

TRIBAL SOVEREIGNTY AND THE GROWTH OF NATIONS
THE IMPACT OF TITLE IV-D CHILD SUPPORT

by

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“To my family and close friends who provided me with the encouragement and support to pursue and achieve my goals. Those whom reminded me I could do it even in the moments when I felt I could not. Especially my father who taught me so much about our ways as a Native People and encouraged me to share my knowledge and what I know about our Oneida People with others so that they too may come to know us, understand us, and share in the ways of our people.”

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Introduction

Native American Indian tribes inhabited North America and governed their people long before the development of the United States. During the early development of the U.S. many Indian tribes entered into treaty agreements with the Federal Government, thus preserving their inherent rights to self-governance and obtaining the status of domestic dependent sovereign nations (Beck, 2007). This creation of tribal sovereignty created a situation of “government to government relationships between tribes and the U.S.” (Beck, 2007, p. 1). As a result, tribal sovereignty must be considered as federal legislation is created.

This paper will examine the impact tribal sovereignty has on the growth and development of the United States and Native American Indian tribes through the creation of federal policy implemented by administrative agencies to protect public interests and govern the lives and actions of individuals. More specifically it describes the growth of nations through the perspective of tribal sovereignty impacting federal legislation for child support and creating legislative, judicial, and service provision growth within the Oneida Nation of Wisconsin. This paper will draw from research and policies pertaining to tribal sovereignty, concurrent jurisdiction between Native American Indian tribes and State Governments, and child support legislation to demonstrate the impact of tribal sovereignty on the growth of a Native American Indian tribe (Beck, 2007; Jimenez, & Song, 1998; Tribal Child Support Enforcement Programs: Final Rule, 2004; “Supreme

Court Orders:”, 2010; Oneida Business Committee Resolution 06-30-08-C Emergency Adoption of Child Support Law, 2008).

In order to examine how tribal sovereignty impacts the growth of Native American Indian nations and the United States, it is imperative to understand what tribal sovereignty is, what it means, and how federal legislation and administrative agencies promulgate rules and regulations which govern both. These are concepts which are frequently misunderstood and have been debated over the course of U.S. history. For this reason a basic definition of tribal sovereignty and description of federal legislation and administrative agencies is provided as follows.

Tribal Sovereignty

Dr. Dave Beck stated it simply in his 2007 brief that “tribal sovereignty is an acknowledgement by the United States of those tribes that are federally recognized to be self-governing, albeit in a restricted way.” Having the status of federal recognition as a tribe within the United States grants the greatest power of self-governance, which is a part of sovereignty. The power of self-governance is the ability to govern; to make, interpret, and enforce laws; over ones own people and lands. Federal recognition of a tribe is typically determined by treaty, Congressional, or executive branch recognition and creates a type of government-to-government relationship between the Tribe and State or Federal government. The ability or authority to determine and/or change tribal sovereignty is one that is only vested within the Federal Government of the United States.

Individual states do not have the ability or authority to determine or change tribal sovereignty.

In a more specific definition and explanation of tribal sovereignty, Felix S. Cohen made the following statement in his 1942 Handbook of Federal Indian Law: “the most basic principle of all Indian law... is that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by expressed acts of Congress, but rather inherent powers of a limited sovereignty, which has never been extinguished” (p. 122). This simply stated means that federally recognized Indian tribes keep all rights and powers over their people and their lands that they have not expressly given up and that the Federal Government has not taken. Federally recognized Indian tribes maintain the powers they had prior to the time of “first contact” so long as they are not inconsistent with national policies. Powers that would be considered to be inconsistent with national policies and are thus restricted from all federally recognized Indian tribes are the same powers that are restricted from individual states which include the ability to make war, engage in foreign relations, and coin money. As a result, degrees of sovereignty vary widely from one tribe to the next which further complicates the understanding of tribal sovereignty because it does not mean the exact same thing for each and every federally recognized Indian tribe.

According to the August 11, 2009 report published in the Federal Register by the Department of the Interior, Bureau of Indian Affairs, there are currently 564 federally recognized American Indian and Alaska Native Tribes within the United States of America. Based on the fact that each federally recognized Indian tribe is a sovereign

nation, each of these tribes could have their own system of government based on their individual tribal constitutions and cultures. No two tribes are exactly alike. Tribal laws differ from tribe to tribe just as state laws differ from State to State. The type of laws a tribe has is tied to their degree of sovereignty. The primary difference in sovereignty between Indian tribes is noted by whether or not the tribe is a Public Law 83-280, commonly referred to as PL 280, tribe.

Federal Legislation and Administrative Agencies

Federal legislation comes out of Congress which is responsible for creating the laws that govern the citizens of the United States. Through the powers assigned, Congress has the ability to delegate a great deal of rule making authority to various administrative federal agencies. Congress is able to delegate this authority so long as it is defined and no legislative power is given away. It is through the use of enabling legislation that Congress identifies the legislative intent of their actions to delegate certain rule-making authority to certain administrative agencies (Cann, 2006). The standards, rules, and policies made by these agencies have the same effect and powers as laws, but Congress maintains “the ultimate source of power” (Cann, 2006, p. 14) in regards to legislation.

Administrative agencies promulgate rules and regulations that have the same power and effect as statutory laws. The rules and regulations made by administrative agencies are referred to as administrative laws and they are primarily created with the intent of protecting public interest. Administrative laws often affect a wide variety of

social issues by impacting funding, services, and programs that directly touch the lives of the general public in one way or another. Often times it is through the creation of administrative laws that the frame work and structure for social programming comes to life. This was the case with the concept of child support.

