence of any action, the party shall state the names and addresses of the parties to the action, the name and address of the court in which the action is filed, the case number of the action, and the name of judge assigned to the action.

(b) Any party desiring a dismissal or stay of an action pursuant to this Protocol shall file a motion to that effect in the court where the stay or dismissal is desired, and shall include in the motion a request for temporary stay pending allocation of jurisdiction under this Protocol. The temporary stay pending allocation of jurisdiction may be ordered ex parte upon the sworn allegations required under paragraph 4(a).

(c) Whenever a court issues a temporary stay pending allocation of jurisdiction, the court shall transmit a copy of a notice of stay to the court where the related action is pending. The court receiving notice of the

temporary stay pending allocation of jurisdiction shall automatically issue a stay of proceedings of the related action.

Sec. 5. Jurisdictional Dismissal.

Notwithstanding the stays issued under section 4, if either court determines after notice and hearing, *sua sponte* or by motion of a party, that it lacks jurisdiction, the court may dismiss the action. The court shall provide notice of the dismissal to the other court.

Sec. 6. Judicial Conference for Allocation of Jurisdiction.

(a) The court issuing the first temporary stay shall contact the other court for the purpose of scheduling a joint hearing on the issue of allocation of jurisdiction. The judges from both courts shall establish a briefing schedule, if any, and shall conduct a bearing at which both judges preside. The location of the hearing and the conduct of the hearing shall be determined by the judges jointly in their discretion. If the two judges cannot be present in the same courtroom, one judge may preside by telephone. The hearing shall be on the record.

(b) At the close of the hearing and applying the standards set forth in section 7 of this Protocol, the judges shall confer to decide the allocation of jurisdiction, and shall decide which case shall be dismissed or stayed. A dismissal without prejudice of one of the cases shall be ordered, except;

(1) If there is a doubt about the jurisdiction of the court in which the case is not dismissed, or if there is a concern for the expiration of a statute of limitations or if other equitable considerations exist, a stay may be issued instead of an order for dismissal, and

(2) The judges may determine that some issues or claims are more appropriately decided in one court and some issues or claims are more appropriately decided in the other court and may make orders appropriate to such circumstances.

The deliberations of the judges shall not be on the record. The judges shall thereafter state on the record their decision and the reasons therefore.

(c) If the judges are unable to allocate jurisdiction at their conference as provided for in section 6(b), above, a third judge will be selected. The judge will be selected from a standing pool of judges, composed of four circuit judges and four tribal judges. Circuit Judges shall be appointed to the pool by the Chief Judge of the Tenth Judicial Administrative District. The Chief Tribal Judge of each Tribal Court which has approved this Protocol, or his or her designee, shall serve on the pool. If fewer than four Tribal Courts approve this Protocol, then the Chief Judges of the Tribal Courts which do approve this Protocol shall jointly select a sufficient number of judges to bring the number of Tribal Judges in the pool up to four. All judges appointed to the standing pool shall remain in the pool until replaced. In the event a case is referred to the pool, any judge who is a member of the pool and who is a

judge of the Tribal Court or Circuit Court from which the referral arises shall be removed from the pool for purposes of that referral. The parties shall then be given the opportunity to mutually decide on the judge. If the parties cannot agree on a judge, each party shall be allowed to peremptorily strike one judge from the pool, and of those remaining one judge shall be drawn at random. That judge shall join the two judges from the courts where the actions are pending, and a hearing *de novo* before all three judges will be scheduled. At the close of the hearing, the judges shall deliberate and decide as set forth in section 6(b), above.

7. Standards for allocation of jurisdiction.

The following factors shall be considered in determining which court shall exercise jurisdiction in the matter:

(1) Whether issues are present in the case which directly touch on or require interpretation of a Tribe's Constitution, By Laws, Ordinances or Resolutions;

(2) Whether the nature of the case involves traditional or cultural matters of the Tribe;

(3) Whether the action is one in which the Tribe is a party, or where tribal sovereignty, jurisdiction, or territory is an issue in the case;

(4) The tribal membership status of the parties.

(5) Where the case arises.

(6) If the parties have by contract chosen a forum or the law to be applied in the event of a dispute.

(7) The timing of the motion to dismiss or stay, taking into account the parties' and courts' expenditures of time and resources, and compliance with any applicable provisions of either court's scheduling orders.

(8) The court in which the action can be decided most expeditiously.

(9) Such other factors as may be appropriate in the particular case.

