

**UNTANGLING THE JURISDICTIONAL WEB:  
DETERMINING INDIAN CHILD WELFARE  
JURISDICTION IN THE STATE OF WISCONSIN**

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I. INTRODUCTION

Even though the Indian Child Welfare Act of 1978<sup>1</sup> was passed thirty-one years ago, determining state versus tribal jurisdiction over the various components of Indian child welfare proceedings in a Public Law 280<sup>2</sup> state remains a confusing area of the law. This

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1. 25 U.S.C. §§ 1901–1963 (2006).

2. 18 U.S.C. § 1162 (2006); 28 U.S.C. § 1360 (2006); 25 U.S.C. §§ 1321–1326 (2006). Public Law 280 was a transfer of jurisdiction from the federal government to state governments. Congress gave six states (five states initially—California, Minnesota (except the Red Lake Nation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin (except later the Menominee Reservation); and then Alaska upon statehood) extensive criminal and civil jurisdiction over tribal lands within the affected states. Since then, Nevada, South Dakota, Washington, Florida, Idaho, Montana, North Dakota, Arizona, Iowa, and Utah have assumed some jurisdiction over crimes committed by tribal members on tribal lands. Public Law 280 also permitted the other states to acquire jurisdiction at their option.

jurisdictional determination goes to the heart of tribal sovereignty and a tribe's ability to self-govern because nothing is more central to a tribal government than the protection of its tribal members, particularly its children.

Currently, this issue is central to the discussions between Tribes<sup>3</sup> in Wisconsin and the Wisconsin Department of Children and Families as part of the Alternative Funding Workgroup. This workgroup is tasked with exploring funding mechanisms that honor the government-to-government relationship between the State of Wisconsin and the eleven tribal sovereigns within the state's borders and that recognize the vast array of services that tribal social service systems provide. Unfortunately, the uncertainty surrounding Indian child welfare jurisdiction has frustrated the progress of the workgroup. Without establishing which sovereign has the jurisdiction to adjudicate Indian child welfare issues, it is difficult to decipher which sovereign also has the responsibility to fund the services provided to the citizens who are the subjects of the Indian child welfare case at hand.

This article will address the jurisdictional issues between Tribes in Wisconsin subject to Public Law 280<sup>4</sup> and the State of Wisconsin itself along with an analysis of which sovereign is responsible for funding the services to the families.

## II. THE INTERPLAY BETWEEN THE ICWA AND PUBLIC LAW 280.

Generally, jurisdiction refers to "[a] government's general power to exercise authority over all persons and things within its territory."<sup>5</sup> Determining which governmental entity would exercise jurisdiction over Indian children was one of the core interests of Congress when it passed the Indian Child Welfare Act (ICWA).<sup>6</sup> Before the passage of

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3. Bad River Band of Lake Superior Chippewa Indians; Lac Court Oreilles Band of Lake Superior Chippewa Indians; Lac du Flambeau Band of Lake Superior Chippewa Indians; Red Cliff Band of Lake Superior Chippewa Indians; Sokaogan Mole Lake Community; St. Croix Chippewa Indians; Forest County Potawatomi; Stockbridge Munsee Community; Menominee Indian Tribe; Oneida Native American Tribes of Wisconsin; Ho-Chunk Nation.

4. The Menominee Indian Tribe is not subject to Public Law 280 due to termination and later restoration of the tribe. Memorandum from Senior Staff Attorney Joyce L. Kiel to Members of the Special Comm. on State-Tribal Relations 2 n.6 (Dec. 10, 2004), [www.legis.state.wi.us/lc/committees/study/2004/STR/files/memmono3\\_str.pdf](http://www.legis.state.wi.us/lc/committees/study/2004/STR/files/memmono3_str.pdf).