Chapter I

Public Law 83-280

Public Law 83-280 is the 280th public law enacted by the 83rd Congress of 1953 (commonly referred to as Public Law 208, or PL 280). It is a public law that transferred jurisdiction of criminal and civil actions on tribal lands, including actions of tribal members, from the Federal Government to State governments (Goldberg, & Champagne, 2007). To fully understand the true purpose of PL 280, it is important to understand the political and historical dynamics of the time. The law was enacted during an era when the Federal Government was openly and actively pursuing the concept of termination and assimilation of Indian people into the “national” dominant culture of the United States of America (Persons II, 1978). Prior to the enactment of PL 280, House Concurrent Resolution 108 was adopted in 1953 “which established tribal termination as the official federal policy and singled out specific Indian Nations for termination” (Melton, & Gardner, 2004). “Under this resolution, approximately 109 Indian tribes and bands were terminated and ceased to exist as legal entities” (Persons II, 1978). The act of termination of an Indian tribe was the Federal Government’s way of discontinuing tribes as legal entities.

The transfer of criminal and civil jurisdiction over Indians on reservation lands was originally granted to five states, which included Minnesota, California, Nebraska, Oregon, and Wisconsin. Alaska was added to this group upon its statehood making a total of six states which came to be known as “mandatory states” for PL 280 (Goldberg, n.d.).

All other states were given the option of acquiring this jurisdiction while Indian tribes were not given any choice in the matter (Goldberg-Ambrose, 1997). This transfer of jurisdiction gave states an increased level of authority and “control over a broad range of reservation activities without any tribal consent” (Melton, & Gardner, 2004). Following the enactment of PL280, ten additional states; Nevada, Idaho, Iowa, Washington, South Dakota, North Dakota, Montana, Arizona, Florida, and Utah; exercised the option of assuming full or partial jurisdiction over Indian tribes within their borders between 1955 and 1971 (Goldberg-Ambrose, & Champagne, 1996). These additional states have been referred to as “non-mandatory, or optional, states” of PL 280 (Goldberg, n.d.).

PL 280 only identified 6 of the 50 states as “mandatory states,” yet this piece of legislation had a tremendous impact on Indian country. At the time that PL 280 was passed, the six “mandatory states” contained 359 of the approximately 550 federally recognized tribes and Native Villages within their borders (Jimenez, & Song, 1998). Once the “optional” states were included the impact on Indian country increased. According to a report from the US Department of Justice, the jurisdictional transfers under PL 280 covered twenty eight percent of the Indian tribes in the continental United States and seventy per cent of all recognized tribes and Alaskan Native villages (Goldberg-Ambrose, 1997).

Purpose of Public Law 83-280

Following World War II, one of the major priorities of President Eisenhower was to significantly reduce the size of the federal budget and in turn the federal deficit (Goldberg, & Champagne, 2007). With termination and assimilation of Indian people as the political trend of the times, a decrease to the budget of the Bureau of Indian Affairs (BIA), which sends federal funds to federally recognized Indian tribe for specific services, was identified as an action that would favor assimilation, formal equality, and eliminate special treatment (Goldberg, & Champagne, 2007). Senate Report No.699 to the 83rd Congress of 1953, which stated alleged lawlessness on Indian lands and identified a lapse in law enforcement services, was another precipitating factor to the proposal and enactment of PL 280 (Melton, & Gardner, 2004).

In an attempt to address two significant problems of law enforcement and criminal justice policy, Congress chose to implement its authority to transfer federal jurisdiction over certain criminal and civil issues on Indian lands to the states (Goldberg, & Champagne, 2007). This was done as opposed to options of providing additional federal law enforcement activity to Indian tribes, increasing resources and support to strengthen tribal law enforcement, or improving the coordination and delivery of law enforcement services between governments; all of which would have been more costly to the Federal Government (Jimenez, & Song, 1998). Thus, the transfer of jurisdiction over these matters from Federal to State Governments was presented by Congress as a solution to the identified lapses in law enforcement on Indian lands (Melton, & Gardner, 2004).

Dual Dissatisfaction of Public Law 83-280

Since the time of its enactment and implementation, Indian tribes have been opposed to the legislation of PL 280. The primary focus of opposition by Indian tribes regarding PL 280 has centered on the fact that it was implemented without the consent of the affected tribes thus “raising serious questions about the proper discharge of the federal trust responsibility and the scope of Congressional authority in Indian affairs” (Goldberg, & Singleton, 1998). PL 280 has been viewed by many as “a complete failure to recognize tribal sovereignty and tribal self-determination” (Melton, & Gardner, 2004). The lack of tribal consent in the transfer of jurisdiction was noted by President Eisenhower upon his signing PL 280 into law when he urged that an amendment be made to the law requiring some sort of tribal referenda (Melton, & Gardner, 2004). No amendments were made to PL 280 until 1968.

States on the other hand originally found PL 280 to be an inviting avenue for assuming a level of authority over Indian lands they previously did not have. Many states did not anticipate the financial burden of providing the law enforcement services on reservations that accompanied the jurisdictional transfer. The states were dissatisfied with the total absence of federal funding provided under the legislation for the additional services they were now providing (Goldberg, & Singleton, 1998). In essence, PL 280 was at that time the equivalence of what is now commonly referred to as an “unfunded mandate” (Melton, & Gardner, 2004). State dissatisfaction with PL 280 was compounded by the fact that the jurisdictional transfer was final and irreversible (Goldberg, & Singleton, 1998). Once a state was in the Act, or opted into PL 280, there

was no way in the legislation of reversing the process and the states were left with the financial burden of providing services.