Sec. 8. Powers, Rights, and Obligations Unaffected.

Nothing in this protocol is intended to alter, diminish, or expand the jurisdiction of state or tribal courts, the sovereignty of state or tribes, or the rights or obligations of parties under state, tribal, or federal law.

APPENDIX B

Appendix

1. Procedures in Tribal/State/Federal Courts

There are instances when state laws, policies or procedures specify the remedies available for the resolution of disputes. In the same instance, tribal laws, policies or procedures may allow different remedies. In either event, when the remedies or other factors that affect the outcome differ between jurisdictions, a resolution of those differences must be addressed.

- The Forum identified a need to standardize methods or procedures to be followed to address and resolve differences between courts.

Issues Identified:

- a. Tribal court/state court conflicts concerning procedural requirements in family and divorce law
- b. Model procedures for deciding discretionary change of venue cases
- c. Creation of an Indian Law Benchbook
- d. Develop federal legislation regarding tribal court opportunities in child support programs, and develop a model for state/tribal/county relationships.
- e. Conflicts between counties and tribes regarding child support orders
- f. Develop procedures for establishing agreements regarding the jurisdiction of tribal courts over non-Indians on the reservation.
- g. Address enforcement issues concerning failure to pay in forfeiture cases (including license suspensions, contempt of court powers and impoundment of vehicles).
- h. Tribal court assumption of traffic accident jurisdiction varies from tribe to tribe.
- i. Circuit court enforcement of tribal court orders (such as judgments of debt collection)

2. Full Faith and Credit

Full Faith and Credit is a recurring issue that was raised in a variety of specific ways by each work group. The work groups also determined that tribal courts are too diverse in their stages of development to try to apply only one solution to solve differences.

- The Forum must weigh the pros and cons of a single statewide approach and solution as compared to a regional approach encompassing area specific applications.

- The Forum working groups identified the need to establish a dearer and more specific definition of what full faith and credit truly means to the courts in Wisconsin. The Forum should consider developing an application test to review this definition.

• Wis. Stat. 806.245 has provided definitive parameters for the application of full faith and credit. This should be reviewed and more fully discussed.

Issues Identified:

a. Full faith and credit of both tribal court and state court decisions need implementation. Education is needed on the criteria to be used in granting full faith and credit and on how the State of Wisconsin full faith and credit statute is (and isn't) being implemented.

b. Address how to implement full faith and credit concerning domestic violence orders and child support orders, and accomplish this in culturally sensitive ways.

c. Develop model procedures for understanding and applying the Wisconsin full faith and credit statute. The statute should be reviewed, revisited and studied.

d. There needs to be better enforcement of tribal court decisions.

e. Domestic abuse restraining orders should be registered with the Central Registry and the National Crime Information Center to make sure orders get enforced. There needs to be training for social services and for law enforcement on this.

Issues Identified:

a. Pursue grant monies to study jurisdictional issues.

b. Study tribal and circuit court concurrent jurisdiction in the area of divorce.

c. Assess the need for drug courts.

d. Study should be directed toward alcohol and involuntary commitments.

e. P.L. 280 prohibits trust land decisions - this could force divorces involving land into circuit court - to what extent is this a problem and is there a remedy?

f. As a P.L. 280 state what are the effective jurisdictional boundaries between tribal and circuit courts, and how are these defined?

g. Is there a model 161 agreement, and do CHIPS cases fall within 161?

h. Which court should exercise jurisdiction when a child resides on the reservation but the child gives "off the reservation"? Is the address by agreement or legislation? Is uniformity achievable?

i. Jurisdictional and educational issues exist between tribes and DA's offices and between tribes and the W. Department of Natural Resources: how should these be addressed?

j. Instances of double prosecution (tribal and state) that should be reduced (see *State v. Bearheart, Jr.*) Some tribal courts wish to exercise greater criminal authority over tribal members on the reservation.

k. Concerning issues of concurrent regulatory authority (fireworks, for example), should the tribe or the state act?

1. Jurisdictional issues may be remedied in part by educational approaches, for example the choices of law and forum may be addressed in attorney and judge education programs.

m. Civil law areas to be addressed:

1. Torts (example: car accident between Indian and non-Indian on the reservation; a matrix would be helpful to determine who exercises jurisdiction -state or tribe)

2. Land use (example: zoning issues for non-Indian owned property within the reservation).

4. Access to Legal Library Reference Materials & Education

The working groups also clearly defined the need to establish a tribal court reference library and provide access to this material. The reference library would allow litigants, advocates, and attorneys access to the procedures under which they must present their case in each jurisdiction.