5. BLACK'S LAW DICTIONARY 927 (9th ed. 2009).

6. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989).

this Act, state courts had exercised jurisdiction and “failed to recognize the essential tribal relations of Indian people and the social and cultural standards in tribal communities, and thus harmed tribal interests.”<sup>7</sup> The ICWA was designed to remedy these failures by creating presumptive jurisdiction in tribal courts.<sup>8</sup>

The ICWA established a dual-jurisdiction paradigm. “[T]ribes have exclusive jurisdiction over child custody matters when the Indian child resides or is domiciled on an Indian reservation, or when the child is a ward of the tribal court, unless another federal law provides otherwise . . . .”<sup>9</sup> Tribes also have concurrent jurisdiction with the state over Indian children who reside or are domiciled off the reservation.<sup>10</sup>

The ICWA’s reference in section 1911(a) to exclusive jurisdiction, unless other federal law provides otherwise, presumably refers to Public Law 280,<sup>11</sup> which was passed decades earlier. Instead of clarifying the jurisdictional interrelation between the ICWA and Public Law 280,<sup>12</sup> Congress, in passage of the ICWA, left that issue to be decided by the courts.

To understand how the two federal acts interplay, it is prudent to briefly review the history of each act. Generally, Public Law 280<sup>13</sup> was passed to address the perceived lack of criminal law enforcement on tribal lands. However, Public Law 280 also contained a civil jurisdiction provision<sup>14</sup> intended to allow for native people to have their civil issues heard in a state forum if a tribal forum did not exist. Unfortunately, the legislative language used by Congress to effectuate this intent was not clear.

However, Supreme Court precedent has clarified the scope of this jurisdictional grant. For example, in *Bryan v. Itasca*, the Court pronounced that Public Law 280<sup>15</sup> was “primarily intended to redress

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7. NATIVE AM. RIGHTS FUND, A PRACTICAL GUIDE TO THE INDIAN CHILD WELFARE ACT 16 (2007) (citing 25 U.S.C. § 1901(5) (2006)).

8. *Id.* (citing *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989)).

9. *Id.* See 25 U.S.C. § 1911(a) (2006).

10. See 25 U.S.C. § 1911(b) (2006).

11. 18 U.S.C. § 1162 (2006); 28 U.S.C. § 1360 (2006); 25 U.S.C. §§ 1321–1326 (2006).

12. 18 U.S.C. § 1162 (2006); 28 U.S.C. § 1360 (2006); 25 U.S.C. §§ 1321–1326 (2006).

13. 18 U.S.C. § 1162 (2006); 28 U.S.C. § 1360 (2006); 25 U.S.C. §§ 1321–1326 (2006).

14. 28 U.S.C. § 1360 (2006).

15. 18 U.S.C. § 1162 (2006); 28 U.S.C. § 1360 (2006); 25 U.S.C. §§ 1321–1326

the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens.”<sup>16</sup>

The U.S. Supreme Court also addressed the scope of Public Law 280<sup>17</sup> in *California v. Cabazon Band of Mission Indians*.<sup>18</sup> In *Cabazon*, the Court analyzed whether California’s gaming law was applicable within the Cabazon Band of Mission Indians’s reservation under Public Law 280.<sup>19</sup> To determine the scope of Public Law 280’s grant of state jurisdiction, the Court focused on whether the law to be enforced was criminal/prohibitory or civil/regulatory in nature.<sup>20</sup>

[I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280’s grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the State’s public policy.<sup>21</sup>

Applying this analysis, the Court held that the state’s gaming laws were civil/regulatory.<sup>22</sup> California’s public policy did not forbid gambling since the State operated its own lottery, authorized pari-mutuel betting on horses, and permitted many organizations to conduct bingo and card games.<sup>23</sup> The mere fact that California’s regulations were enforced by misdemeanor penalties did not change their civil/regulatory nature to criminal/prohibitory.<sup>24</sup>

This background on Public Law 280 frames the discussion of the interplay between Public Law 280 and the ICWA. The crux of the analysis must begin with section 1911(a) of the ICWA, which ad-

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(2006).

