



**2015 WSSFC
Substantive Track – Session 2**

**Working with Indian
Tribes**

*Sara M. Drescher
Forest County Potawatomi Community, Milwaukee*

About the Presenter...

Sara M. Drescher is an in house attorney with the Forest County Potawatomi Community working out of the Milwaukee office. She received a B.A. in Psychology and Philosophy from Marquette, a J.D. from Marquette University Law School, and is currently writing her dissertation for a PhD in Environmental Resources at the University of Wisconsin. Prior to joining the Forest County Potawatomi Community Legal Department Ms. Drescher worked with two Milwaukee based law firms representing a variety of corporate, individual, and tribal clients in the areas of environmental, transactional, real estate, construction, redevelopment, National Environmental Policy Act, compliance, mineral resources, energy, and remediation. Ms. Drescher is a member of the American and Wisconsin Bar Associations' Environmental, Land Use, and Real Estate Division, as well as the Milwaukee Bar Association.

Working with Indian Tribes
Sara M. Drescher
Forest County Potawatomi
Community



October 22, 2015
2015 Wisconsin Solo & Small Firm Conference
Kalahari Resort, Wisconsin Dells

1

What You Will Learn?

- Help your clients understand the importance of tribes in Wisconsin.
- Help your clients understand the fundamental importance of Tribal Sovereignty.
- Help your clients understand how working with tribes is different than working with other entities.

2

Disclaimer

- Tribal law is very complex and this presentation provides a limited nutshell. Recognize that:
 - Tribal governments are all distinct. Tribal practices are also different than state and federal systems.
 - Different doesn't mean "bad."
 - Tribal courts provide unique practice opportunities.

3

Why is understanding the legal framework and how to work with tribes important?

- There are 566 federally recognized tribes.
- Tribes are sovereign – they run governments, programs, and departments that represent a significant use of local services.
- All tribes are different. Their laws, cultures, histories and needs are distinct.
- Tribal interests and needs may provide unique and different opportunities for business growth.

4

Examples of Areas of Interest

- | | |
|----------------------------------------|--------------------------------------------------|
| • Gaming | • Fishing & Hunting Rights & Habitat Protections |
| • Education/Healthcare | • Transportation/Roads |
| • Community Service | • Homeland Security/Disaster Response |
| • Elder Care/Mental Health Concerns | • Construction |
| • Employment/Labor | • Family Services |
| • Economic Development | |
| • Real Estate/Investments | |
| • Natural Resources/Energy | |
| • Clean Energy Projects/REC Purchasing | |
| • Hotel & Restaurant Industry | |

5

Websites

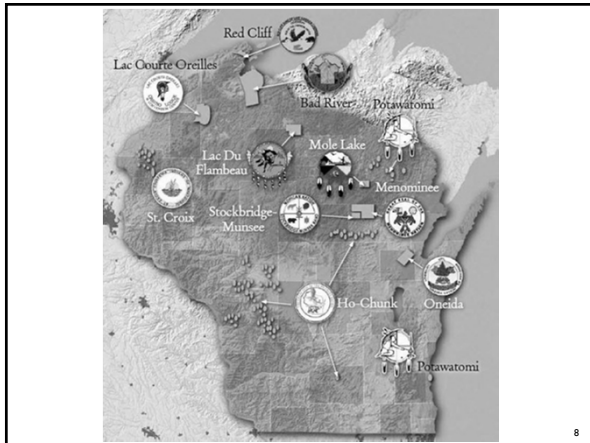
- US Department of the Interior Indian Affairs – Tribal Leaders Directory and Tribal Entities List (Current list of 566 recognized tribal entities) (2015):
 - <http://www.bia.gov/WhoWeAre/BIA/OIS/TribalGovernmentServices/TribalDirectory/>
- BIA Regional Offices, Midwest Region 5, Great Lakes Agency, Ashland, Wisconsin:
 - <http://www.bia.gov/WhoWeAre/RegionalOffices/Midwest/index.htm>
- A Directory of Tribal Courts in Wisconsin:
 - <http://www.judicare.org/media/files/Directory%20of%20WI%20Tribal%20Courts%20052013.pdf>
- USC Title 25:
 - <http://www.gpo.gov/fdsys/granule/USCODE-2011-title25/USCODE-2011-title25-chap15-subchapl-secl301/content-detail.html>

6

There are eleven tribes in Wisconsin...