Amendments to Public Law 83-280

PL 280 was not amended until 1968 with the passage of the Indian Civil Rights Act. Under this Act Congress provided some relief to both the tribes and the states in relation to the transfer of civil and/or criminal jurisdiction. The relief offered under this Act was created to address the issues of dissatisfaction of both the tribes and the states.

One way in which the Indian Civil Rights Act amended PL 280 was to require that any future transfer of jurisdiction, over civil and/or criminal issues from the Federal Government to a State, have the consent of the Tribe it affects (Goldberg, n.d.). This did not impact any of the jurisdictional transfers that had already taken place. It did return a level of self-governance to unaffected tribes as there has not been a single tribe that has consented to a transfer of jurisdiction since the passage of the Act (Goldberg-Ambrose, & Champagne, 1996).

Another way in which the Indian Civil Rights Act amended PL 280 was that it created the ability for States, but not Tribes, to request a retrocession of jurisdiction back to the Federal Government (Bozarth, 2000). The retrocession of PL 280 is the states ability to request the return of jurisdiction over civil and/or criminal issues, either in full or in part, back to the Federal Government. A request for retrocession can be made by the state for either individual tribes or for all tribes within the state (Goldberg, & Singleton, 1998). As identified in the Indian Civil Rights Act, now codified as 25 U.S.C. sec 1321-

26, final decision on a request by a state for retrocession of PL 280, whether in full or in part, is at the discretion of the Secretary of the Interior.

Under this amendment, the ability to request retrocession has not provided Indian tribes with any formal role in the process or the ability to initiate a request. Even without this ability, many Indian tribes have been effective in campaigning through their respective state governments for retrocession to various degrees (Melton, & Gardner, 2004). Many of the other tribes affected by PL 280 have found ways to enforce cooperative agreements of joint jurisdiction. Since the passage of the Indian Civil Rights Act “retrocession has taken place affecting tribes in both the named, or “mandatory,” Public Law 280 states, as well as tribes in the optional states” (Goldberg, & Champagne, 2007). Of the 150 tribes under PL 280 jurisdiction in the continental states, 31 have retroceded, to varying degrees, with 7 having been from the “mandatory” states (Goldberg-Ambrose, 1997). On the other hand, there have not been any retrocessions of the more than 235 tribes and Native villages of Alaska (Goldberg, & Champagne, 2007).

Chapter II

Concurrent Jurisdiction and Public Law 83-280

State jurisdiction over civil and/or criminal issues on Indian lands under PL 280 is not uniform. The specifics of jurisdiction vary from state to state, as well as from Tribe to Tribe within a single state with regard to control and accountability over law enforcement and criminal/civil justice (Goldberg, & Champagne, 2007). One concept that is uniform nation wide is the fact that PL 280 did not supplant Federal Indian Law or Tribal Sovereignty (Great Lakes Indian Law Center, 2008). Federal Indian Law states that “any intent by Congress to abrogate the Tribes’ inherent rights must be express, clear, and unambiguous in a federal statute” (Public Law 83-280 of 1953). Since PL 280 did not abrogate Tribe’s inherent rights, it did not eliminate tribal jurisdiction of civil or criminal issues at any point in time (Great Lakes Indian Law Center, 2008). PL 280 actually created a situation in which both tribal and state jurisdictions operate simultaneously. This is referred to as concurrent jurisdiction which is defined by USLaw.com law dictionary as “the ability to exercise judicial review by different courts at the same time, within the same territory, and over the same subject matter.”

The existence of concurrent jurisdiction between Tribes and States opens the door to a multitude of different scenarios. By simple definition of concurrent jurisdiction, there theoretically exists the ability for dual prosecution of the same crime or legal issue. One prosecution could occur within the State Courts while yet another could occur within the Tribal courts, thus creating the possibility of double jeopardy or opposing final rules.

Since the 5th Amendment of the United States Constitution provides protection against double jeopardy and the Indian Civil Rights Act imposes most of the requirements of the Bill of Rights on Indian tribal governments, this has the propensity to create a very complex situation. Even though both entities are able to have jurisdiction over an issue, they cannot both exercise this jurisdiction (Great Lakes Indian Law Center, 2008).

Impact of Concurrent Jurisdiction

When two different authorities are able to have jurisdiction over the exact same issue yet only one of the authorities can exercise their jurisdiction, situations of great tension and conflict are apt to arise. Many questions present themselves that do not necessarily have clear or simple answers. Who is going to exercise their jurisdictional power? Is one jurisdictional power greater than the other? Who decides which jurisdictional power will rule and under what circumstances? What responsibility do the separate courts have to each other, if any? Thus was the situation in *Teague vs. Bad River Band of the Lake Superior Tribe of Chippewa Indians*.

Teague vs. Bad River Band of the Lake Superior Tribe of Chippewa Indians (1999) was a Wisconsin case in which action was filed in the Ashland County Circuit Court and the Bad River Band Tribal Court, a judicial system of a Wisconsin PL 280 Tribe, resulting in opposing final judgments and orders. Since both judicial systems had a claim to jurisdiction over the issue, both courts carried their respective case through with full awareness that the other court was also taking action. When it came to the point of the Circuit Court enforcing the ruling of the Tribal Court, a dispute arose as to whether or

not the Tribal Court ruling should be granted full faith and credit as directed under Wis. Stat. § 806.245. As a result of further court action the case went before the Supreme Court of Wisconsin for final ruling in a case referred to as *Teague III* of 2003. During the time in which *Teague III* was proceeding through the Supreme Court of Wisconsin, the Circuit Courts in the 10th Judicial Administrative District and the Four Chippewa Tribes of Northern Wisconsin adopted the Tribal/State Protocol for the Judicial Allocation of Jurisdiction; now referred to as the Teague Protocol (Great Lakes Indian Law Center, 2008).