16. *Bryan v. Itasca County*, 426 U.S. 373, 383–84 (1976). (stating that Public Law 280 did not give the states general regulatory powers over tribes and their members); see also Jake J. Allen, *Chipping Away at the Indian Child Welfare Act: Doe v. Mann and the Court’s “1984” Interpretation of ICWA and P.L. 280* 20–21 (Indigenous Law & Policy Ctr., Working Paper No. 2007–03, 2007), available at <http://www.law.msu.edu/indigenous/papers/2007-03.pdf>.

17. 18 U.S.C. § 1162 (2006); 28 U.S.C. § 1360 (2006); 25 U.S.C. §§ 1321–1326 (2006).

18. 480 U.S. 202 (1987).

19. *Id.* at 211–22.

20. *Id.* at 209–10.

21. *Id.* at 209.

22. *Id.* at 211–12.

23. *Id.* at 210.

24. *Id.* at 211.

dresses exclusive tribal jurisdiction except where such jurisdiction is otherwise vested in the state by existing federal law.<sup>25</sup> This reference to existing federal law is somewhat amorphous but has been generally thought to reference Public Law 280. Based on the *Bryan v. Itasca* and *California v. Cabazon* Supreme Court cases, the analysis as to whether Public Law 280 confers jurisdiction upon the State within the reservation is based upon whether the laws to be applied are civil/regulatory or criminal/prohibitory. This must be considered along with the intent of Public Law 280 to provide a forum to hear disputes between native people or between a native person and a non-native state citizen in a state forum, thus focusing on private litigation.

Hence, based on Supreme Court precedent and Congress's intent in passing Public Law 280, it is sound to conclude that actions commenced by state agencies against parents to remove children or to bring the family relationship under court supervision fall within the civil/regulatory analysis of Supreme Court precedence. Those actions also fall outside of the private party actions contemplated by Congress in passing Public Law 280. Furthermore, the Attorney General of Wisconsin found that involuntary proceedings to terminate parental rights based on neglect or abuse are regulatory in nature and fall outside the boundary of the State's Public Law 280 civil jurisdiction.<sup>26</sup> Therefore, in the State of Wisconsin, a reassumption of jurisdiction under the ICWA section 1918(a) is not required for the tribe to have exclusive jurisdiction within the reservation boundaries.

This means that all phases of a child welfare investigation or proceeding fall within the jurisdiction of the tribe when the child is domiciled within the reservation. The phases include, but are not limited to, Child Protective Services initial assessment investigations, removal of children from the home, and child in need of protection or services cases.<sup>27</sup>

The case typically cited in opposition to this analysis is *Doe v. Mann*.<sup>28</sup> However, this case has no binding authority in Wisconsin and fails to address the Wisconsin-specific analysis that is the subject of this article. The *Doe v. Mann* opinion is flawed in pointing to *In re Burgess*<sup>29</sup> as somehow diminishing the effect of the 1981 Wisconsin Attorney

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25. 25 U.S.C. § 1911(a) (2006).

26. 70 Wis. Op. Att'y Gen. 237 (1981). See also Allen, *supra* note 16, at 14.

27. See e.g., NATIONAL INDIAN CHILD WELFARE ASSOCIATION, INDIAN CHILD WELFARE GLOSSARY AND FLOWCHART 3, <http://www.narf.org/icwa/resources/flowcharts/glossary.pdf> (last visited Nov. 27, 2009).

28. 415 F.3d 1038 (9th Cir. 2005).

29. 665 N.W.2d 124 (Wis. 2003).

General Opinion that specifically addresses child welfare jurisdiction under the Indian Child Welfare Act in the State of Wisconsin. *In re Burgess* did not deal with child welfare jurisdiction, but instead was an insanity proceeding by the State against a sexually violent individual.<sup>30</sup>

*In re Burgess* did, however, partly address Wisconsin's Public Law 280 jurisdiction.<sup>31</sup> In addressing the Public Law 280 issues in *In re Burgess*, the Wisconsin Supreme Court relied heavily on the fact that Mr. Burgess challenged the jurisdiction of the state court to adjudicate his issues as a tribal member domiciled on the reservation.<sup>32</sup> The district court contacted the Lac du Flambeau Tribal Court to determine if the Tribal Court was able and willing to exercise jurisdiction over the matter.<sup>33</sup> The Lac du Flambeau Tribal Court declined jurisdiction because the tribe had not yet passed an ordinance to address the commitment of sexually violent persons such as Burgess.<sup>34</sup> But for this declination of jurisdiction, it is quite probable that the case would have been transferred to Lac du Flambeau Tribal Court at that time. This fact was a crucial threshold issue tipping the balance, in the supreme court's opinion, towards determining that the state had jurisdiction over the matter.