1. Bad River Band of Lake Superior Chippewa Indians;
2. Lac Courte Oreilles Band of Lake Superior Chippewa Indians;
3. Lac du Flambeau Band of Lake Superior Indians;
4. Red Cliff Band of Lake Superior Chippewa Indians;
5. Sokaogon Chippewa Community;
6. St. Croix Chippewa Community;
7. Forest County Potawatomi Community;
8. Stockbridge-Munsee Band of Mohican Indians;
9. Menominee Indian Tribe of Wisconsin;
10. Oneida Nation of Wisconsin; and
11. Ho-Chunk Nation.

7



8

Tribal Contributions to the State and Local Economy

Tribes contribute to State and local economies through employment opportunities for non-tribal members, payment of taxes to the State and federal government, payments to the State under the Gaming Compact, payments to local governments pursuant to Service Agreements, local services contracts, and by securing federal grant dollars that benefit the entire community.

9

Tribal Compacts & Amendments

Tribes contribute a percentage of gaming revenue to the States.

- Wisconsin Department of Administration, Tribal Compacts and Amendments:
 - <http://www.doa.state.wi.us/divisions/gaming/indian-gaming/compacts>

10

Tribal Contributions to the State and Local Economy (cont.)

- Federal income taxes – all employees pay federal income taxes.
- Tribes make contributions for FICA (Federal Insurance Contributions Act – i.e. Social Security), FUTA (Federal Unemployment Tax Act) and Medicare on behalf of all its employees.
- State income taxes – all non-member employees pay state income taxes and all tribal members who either live or work off the Reservation pay state income taxes.
- Real estate taxes – tribes and tribal members pay real estate taxes on all fee land, even though tribes provide governmental services which benefit those lands and area residents.
- Sales taxes – all tribal members pay state sales taxes for off Reservation purchases of goods and services.

11

Important Concepts

- Indian Country
- Sovereignty
- Sovereign Immunity
- Jurisdiction
- PL-280
 - Note PL-280 has mandatory application in six states, including Wisconsin. The Menominee Reservation is excluded from application of PL-280 and will not be discussed today.

12

What is “Indian Country”?

- Legal term defined at 18 U.S.C. Section 1151
- Indian country includes:
 1. All land within the limits of an Indian reservation;
 2. All dependent Indian communities;
 3. All Indian allotments whether they are located within reservations or not; and
 4. All federal trust lands held for tribes.
- The term includes land owned by non-Indians, as well as towns incorporated by non-Indians if they are within the boundaries of an Indian reservation.

13

What is Sovereignty?

- Supreme power or authority.
- Independent power or authority of a government.
- Full right and power of a government to govern itself without any interference from outside governing bodies.
- Caselaw beginning with the Marshall trilogy – a series of three Supreme Court cases affirming tribal sovereignty:
 - *Johnson v. McIntosh*, 21 U.S. 543 (1823)
 - *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831)
 - *Worcester v. Georgia*, 31 U.S. 515 (1832)

14

What are Sovereign Powers?

- Enter into treaties
- Make laws
- Enforce laws
- Determine criteria for citizenship or membership
- Exclude people from territory
- Promote and protect citizens/members and territory

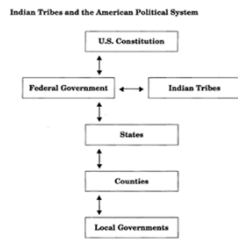
15

Tribal Sovereignty

- Indian tribes – have inherent sovereignty that pre-exists the United States Constitution to govern itself.
- As a matter of sovereignty, tribes generally have the same right as states to establish similar laws that govern commerce/business within their jurisdictions.

16

Tribal Sovereignty (cont.)