The Teague Protocol outlines how concurrent jurisdictional issues, specifically those between the 10th Judicial District of Wisconsin and the Four Chippewa Tribes of Wisconsin, should be addressed if a Tribe and the Circuit Court have jurisdiction over issues that are primarily tribal. The principle of the Teague Protocol is based on the doctrine of tribal exhaustion as determined by *National Farmers Union Ins. Cos. v. Crow Tribe of Indians* (1985). The doctrine of tribal exhaustion provides the forum whose jurisdiction is being challenged, tribal court jurisdiction, to have the first opportunity to evaluate the grounds for the challenge, thus allowing a tribal court to determine its own jurisdiction (Weathers, 2008). The doctrine also requires that all tribal court remedies be exhausted before entering into proceedings in a state/federal court (Weathers, 2008). The Teague Protocol was thus adopted as an assistive measure to further address confusion over concurrent jurisdiction, not as a means to grant the state court the authority to determine the bounds of tribal jurisdiction (Great Lakes Indian Law Center, 2008). It is vital to remember that tribal jurisdiction does not exist as a granted power from the state,

but rather as an inherent right of sovereignty that was never expressly removed by Congress.

The Teague Protocol indicates that the allocation of jurisdiction should be decided prior to a court rendering a judgment and that the parties who commence an action must disclose whether there is any related action in another court (P. Stenzel, personal communication, July 13, 2009). It also adopted the following thirteen factors in the 2001 Teague Protocol;

- Where the action was first filed and the extent to which the case has proceeded in the first court;
- The parties' and court's expenditures of time and resources in each court;
- The relative burdens of the parties;
- Whether the nature of the action implicates tribal sovereignty;
- Whether the issues in the case require application and interpretation of a tribe's law or state law;
- Whether the case involves traditional or cultural matters of the tribe;
- Whether the location of material events giving rise to the litigation is on tribal or state land;
- The relative institutional or administrative interests of each court;
- The tribal membership status of the parties;
- The parties' choice of contract (meaning choice of forum);
- The parties' choice of contract (meaning choice of law);

- Whether each court has jurisdiction over the dispute and the parties and has determined its own jurisdiction;
- Whether either jurisdiction has entered a final judgment that conflicts with another judgment

as indicated by Chief Justice Abrahamson in her *Teague III* concurrence, to assist State and Tribal Courts determine, through more cooperative measures, which court should proceed (Great Lakes Indian Law Center, 2008).

Even with the doctrine of tribal exhaustion and the guidelines of the Teague Protocol to address issues of jurisdiction as they relates to litigation, concurrent jurisdiction between Tribes and States creates the need for cooperative agreements. These agreements need to address how the two jurisdictions will work together for the provision services to the communities and outline roles and responsibilities for cooperation. Many programs and services are the result of federal legislation and federal funding that is administratively passed on for implementation to Tribes and/or States thus making cooperation between them vital.

Chapter III

The Original Federal Legislation of Child Support

The concept of child support, a legal requirement for absent parents to provide financial support for their children, came out of the Federal Government for the first time in 1950 through an amendment to the Aid to Families with Dependent Children (AFDC) program (Green Book, 2000). The amendment came as a response to increasing welfare caseloads in which the number of single parent households were more often a result of separation, divorce, and non-marriage than a result of the death of a parent (Green Book, 2000). Under this amendment it became required by law for welfare agencies to notify law enforcement when benefits were issued for a child, or children, whom had been abandoned by one of their parents. This notification then prompted location actions to find and order the absent parent to pay child support (Green Book, 2000). By 1975 Congress enacted the Family Support Act (FSA) and the Child Support Enforcement and Paternity Establishment Program (CSE) was established under Public Law 93-647 (PL 93-647- the Family Support Act); part D of Title IV of the Social Security Act.

The primary purpose behind the establishment of the CSE program was to reduce the amount of government spending on welfare services by placing the responsibility of support back on the non-custodial parent (Morgan, 1996). The expectation of the CSE program was to prevent single parent household dependency on public welfare by establishing paternity for children born out of wedlock, locating non-custodial parents, establishing child support orders, enforcing child support obligations, and collecting and

dispensing child support payments. As a secondary function, the CSE program was also expected to function as a “welfare cost recovery mechanism” by passing through some of the child support collected to the family and intercepting the remaining amount as repayment to the State’s welfare program (Turetsky, 2005 p. 402). The most recent action of the CSE program in the reduction of government spending on welfare was the 1984 amendment to the Family Support act of 1975 mandating child support orders to include a petition for medical support (Green Book, 2000). The rationale behind this amendment was to reduce expenses related to Medical Assistance services.

Development and Structure of Child Support Enforcement

Title IV-D of the Social Security Act is the piece of federal legislation that enabled the creation of a National Child Support Enforcement Program under Department of Health and Human Services. In 1975 the Department of Health and Human Services used the legislation of the Family Support Act (PL 93-647), as approved by Congress, to implement Title IV-D of the Social Security Act and create the National Child Support Enforcement Program. The program was created at the federal level to address a social issue of the general populous. From the beginning, the National Child Support Enforcement Program was created as a joint venture between the Federal Government and the States as a federally funded, state-operated, matching grant program (Tribal Child Support Enforcement Programs, 2004).