The supreme court stated,

[f]urthermore, the tribal court in this case declined to accept jurisdiction because the Lac du Flambeau Tribe had not yet passed an ordinance regarding the commitment of sexually violent persons. Thus, the appropriateness of state jurisdiction is bolstered since one of the stated purposes of Pub. L. 280 was to 'redress the lack of adequate Indian forums.'<sup>35</sup>

Therefore, if the Lac du Flambeau Tribe had passed an ordinance and accepted jurisdiction over the matter when the district court inquired whether the tribal court was going to exercise jurisdiction, the case would have been transferred. Had it been transferred, the supreme court's decision would have likely tipped in the other direction, towards allowing a finding under a Public Law 280 analysis that the tribal court was the proper court to exercise jurisdiction over this matter.

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30. *Id.* at 127.

31. *Id.* at 129–30.

32. *Id.* at 127.

33. *Id.* at 127–28.

34. *Id.*

35. *Id.* at 133.

This analysis of the Wisconsin Supreme Court decision *In re Burgess* is bolstered by the opinions rendered upon appeal by the U.S. District Court of the Western District of Wisconsin<sup>36</sup> and the 7th Circuit.<sup>37</sup> The opinion from the federal district court notes the great weight given the tribal court's declination of jurisdiction and further states that Burgess's argument has merit.<sup>38</sup> Unfortunately, the standard in this appeal was substantial, which resulted in the court's holding that

[i]n sum, even if the Wisconsin Supreme Court were *incorrect* to conclude that Chapter 980 falls within the scope of Pub. L. 280's jurisdictional grant, this conclusion is not an *unreasonable* application of clearly established federal law as determined by the Supreme Court of the United States. Therefore, Burgess is not entitled to habeas relief on his first claim.<sup>39</sup>

The 7th Circuit, likewise, treated the declination of jurisdiction by the tribal court as a threshold issue because it noted that as a result of that declination, the district court denied Burgess's motion based on its understanding that the State was allowed to assert jurisdiction over reservation Indians in any area where the tribe did not have an ongoing tradition of acting.<sup>40</sup> The 7th Circuit took issue with the analysis used by the Wisconsin Supreme Court to hold that the State of Wisconsin had jurisdiction over a tribal member residing on the reservation. The 7th Circuit stated "[w]ith respect, we cannot agree with the Supreme Court of Wisconsin that Chapter 980 qualifies as a 'criminal statute.'"<sup>41</sup>

Furthermore, the 7th Circuit stated, "[i]n the final analysis, if this case turned solely on the question whether clearly established federal law would permit a characterization of chapter 980 as criminal, we would need to reverse."<sup>42</sup> In the 7th Circuit's analysis, they started with the premise in the U.S. Supreme Court case of *Bryan v. Itasca County* that the civil grant in Public Law 280 was primarily intended "to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and

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36. *Burgess v. Watters*, No. 04-C-544-C, 2005 WL 106780 (W.D. Wis. Jan. 19, 2005).

37. *Burgess v. Watters*, 467 F.3d 676 (7th Cir. 2006).

38. *Burgess*, 2005 WL 106780, at \*11.

39. *Burgess*, 2005 WL 106780, at \*14.

40. *Burgess*, 467 F.3d at 679–80.

41. *Id.* at 684.