17

Basis of Tribal Sovereignty

- The U.S. Constitution, federal statutes, and Supreme Court cases give the U.S. government and state government different levels of sovereign powers.
- When the U.S. was created, the Constitution and federal statutes maintained tribes' inherent sovereign powers. The Supreme Court has since further defined the scope and nature of tribal sovereignty.
- The U.S. government has complete primary sovereignty.
- U.S. relates to other countries as one nation to other nations.
- U.S., to some extent, relates to tribes as one nation to other nations.
- U.S. has the ability to oversee and exercise some control over states and tribes.

18

Powers of Tribal Governments

- Right to decide membership
- Administration of justice (law enforcement, courts)
- Regulation of domestic and family relations;
- Determination of property rights (e.g. inheritance)
- Tribal control of land – acquisition, assignment and leasing, exclusion, zoning
- Conservation and environmental protection

19

Powers of Tribal Governments (cont.)

- Protection of traditional cultural, historic and sacred properties
- Regulating hunting and fishing (even off-reservation if a treaty)
- Business regulation and development – license, tax, zone, establish businesses, regulate or license businesses, resource development (or not)

20

Powers of Tribal Governments (cont.)

- Agreements – with businesses or other governments
- Relations with other governments;
- Providing social services – education, health care, housing
- Providing, regulating or taxing utilities

21

Sovereign Immunity

- Sovereign Immunity is the doctrine that precludes a claim against a sovereign without the sovereign's consent.
- As a sovereign, a tribe is immune from suit.
- Tribes are presumptively immune from state law.
- The concept can result in confusion which can be compounded by issues of, for example, land ownership or licensing for certain activities.

22

Why is Jurisdiction Important?

- Civil Jurisdiction: Tribes exercise jurisdiction over tribal members and possibly non-tribal members on tribal lands. States generally do not.
- Tribes control specific territories – Indian Country and may control people within Indian country:
 - *Montana v. United States*, 450 U.S. 544 (1981).
- Tribal members and tribes have rights on and off reservation land.

23

Jurisdiction (cont.)

- Indian Civil Rights Act applies to Tribes of the U.S. and makes many of the Bill of Rights applicable within tribes:
 - *Talton v. Mayes*, 163 U.S. 376 (1896).
 - *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).
- Jurisdictional Maze - Jurisdiction for different issues may rest in multiple authorities:
 - *United States v. Wheeler*, 435 U.S. 313 (1978).

24

Jurisdiction (cont.)

- Limited Exception: Public Law 280 states have criminal jurisdiction and civil adjudicatory jurisdiction, but not civil regulatory jurisdiction.
- PL-280 Case law suggests that a tribal member can access civil court systems should he choose. It does not provide blanket civil adjudicatory authority.

25

Jurisdiction (cont.) What is Public Law 280?

- A transfer of legal authority from the federal government to state governments providing an increased role for state criminal jurisdiction over individuals in Indian Country.
- Under PL-280, states may take tribal members to state courts for prosecution in cases arising from criminal matters within reservation boundaries.
- PL-280 is frequently misinterpreted.

26

Jurisdiction (cont.) What Public Law 280 did:

- Eliminated most federal Indian country criminal jurisdiction.
- Authorized state criminal jurisdiction over tribal members.
 - Applies on reservation
 - ICRA applies

27

Jurisdiction (cont.)
What Public Law 280 did NOT do:

- Authorize state jurisdiction over tribes
- Terminate tribes
- Federal recognition maintained
- Trust status of land maintained
- Federal obligations to provide services maintained
- Make state regulations applicable to tribal members
- Give the state taxing authority over tribal members
- Make county and city laws applicable to tribal members
- Abrogate tribes' federally protected hunting and fishing rights
- Authorize state jurisdiction over trust lands
- Eliminate tribes' civil and criminal jurisdiction

28

Jurisdiction (cont.)