As a matching grant program, the Federal Government is responsible for defining the overall rules, regulations, and design of CSE. Since the Federal Government is

responsible for the legislation of and structure of CSE, the rules and regulations carry the same power and effect as statutory laws of the United States. Under this arrangement, the Federal Government is also responsible for providing operational funding and technical assistance for the implementation and administration of CSE services in the local arena (Green Book, 2000). As part of the joint venture, States were given the authority to disperse federal funds and define the way in which CSE services would be administered. As a result, many States decided to further disperse funding and administrative authority over the establishment and enforcement of child support to the county level. This created an even more diversified “state-supervised, county-administered” program (Pearson, & Griswold, 2001).

From its inception, the authority to administer the delivery of Title IV-D CSE federal programming was given solely to the States (Tribal Child Support Enforcement Programs, 2004). This created a situation in which Tribes were required to receive federal funds and direction, regarding the administration of CSE services, from the state within which they were located. The original legislation failed to make any provisions enabling federal funds or direct authority over services to be granted to the Tribes. This was found to be a blatant violation of the tribal sovereignty rights to self-governance as granted under the Constitution and Federal Law (Tribal Child Support Enforcement Programs, 2004). Since State and local governments have limited, or non-existent, authority in Tribal territory, this also created a gap in the provision of Title IV-D services to many citizens of the United States.

Chapter IV

Child Support and Native Americans

In 1996 the Federal Government implemented a drastic change to Title IV-D services with the enactment of Public Law 104-193, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA). PRWORA implemented changes in many parts of the Social Security Act and was the legislation responsible for abolishing the Aid to Families with Dependent Children (AFDC) welfare system and replacing it with the Temporary Assistance to Needy Families (TANF) block grant program. As part of the Federal guidelines for this block grant welfare program, it became mandatory for States to operate some type of Child Support Enforcement Program in-order to receive the federal funds (Solomon-Fears, 1998). The primary purpose for the move from AFDC to TANF was to continue to decrease governmental expenditures on welfare by placing a greater emphasis on increasing the enforcement of child support (Barnow, Dall, Nowak, & Dannhausen, 2000).

Not only did PRWORA implement TANF and the connection between welfare benefits and cooperation with child support, it also authorized the direct funding of Title IV-D Child Support Enforcement Programming to American Indian and Alaska Native Tribal organizations (Tribal Child Support Enforcement Programs, 2004). The PRWORA legislation made it possible, but not mandatory, for Native American Tribes to receive federal funding for the provision of Child Support Enforcement services to those under their jurisdiction. It identified the need for program requirements that would be consistent

with those of the States while respecting the sovereign rights of self-governance of the Tribes. Included in the legislation is the ability for Tribes to decide, at any time, if they want to provide child support enforcement services within their jurisdiction, or leave the provision of these services under the authority of the State/County within which they are located. As of March 30, 2004 federally recognized American Indian and Alaska Native Tribes have the authority, under Final Rule of Federal Legislation regarding Tribal Child Support Enforcement Programs codified at 45 C.F.R. Parts 286, 302, 309, and 310, to operate their own Child Support Enforcement services. When a Tribe makes the decision to provide Title IV-D Child Support Enforcement Services they are required to submit a proposal outlining how they are going to meet the federal objectives of establishing paternity; establishment, modification, and enforcement of support orders; and location of non-custodial parents to the Federal Office of Child Support Enforcement under the Department of Health and Human Services for approval (Howard, 2008). According to the Bureau of Indian Affairs, 30 federally recognized Tribes were operating fully comprehensive Title IV-D Child Support Enforcement Programs as of 2008 while others had begun to explore the option and enter into the program start-up phase (“Quick Facts,” 2008).

Requirements for Native American Child Support Programs

When PRWORA authorized direct federal funding to Native American Tribes for Child Support Enforcement programs, it did so under the requirement that the Tribes demonstrate the capacity to meet the objectives of Title IV-D, “including the

establishment of paternity, establishment, modification, and enforcement of support orders, and location of absent parents” prior to receiving program funding (Balanced Budget Act of 1997, 1997). The most basic requirement for a Tribe to demonstrate this capacity is for the Tribe to have “an established Tribal Court System or Court of Indian Offenses with the authority to establish paternity, establish, modify or enforce support orders or to enter support orders in accordance with child support guidelines established or adopted by such a Tribal entity” (Personal Responsibility and Work Opportunity Reconciliation Act, 1996). This means that the established Tribal Court must have the Tribal laws to address all these issues. It is important to note that tribal laws include “treaties, the Tribal Constitution, codes, decisional law, and tribal customs” as specified by that Tribe (Hansen, 1991). Based on tribal inherent rights to self-governance, the Federal Government recognized the importance of tribal customs and traditions and in the Tribal Child Support Enforcement Programs: Final Rule of 2004; codified at 45 C.F.R. Part 309; and determined that customs and traditions are considered to have the same force and effect of law. According to the Bureau of Indian Affairs, as of 2005 there were approximately 298 Federally Recognized Tribal Governments with recognized court systems.

The Federal Government’s understanding of the unique needs and challenges facing Native Americans, along with honoring their sovereignty rights regarding self-governance, lead to federal legislation providing Tribes with a greater array of options in the provision of Child Support services so that Tribes may more effectively meet the needs of their people. The area of Child Support Enforcement has produced federal

legislation which provides options to Tribal Child Support Agencies, in the areas of creating and enforcing child support orders, which are not available to State/County agencies. These provisions in the legislation were created with the assistance and input of many Native American Tribes (Tribal Child Support Enforcement Programs, 2004) and are intended to acknowledge the importance of family structure, bring in the unique challenges Tribes often face due to geographic location, and act as a means of improving the quality of life to increase the likelihood of compliance with Child Support Services.