42. *Id.* at 676, 686.

other private citizens,” not to “confer general state civil regulatory authority over reservation Indians.”<sup>43</sup> The appellate court also stated, “[t]his court has questioned whether a state would have jurisdiction involuntarily to commit an enrolled tribal member, but we did not need to decide this issue.”<sup>44</sup>

There are certainly strong arguments that Chapter 980 falls outside Public Law 280’s limited grant of civil jurisdiction. In other contexts, the Supreme Court has expressly classified these types of civil laws that aim to protect the public from danger as “regulatory.”<sup>45</sup> The 7th Circuit also noted that at least one court has determined that a state lacks the authority to involuntarily commit a mentally ill tribal member who resides on a reservation.<sup>46</sup> The 7th Circuit also cited the 1981 Wisconsin Attorney General opinion<sup>47</sup> as bolstering its opinion that exercising the jurisdiction is not within Public Law 280’s grant of jurisdiction over Indian Country in the State of Wisconsin.<sup>48</sup> The court did note that *Doe v. Mann*<sup>49</sup> has taken a different approach to interpreting Public Law 280’s limited grant of civil authority and therefore “[t]his is enough to show, under the generous AEDPA<sup>50</sup> standards, that the Wisconsin Supreme Court’s conclusion does not lie outside the bounds of permissible differences of opinion. We thus cannot conclude that the court unreasonably applied clearly established federal law.”<sup>51</sup>

Given the Seventh Circuit’s sharp criticism of the Wisconsin Supreme Court’s rationale for concluding that the State could exercise

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43. *Id.* at 686 (citing *Bryan v. Itasca County*, 426 U.S. 373, 384 (1976)).

44. *Id.* See also *United States v. Teller*, 762 F.2d 569, 577 (7th Cir. 1985) (noting that “questions of jurisdiction are raised by two facts—the crime took place on an Indian reservation, and so trial was to be in federal court, and the defendant is an Indian, and so perhaps not subject to the state’s civil commitment procedures”).

45. *Burgess*, 467 F.3d at 686–87. See also *Smith v. Doe*, 538 U.S. 84, 105 (2003); *Jones v. United States*, 463 U.S. 354, 361–62 (1983). The Supreme Court has also held that a state has authority under its police power to protect the community from dangerous tendencies of some who are mentally ill. See generally *Addington v. Texas*, 441 U.S. 418, 426 (1979).

46. *White v. Califano*, 437 F. Supp. 543, 549 (D.S.D. 1977), *aff’d.*, 581 F.2d 697 (8th Cir. 1978) (determining that because “the process of committing someone involuntarily brings the power of the state deep into the lives of the persons involved in the commitment process. . . . [A]pplying the procedures of an involuntary commitment to an Indian person in Indian country would require severe intrusions into the tribe’s vestigial sovereignty”).

47. 70 Wis. Op. Att’y. Gen. 237 (1981).

48. *Burgess*, 467 F.3d at 687.

49. 415 F.3d 1038 (9th Cir. 2005).

50. Anti-Terrorism and Effective Death Penalty Act, 28 U.S.C. § 2254 (2006).

51. *Burgess*, 467 F.3d at 687.

Public Law 280 jurisdiction to civilly commit a tribal member domiciled on the reservation, it is likely that absent the generous standard of review applicable to the case, the 7th Circuit would have overruled the Wisconsin Supreme Court.

All but one tribe in the State of Wisconsin have tribal courts which regularly exercise jurisdiction over child welfare matters and, therefore, even under the Wisconsin Supreme Court analysis, the issue should be properly heard in a tribal court.

For any criminal abuse or neglect charges that may come to light from a child protective services investigation, the criminal jurisdiction is concurrent within the reservation under Public Law 280. Therefore, the tribe could prosecute such offenses but is limited by the Indian Civil Rights Act as to the penalties that can be assessed. The Indian Civil Rights Act limits a tribe to imposing a maximum of one year of imprisonment and a fine of \$5000, or both.<sup>52</sup> The state could also prosecute that same individual for the same criminal charges under its jurisdictional authority and there would not be a double jeopardy argument available to the defendant.<sup>53</sup> Off the reservation, the state would have criminal jurisdiction to proceed against the tribal member.