- Tribal civil jurisdiction over non-Indians is dependent upon whether it implicates tribal self-government or is necessary for tribe's ability to control internal relations. (Montana v. U.S.)
- Factors to consider include:
 - Whether the non-Indian has entered into a consensual relationship with the tribe or is engaging in an activity that impacts the tribe's political integrity, economic security or health and welfare; and
 - May be concurrent jurisdiction. (U.S. v. Wheeler)

29

State Authority

- Cannot infringe on the right of tribes to make their own laws and to be ruled by them.
- A state may have an interest in a situation/case (e.g., gaming, harvests).
- Where tribal self-government is evident, regulation by the state is unlikely.
- Tax non-Indian fee lands.
- Criminal jurisdiction.
- Any powers allowed by Congress.

30

Federal Pre-emption of State

- Feds have “subject matter jurisdiction”
- Commerce, crime, health, housing, education, natural resources
- Regulations on Indian fee lands
- Gaming, environmental, etc.
- Taxation
- Tribal members pay federal income taxes, also state if work off-reservation

31

What does this add up to?

- The interplay between sovereign entities, different legal systems, and jurisdiction is complex but should not be a barrier to doing business.

32

**HOW DOES ALL OF THIS APPLY?
BRINGING THE PIECES TOGETHER.**



33

Business Opportunities with Tribes

- Goods
- Consultants
- Legal Services
- Construction Contractors
- Services for daily business activities
- Also opportunities with individual tribal members

Remember – All tribes are unique and most have several different businesses. Interests, business needs, and cultures dictate necessary services.

34

Contracting with Tribes – the law

- Sovereignty and Contracts:
 - State law will not apply
 - Tribal courts will exercise jurisdiction
 - Tribal law will apply
- Tribal courts may have a tribal bar exam.
- Each tribe has its own body of laws:
 - *Teague v. Bad River Band of Chippewa*
 - Comity
 - Transfer between State and tribal courts

35

Contracting with Tribes

- Government process for approvals.
- Do you need tribal permits or approvals on tribal lands?
- You are an independent contractor and responsible for knowing and following all relevant legal authority.

36

Representing Tribal Individuals

- ICRA issues
- Divorce
- Trust & Estates
 - Land status may alter rights:
 - Fee, trust, allotment.
 - Be sure to ask the question:
 - tribal members retain certain rights on and off reservation.

37

Contracting with Tribes

- UCC:
 - Some tribes have adopted UCC Article 9 provisions.
 - Each tribe's requirements are individual to that tribe.
 - Filing may occur through a tribal system or the state.

38

Contracting with Tribes

- Taxes:
 - Working with tribes may offer unique opportunities to create financial incentives for both parties.
 - For example, investment tax credits.
- Be thoughtful about using mechanisms that can enhance the process for both parties.

39

Contracting with Tribes

- Gaming Facilities:
 - Special Contractual Requirements for highly regulated industry-Compact Requirements.
 - Special rules related to who has access to gaming facilities.
 - Age of service providers, criminal records.
 - Importance of Privacy.
 - Do not infringe on rights of publication, IT, logos, security measures.
 - Gaming Commission and Gaming Facilities have important requirements that businesses need to consider.
 - Can I meet the requirements?

40

Contracting with Tribes Grants & Self Governance

- Every grant program has different requirements.
- Tribes must comply with program terms and this can include a requirement that contractors comply with terms when contracting for work paid for by grant funds.
- Noncompliance means no funding and no project

41

Best Practices when working in Indian Country

- Contractual "truthfulness." If a project will take 6 months, bid it for 6 months.
- Listen. Tribal needs, goals and expected outcomes can be different than non-tribal.
- Be aware and anticipate tribal needs and timelines for signatures and approvals.
- Government processes are subject to pre-established protocols.
- Respect confidentiality and do not advertise tribal business experience without approval.
- Provide frequent communication and updates – no surprises.
- Research the tribe you are working with. All tribes are different.
- Be collaborative and offer ideas and value.

42



QUESTIONS

Sara M. Drescher, Attorney
Forest County Potawatomi Community
Legal Department
313 North 13th Street
Milwaukee, WI 53233
Sara.Drescher@fcpotawatomi-nsn.gov
(414)292-3614

43