Issues of Tribal Jurisdiction Over Child Support and Civil Matters

Native American Tribes that decide to operate comprehensive Title IV-D Services are taxed with the challenge of meeting the federal requirements of Child Support Enforcement Programming without compromising their specific Tribal and family traditions. Every Tribe that decides to operate a Title IV-D Child Support Enforcement program must define the jurisdiction of their program as it relates to the civil issue of child support. As previously noted, the issue of jurisdiction is often controversial and jurisdictional issues around the civil subject matter of child support are no exception. In 1989 a survey was sent out to 32 states with Federally Recognized Indian Tribes from the Conference of Chief Justices assessing jurisdictional disputes (Rubin, 1990). This survey found domestic relations disputes; such as divorce, child custody, and support; to be the second most frequently reported jurisdictional issue (Rubin, 1990).

As an over all jurisdictional issue to civil matters, questions have been raised as to whether or not a Tribe can take jurisdiction over a civil matter if the case involves a non-

Tribal member or a non-Indian. Congress has not enacted any general statute that abrogates Tribal Courts ability to hear civil matters or to limit Tribal jurisdiction over civil matters involving non-Indians (Great Lakes Indian Law Center, 2008). The 1981 Supreme Court case of *Montana v. United States* (1981) set the pace in clarifying the Tribal Court's ability to assert civil jurisdiction over non-members and non-Indians with Justice Stewart's majority opinion:

Though *Oliphant* only determined inherent Tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian Tribe do not extend to the activities of nonmembers of the Tribe. To be sure, Indian Tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A Tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the Tribe or its members, through commercial dealing, contacts, leases, or other arrangement. ... A Tribe may also retain inherent power to exercise civil authority over the conducts threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe... No such circumstances, however, are involved in this case (*Oliphant v. Suquamish Indian Tribe*, 1978).

Thus in civil matters, such as child support, tribal jurisdiction can exist over non-Indians as it relates to a "consensual relationship" and the exercise of jurisdiction is necessary to

protect “the political integrity, the economic security, or the health or welfare of the Tribe” (*Oliphant v. Suquamish Indian Tribe*, 1978). As a result, the Supreme Court has since determined that when challenges to tribal civil jurisdiction arise and are brought to the Federal Courts, the courts are to require litigants to exhaust the remedies of Tribal Court (*Iowa Mutual Ins. Co. v. LaPlante*, 1987). Congress identified that Tribes have a vested interest in “preserving and protecting the Indian Family as the wellspring of its future” (H.R. Rep. No 95-1386, 1978), and the Supreme Court has stressed the importance of Tribal power to regulate internal domestic relations. These rulings have been made in regard to civil jurisdiction for both PL 280 and non-PL 280 Tribes in which a situation of concurrent jurisdiction of civil matters exists.

The direction and interpretation provided by the U.S. Supreme Court did not fully alleviate the issues associated with tribal jurisdiction of civil/domestic matters. The dispute seemed to move from the initial issue of jurisdiction over the subject matter to an issue of recognition and enforcement of Tribal Court orders. This was especially true in the area of Tribal child support and State recognition and enforcement of Tribal Court orders for support (Stoner, & Orona, 2004). The struggles in this area lead Congress to enact the Federal Full Faith and Credit for Child Support Orders Act of 1994. Under this piece of legislation a State is required to recognize and enforce another State’s child support order in which “State” is defined as: “ a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, and Indian Country” (General Crimes Act, 1948). Even with this Federal

Law in place, Tribal Court judges continue to report encountering problems in the area of having their court judgments enforced in State forums (Leeds, 2000).

Chapter V

Practical Differences of State and Tribal Child Support

The requirements and performance standards for child support programs are set by the Federal Office of Child Support Enforcement (OCSE). The requirements established for child support services apply to all child support programs receiving Title IV-D funding, regardless of whether the program is State or Tribal. The performance standards established by OCSE define what is expected to be accomplished in each objective of child support services. The ability to meet or exceed the established performance standards is linked to the amount of federal funding received by a State Child Support Enforcement Agency. This is not the case for Tribal Child Support Enforcement as Title IV-D funding for Tribal Child Support Enforcement is not linked to performance standards. Many Tribal Child Support Enforcement Agencies utilize the established performance standards as a gauge for “customer service” and as a guide to align themselves with the overall goals of Child Support Enforcement services. Title IV-D requires that both States and Tribes provide for the establishment of paternity in order to receive federal funding. Paternity is required to be established in a child support case unless it is determined that establishing paternity would cause risk of harm to the custodial party and the child, is not in the best interest of the child for cases of incest or forcible rape, or if legal proceedings for adoption are pending (Tribal Child Support Enforcement Programs, 2004). While both States and Tribes are required to

provide for the establishment of paternity, the federal regulations for setting paternity establishment are defined differently.