### III. THE IMPACT OF WISCONSIN'S CHILD PROTECTIVE SERVICES LAW

Wisconsin law requires the state agency to investigate any reports received about child abuse or neglect.<sup>54</sup> This requirement attaches to all abuse or neglect reports within the state's jurisdiction.<sup>55</sup> The state was not granted jurisdiction over child welfare or child protective services (CPS) issues within reservations located in the State of Wisconsin.<sup>56</sup> The ICWA does allow for emergency removal or placement of a child, but *only* when the emergency removal is of an Indian child who is a resident of or is domiciled on a reservation but *temporarily* located off the reservation.<sup>57</sup>

If a tribe is not able to provide twenty-four hour CPS to tribal members, the tribe could enter an intergovernmental agreement with

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52. Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(7) (2006).

53. *United States v. Wheeler*, 435 U.S. 313, 330 (1978) (noting that it does not violate the Fifth Amendment provision against double jeopardy for the Tribe and the federal government to prosecute a defendant for the same offense; both independent sovereigns are entitled to vindicate their identical public policies).

54. WIS. STAT. ANN. § 48.981(3)(c)1.a (West Supp. 2009).

55. *Id.*

56. *See supra* Part I.

57. 25 U.S.C. § 1922 (2006) (emphasis added).

the county agencies surrounding the reservation for any coverage the tribe could not provide as part of the tribe's inherent sovereign powers.<sup>58</sup>

#### IV. BUREAU OF INDIAN AFFAIRS AND REMOVAL AUTHORITY

It has been reported that the Bureau of Indian Affairs ("BIA") has taken the position with Tribal Child Welfare programs that BIA funds cannot be used for CPS investigations and the removal of children from homes.<sup>59</sup> This assertion by the BIA is not founded in the language of the ICWA nor in any regulations or the BIA Guidelines for state courts.<sup>60</sup> The jurisdictional discussion in Part I, above, indicates that the tribes have full authority to conduct CPS investigations and remove children when warranted.<sup>61</sup>

The BIA may be taking the position that they are a payor of last resort and, because Wisconsin Statutes mandate county social services to do CPS investigations, that the State should have the responsibility for funding such investigations. This argument is flawed, however, because the State was not granted any jurisdiction to conduct CPS investigations within the reservation.<sup>62</sup>

#### V. REASSUMPTION OF EXCLUSIVE JURISDICTION UNDER THE ICWA

According to the Wisconsin Attorney General, a reassumption of exclusive jurisdiction under the ICWA affects proceedings that do not fall within the civil regulatory jurisdiction granted to the State under the Supreme Court's interpretation of Public Law 280.<sup>63</sup> Examples of non-regulatory proceedings that may fall under the jurisdictional grant of Public Law 280 are proceedings such as a voluntary termination of parental rights and voluntary adoption proceedings.<sup>64</sup> Without a reassumption of exclusive jurisdiction, these actions may be subject to concurrent jurisdiction. The reassumption would eliminate the

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58. WIS. STAT. ANN. § 48.981(3)(c)(9)(cm) (West Supp. 2009).

59. See e.g., Administration for Children and Families, Considerations for Indian Tribes, Indian Tribal Organizations or Tribal Consortia Seeking to Operate a Tribal Title IV-E Program, [http://www.acf.hhs.gov/programs/cb/laws\\_policies/tribal\\_considerations.htm](http://www.acf.hhs.gov/programs/cb/laws_policies/tribal_considerations.htm) (last visited Nov. 27, 2009).

60. See 25 U.S.C. § 1901 (2006). See also Bureau of Indian Affairs Guidelines for State Courts: Indian Child Custody Proceedings, 44 FED. REG. 67584 (Nov. 26, 1979), available at [http://www.nicwa.org/policy/regulations/icwa/ICWA\\_guidelines.pdf](http://www.nicwa.org/policy/regulations/icwa/ICWA_guidelines.pdf).

61. See *supra* Part I.

62. See *supra* Part III.

63. 70 Wis. Op. Att'y Gen. 237, 3 (1981).