The Forum should coordinate the definition of:

- What resources are currently available.
- What other materials should be acquired.
- Where the library will be located.
- How access will be provided to the collected material.

Issues Identified:

a. The State of Wisconsin Law Library has books by topical areas of the law. We need one on Indian Law/Tribal Courts. Specifically, the WI statutes dealing with Indian Law and Tribal Courts should be condensed into a booklet for easy reference.

b. It is important to know tribal court rules. Perhaps we may utilize some of the Gaming Compact monies for a staff person and bringing together of rules.

c. There are other state statutes that have impacts here, such as the school laws. We need to be aware of them also. We need good systems of communication.

d. If a case is in state court for an offense off the reservation, the state court needs to know what treatment is available with the tribe. What resources are out there? Generally, the closer to home, the more local, the better.

e. All tribal codes and ordinances should be published on the web.

f. Non-Indian lawyers need to be educated on practicing in tribal court, tribal bar exams, and admission to practice in a particular tribal court. Continuing legal education courses should be organized for lawyers. We have an excellent opportunity with the year 2000 conference of the State Bar and Judiciary. The Indian Bar Section has sponsored a CLE on going into tribal court as an attorney. Court administrator and clerk education is also important.

g. Because tribal courts vary so much, it is critical to be able to research the tribal constitution and ordinances. These are like local rules of court. Right

now you often have to go to the tribal library to look for the documents that exist. There should be publication of tribal court ordinances and decisions on the Internet and

5. Tribal/State/Federal Court Relationships

Many examples of court relationships were presented.

The Forum needs to decide if court relationships warrants further segregation into specific categories.

- Child support
- Child In Need of Protective Services (CHIPS)
- Divorce
- Traffic
- Criminal

The Forum also needs to identify the courts stakeholders, determine their needs and establish the administrative relationship between courts.

Issues Identified:

a. In specific geographic areas there should be better cooperation and communication between tribal court judges and circuit court judges.

b. Truancy is hard to solve. Sharing resources should be investigated. We understand that we can cooperate better.

c. How about the use of ordinances for truancy? What responsibility does the tribe want? What is the most effective way to handle?

d. Because the tribes themselves are at difference stages, some in infancy, the need for more communication is great. Perhaps a State Ombudsperson is also needed.

e. Many times matters are resolved differently because of who is there. The tribal courts can be at such different stages themselves and at different levels of cooperation with the counties (and the Menominee are not covered by Public Law 280).

f. Indian courts are developing and gaining more recognition. Circuit judges can help by publicly complimenting tribal courts and recognizing their effectiveness so people trust their decisions. Tribal courts can help relieve circuit court caseload.

6. Differing Value Systems and Traditions

The topic of values was addressed several times and in slightly different ways such as unwritten laws, peace making, traditions and customs.

• The Forum should recognize that unwritten tribal values and traditions form the foundation for tribal governance and courts and are a necessary part of public issues and dispute resolution forums.

• The Forum should determine how the mixture of values and traditions interacts with other courts.

Issues Identified:

- a. Educational forums to address varying value systems and how values affect decision making.
- b. Restorative justice and sending Indian youth to the tribe for resolution of issues and problems.
- c. Educational efforts to broaden the historical and cultural understanding of the responsibilities of tribal courts and tribal judges.
- d. Encourage attorneys to join the Indian Law Section of the State Bar.
- e. Treaties provide little practical guidance in law issues; agreements are preferred to resolve disputes, not just more appellate cases.
- f. Racial issues exist between tribal and county law enforcement officers - how to address these?
- g. Written codification of tribal law is relatively new and there is a need to recognize and respect unwritten laws, customs and traditions through full faith and credit - how to use oral traditions?
- h. Some tribes have peacemakers to resolve disputes in a traditional manner - but how is this to be recognized and respected by non-Indians, as well as other traditional dispute resolution mechanisms?

7. Regional Court Meetings

Recommendations were made several times to conduct geographic area, district or local meetings. Regional sessions are certain to enhance communications, improve intra-agency cooperation, and identify regional needs.

8. Forum Administration

The administration of the forum was raised during the closing meeting of the Forum Planning Committee.

A need was identified for a determination of the overall administrative functions of the Forum.

Areas of definition include:

- Funding
- Staffing
- Grant writing