State Title IV-D programs are required to comply with the Standards for Program Operations of 1975. This specific part of the Federal regulations indicates that States must provide a process for unmarried parties to consent to a voluntary acknowledgment of paternity and that this must be offered at hospitals and birthing centers, the opportunity to request genetic testing in situations of contested paternity, and a judicial or administrative process which allows for legal action to establish paternity in accordance with State law. Under the Tribal Child Support Enforcement Programs of 2004, States are required to give full faith and credit to the establishment of paternity from another state. Tribal Title IV-D programs are required to comply with the Tribal Child Support Enforcement Programs, 2004. This section of the federal regulations indicates that Tribes are also required to provide for voluntary acknowledgement of paternity but it does not define requirements of the process. Under this section of the federal regulations Tribes are also required to have procedures for genetic testing in contested paternities, unless barred by Tribal law, and they must have a “process established under Tribal law, code, and/or custom” to establish paternity. Since Tribes are not subject to the Federal Full Faith and Credit clause of the Constitution, they are not required to give full faith and credit to State establishment of paternity but they may do so under the subject of comity. In turn, States are not required to extend full faith and credit to Tribal establishment of paternity unless it is premised in a Tribal Child Support order pursuant to the Full Faith and Credit for Child Support Orders Act of 1994.

Title IV-D also requires the establishment of child support obligations/orders. Under federal regulations both States and Tribes are required to use local laws and procedures in the establishment of support orders (Standards for Program Operations, 1975). Under this same regulation, both States and Tribes have the ability to utilize either a judicial or an administrative forum for the establishment of child support orders.

State Title IV-D programs are required to meet specific federal timeframes, as defined in the Standards for Program Operations of 1975, when it comes to the act of establishing a child support order. Tribal Title IV-D programs are required to provide for the establishment of an order without being subjected to any specific federal timeframes. Both State and Tribal Title IV-D programs are required to have a set of guidelines based on descriptive and numeric criteria which result in a calculated child support obligation. These requirements are specifically defined for State programs in the Standards for Program Operations of 1975 and for Tribal programs in the Tribal Child Support Enforcement Programs: Final Rule of 2004. The regulations governing State and Tribal Title IV-D programs, respectively, denote some very specific differences in the establishment of child support orders.

According to their specific requirements, State programs are required to address the health care needs of the child by including an order to address medical support in some manner. Tribal programs are not required to address, nor are they prohibited from addressing, issues of medical support. This is because the Tribal Child Support Enforcement Programs: Final Rule, 2004 created a provision regarding Indian Health Services (IHS) which is required to provide federal health services to American Indians

and Alaska Natives. IHS provides a service of health care but does not provide health insurance coverage. There for, Tribal programs are able to determine their specific needs around creating an order for medical support to best meet the needs of the child. On the other hand, Tribal programs have the ability to utilize non-cash support to satisfy support obligations. This is an option State programs do not have. Non-cash support is defined as “support provided to a family in the nature of goods and/or services, rather than in cash, but which, nonetheless, has a certain and specific dollar value” (Tribal Child Support Enforcement Programs, 2004). It is also stated that non-cash support must directly contribute to the needs of the child and meet the federal regulations of stating the specific dollar amount of the support obligation and that non-cash support can not be used to pay assigned support obligations such as state owed debt (Tribal Child Support Enforcement Programs: Final Rule, 2004).

As a continuation of the requirement to establish support obligation/orders, Title IV-D includes a requirement for the modification of support obligations/orders. This requirement takes into consideration that situations change with time and support obligations/orders also need change to match the financial circumstances of the parents and needs of the child(ren). State Title IV-D programs are required to provide for a review of support orders at least every three years at the request of the parties, or the State if a party is receiving public assistance (Personal Responsibility and Work Opportunity Reconciliation Act of 1996). Tribal Title IV-D programs are required to identify in their initial application for Title IV-D funding how the Tribe will address

modification of support orders, but there are no specific federal regulations regarding the process (Tribal Child Support Enforcement Programs, 2004).

Finally, Title IV-D requires the enforcement of child support obligations/orders. Enforcement actions may be taken against the person or the person's assets depending on what the State or Tribal laws and jurisdictions allow for. Federal legislation requires States and Tribes to have some specific enforcement techniques available, but they are not restricted to those measures. There are some enforcement techniques that are only available to State Title I-D agencies while others are available to any child support enforcement entity; State, Tribal, private attorneys, and collection agencies. The way in which these enforcement techniques are used is dependent upon the specific action being taken. Some actions require the use of the court system while others are administrative and do not require the use of the court. For these reasons, the enforcement of a child support obligation/order is not a clear cut process, but rather one that is defined by the facts of the specific case and Federal, State, and Tribal mandates.

State Title IV-D programs are required to have the following enforcement techniques in order to receive Federal funding for their program.

- Income Withholding – a procedure which requires an employer to make automatic deductions from an employee's income/wages for payment of his/her child support obligation. A provision for this type of enforcement is required in any order issued or modified by a State (Standards for Program Operations, 1975). The Uniform Interstate Family Support Act of 1996 has

enabled States to initiate an income withholding and send it directly to an employer in another State for enforcement without the use of court action.

- Judgments – an action that provides child support obligations/orders the ability to be entitled as judgments, thus allowing action to be taken for unpaid child support installments (Omnibus Budget Reconciliation Act of 1986).
- Liens – the action of placing a lien, in the amount of overdue child support, against the paying parties real and/or personal property (Requirement of Statutorily Prescribed Procedures to Improve Effectiveness of Child Support Enforcement of 1986). The federal legislation also requires States to give full faith and credit to a lien from another State so long as the lien action complies with the procedural rules of the State Requirements of statutorily Prescribed Procedures to Improve Effectiveness of Child Support Enforcement of 1986.
- Federal Tax Refund Intercept – the submission of a request for federal tax refund intercept to off set the amount of “overdue” child support for cases meeting the qualifications. This is a process that is only available to State agencies, but agreements can be made for States to submit the intercept on behalf of a Tribal agency (Tribal Child Support Enforcement Programs: Final Rule, 2004).
- Financial Institution Data Match (FIDM) – a process of locating assets, with the assistance of financial institutions, which can be identified for liens to pay toward unpaid child support obligations. This is a process through which

financial institutions match data about assets against a list of delinquent accounts for child support (Requirement of Statutorily Prescribed Procedures to Improve Effectiveness of Child Support Enforcement of 1986). When a match occurs, the IV-D agency has the ability to attach a lien to the asset and seize the asset to satisfy the delinquent obligation, in accordance with State law.