64. *Id.* at 4.

State's concurrent jurisdiction over these actions within the reservation, or over the area granted exclusive jurisdiction under the petition as accepted by the federal government.<sup>65</sup>

#### VI. VOLUNTARY ACTIONS AND STATE COURT JURISDICTION

Tribes have exclusive jurisdiction in the State of Wisconsin over involuntary child welfare proceedings within the reservation when the child is residing on or domiciled within the reservation.<sup>66</sup> If the tribe has reassumed exclusive jurisdiction under the ICWA, the tribe also has jurisdiction over voluntary child welfare proceedings.<sup>67</sup> This exclusive jurisdiction does not allow a state court to hear these matters absent an intergovernmental agreement allowing the State to exercise such jurisdiction in accordance with any limitations drafted in the agreement.

#### VII. CHILD WELFARE SERVICES AND FUNDING

Jurisdiction and financial responsibility are two separate concepts. "Jurisdiction refers to the authority of a government to adjudicate or decide a particular legal matter in its court, while service responsibility refers to the particular government which is responsible for providing services to the children and families involved in a particular child welfare proceeding."<sup>68</sup> Tribal members are tri-citizens because they are citizens of their tribe, the United States, and the state in which they reside.<sup>69</sup> This status entitles them to state services which, as state citizens, they are eligible to receive, even if the tribe exercises jurisdiction in a particular case.<sup>70</sup> In child welfare situations, many of the services provided to children and families by the State will

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65. *Id.*

66. *Id.* at 7; *see also* 25 U.S.C. § 1911(a) (2006) ("An Indian tribe shall have jurisdiction exclusive as to any State over *any* child custody proceeding . . .") (emphasis added).

67. 70 Wis. Op. Att'y Gen. 237 (1981).

68. NATIVE AM. RIGHTS FUND, *supra* note 7, at 18.

69. *Id.*

70. *Id.* *See also* *Howe v. Ellenbecker*, 8 F. 3d 1258, 1263 (8th Cir. 1993) (holding that Title IV-D of the Social Security Act created a Section 1983 cause of action to obtain child support from absent parents living on Indian reservations), *limited by* *Blessing v. Freestone*, 520 U.S. 329 (1997) (limiting standing under Section 1983); Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1145 (2004) (citing a string of cases in which tribal members have been found to have rights to equal state services notwithstanding their tribal membership).

be partially federally funded. The federal funding prohibits States from discriminating upon the basis of race or political subdivision within the state.<sup>71</sup>

The U.S. Constitution guarantees the equal protection of the laws to all of its citizens through the Fourteenth Amendment.<sup>72</sup> Tribal members who were not already granted citizenship were made citizens of the United States by the 1924 Snyder Act.<sup>73</sup> State citizenship was officially recognized only in the 1970s, by a combination of the Fourteenth Amendment and the Snyder Act.<sup>74</sup> Therefore tribal members are citizens of all three sovereigns: the United States, the individual state in which they are domiciled, and the tribe of which they are a member.<sup>75</sup>

This tri-citizenship means that enrolled members of an Indian tribe are guaranteed the equal protection of the laws.<sup>76</sup> Therefore, if a State pays for the placement of other state children as ordered by a court of competent jurisdiction, it must also do so for tribal children who happen to also be citizens of another sovereign.

While the Equal Protection Clause guarantees against infringement of civil liberties by the States, States have not historically afforded tribal members equal protection when provision of state services are at issue. States often argue that because trust land is not subject to state property taxes, tribal members should not benefit from the services paid through property taxation.<sup>77</sup> Another popular argument is that the welfare of Indian people is the sole responsibility

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71. See Native American Rights Fund, A Practical Guide to the Indian Child Welfare Act, FAQ 2: Jurisdiction, <http://www.narf.org/icwa/faq/jurisdiction.htm#qa> (last visited Jan. 2, 2010) (noting that most federal funding sources, such as the Social Security Act's Title IV-E Foster Care and Adoption Assistance, have requirements tied to the receipt of these funds).

72. U.S. CONST. amend. XIV, § 1.

73. 8 U.S.C. § 1401(b) (2006).

74. *Goodluck v. Apache County*, 417 F. Supp. 13, 16 (D. Ariz. 1976), *aff'd sub nom. Apache County v. United States*, 492 U.S. 876 (1976).

75. Citizenship requirements for the tribal sovereign are heavily influenced by the Tribe's constitution. See FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 4.01(2)(a)–(c) (Nell Jessup Newton et al. eds., 2005) (1940).

76. See Krakoff, *supra* note 70, at 1145. Equal protection under tribal law is itself guaranteed by the Indian Civil Rights Act, 25 U.S.C. § 1302(8) (2006).

77. See *Acosta v. County of San Diego*, 126 Cal. App. 2d 455, 459 (1954); see also Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data At Last*, 38 CONN. L. REV. 697, 704 (2006) (“Because reservation trust lands are exempt from state and local property taxes, and tribal members living and earning income on reservations are exempt from state taxes, some of the most important sources of funding for local law enforcement and criminal justice on reservations were unavailable.”).

of the federal government.<sup>78</sup> Both of these arguments have failed in the courts under an equal protection analysis because States do not base services to their non-Indian citizens on proof of taxpaying status, and the federal government has not fulfilled its trust responsibility in a manner that takes care of all tribal member needs.<sup>79</sup> As an example, the courts have held that services must be rendered to Indians just as they are to non-Indians in the following categories: admission into public schools;<sup>80</sup> general relief services;<sup>81</sup> and indigent health services.<sup>82</sup> The courts have upheld the right of Indians to access these social services in the same manner as other citizens of the state. This same analysis would apply to social services rendered to other state citizens in the child welfare arena.

Therefore, even though the tribes may exercise child welfare jurisdiction in various cases, this does not alleviate the counties or the State from their duty to provide services to those Wisconsin citizens who also happen to be citizens of a tribal sovereign.

#### VIII. CONCLUSION

Due in part to the federal government's policy of supporting tribal self-governance, tribal governmental structure has flourished in the last couple of decades. One area of dramatic growth and development has been in the area of child welfare. Every tribe in the State of Wisconsin has a child welfare department and all but one tribe have a court with child welfare subject matter jurisdiction.<sup>83</sup> Because the tribes have this well-developed infrastructure, the State of Wisconsin is required to defer to tribal jurisdiction. This is not only a legal requirement but it is good policy; no other governmental unit is better equipped to resolve the interplay of tribal culture, custom, and tradition with the child welfare laws to the benefit of the whole family structure, which includes the family's connection to the tribe.

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78. See *Acosta*, 126 Cal. App. 2d at 462.

79. *Id.* at 462, 466 (holding that "the jurisdiction of the United States over the Indians residing on Indian reservations . . . is not exclusive" and that tax-exempt status does not "serve[] as a justification for [the denial of] equal treatment under state welfare laws").

80. See *Piper v. Big Pine Sch. Dist.*, 193 Cal. 664, 674 (1924).

81. See *Acosta*, 126 Cal. App. 2d at 466.

82. See *County of Blaine v. Moore*, 568 P.2d 1216, 1222 (Mont. 1977).

83. Currently the Oneida Nation of Wisconsin does not have a court that exercises child welfare jurisdiction. See Oneida Tribal Judicial System Home Page, <http://www.oneidanation.org/government/page.aspx?id=4780> (last visited Nov. 27, 2009) (listing types of cases the court reviews).

The more difficult pill to swallow is that deferring to tribal jurisdiction does not absolve the State of funding responsibilities to the tribal families as “tri-citizens.” This concept is difficult for most legal minds to grasp because of the unique situation that is presented for analysis when tribal members are involved. Typically, when another sovereign asserts jurisdiction, it also takes on funding responsibility, usually because of a change in domicile for the parties involved. In the case of Indian families, the citizenship status of the family members as to the State of Wisconsin does not change simply because the tribal court asserts jurisdiction over the family for the purposes of adjudicating the child welfare matter at hand.