- State Income Tax Refund Offset – a requirement for States that have an income tax to have a State statute authorizing the State revenue agency to withhold income tax refunds for the payment of unpaid child support obligations (Child Support Enforcement Amendments of 1984). This process is similar to the Federal Tax Refund Intercept in place by the Internal Revenue Service (IRS).
- License Revocation – a process for withholding, suspending, or restricting a variety of licenses when there is an unpaid child support obligation. This process applies to drivers' licenses, professional and occupational licenses, and recreational and sporting licenses (Requirement of Statutorily Prescribed Procedures to Improve Effectiveness of Child Support Enforcement of 1986).
- Consumer Reporting Agencies – a process of reporting unpaid child support obligations to credit bureaus as an unpaid debt (Requirement of Statutorily Prescribed Procedures to Improve Effectiveness of Child Support Enforcement of 1986).

- Posting Bonds – “procedures which require that a noncustodial parent give security, post a bond, or give some other guarantee to secure payment of overdue support, after notice has been sent to such noncustodial parent of the proposed action, and the procedures to be followed to contest it” (Child Support Enforcement Amendments of 1984).

Tribal child support programs are required to provide full faith and credit to valid child support orders regardless of whether or not they receive federal funding. Tribal Title IV-D programs are required to have the following enforcement techniques in order to receive federal funding for their program.

- Income Withholding - a procedure which requires an employer to make automatic deductions from an employee’s income/wages for payment of his/her child support obligation. Tribal laws are required to withhold for both current support obligations and arrears. Income withholdings are only required once the noncustodial parent has failed to make support payments which equal one month’s obligation. (Tribal Child Support Enforcement Programs, 2004)

While the use of an income withholding is the only enforcement technique required for Tribal IV-D Child Support Programs receiving federal funding, it is not the only technique Tribal IV-D programs can choose to use. Tribal IV-D programs can choose to use the other enforcement techniques required by state programs and traditional tribal practices so long as they are identified in Tribal law.

Chapter VI

The Oneida Nation of Wisconsin

The Oneida Nation of Wisconsin (also referred to as the Oneida Nation) is a federally recognized, Public Law 83-280 American Indian Tribe. The reservation boundaries of the Oneida Nation lie within both Brown and Outagamie Counties of Northeast Wisconsin. According to data compiled in 2007 by the Oneida Nation Enrollment Office, there are 16,154 enrolled Tribal members residing either on or off the reservation (C. Skolaski, personal communication, February 2009). The Oneida Nation has a defined Constitution and is governed by General Tribal Council (GTC); GTC is made up of all enrolled members who have attained voting age for the Tribe and present themselves at the time of a GTC meeting; with a group of elected officials, the Business Committee, who represent and act on behalf of GTC when GTC is not in session (Oneida Tribe of Indians of Wisconsin [Constitution and By Laws], 1936).

As a sovereign nation, the Oneida Nation utilizes its right to self governance to govern its people and its lands while providing an array of services to enrolled Tribal members and others. The Oneida Nation also works in cooperation with many of the surrounding communities and municipalities in the provision of services. Services provided by the Oneida Nation include, but are not limited to, such things as police services, legal and judicial services, social service programs, health services, economic support services, employment, environmental services, educational services, and community based programs. These services may be provided to enrolled Tribal members

living within the reservation boundaries, enrolled Tribal members living outside the reservation boundaries, Tribal employees, non-Tribal members living within the reservation boundaries, and non-Tribal members with an established relationship to an enrolled Tribal member. How and to whom services are provided is determined by Tribal laws related to the service or by defined policies of the specific program responsible for the delivery of the service.

An Exploration of Title IV-D Tribal Child Support

The Oneida Nation submitted a proposal to the Federal Office of Child Support Enforcement indicating a desire to operate its own Title IV-D Tribal Child Support Enforcement Agency. As a part of the proposal, the Oneida Nation identified the functional status of its established court system, and that with the proper Tribal laws, the tribal court system would have the authority to establish paternity, establish, modify, and enforce support orders, and locate non-custodial parents in accordance with the federal objectives of child support. In January 2006, the proposal was approved and the Oneida Nation received a grant allowing them to enter into the “Start-Up” phase of Title IV-D Tribal Child Support. (L. Schwartz, personal communication, June 2008)

The “Start-Up” phase of Tribal Child Support is a period of time during which federal funding is provided, in the form of a grant, to a Tribal entity for the purpose of fully exploring the feasibility and ability of the Tribe to operate its own Title IV-D Child Support Enforcement Agency. During this time a Tribe must formulate a functional plan for the operation of a child support program that meets all the required federal regulations

of a Title IV-D Tribal Child Support Enforcement Agency. This includes having all the laws and/or tribal regulations in place to provide the Tribe with the authority to establish paternity, establish, modify, and enforce support orders, and locate non-custodial parents.

During the “Start-Up” phase, the staff of the Oneida Child Support Program conducted a dual purpose community survey to help determine the direction the agency should take with issues related to child support. As a result of the survey, the Oneida Child Support Program was able to gather information indicating how the general tribal membership felt about the idea of the Oneida Nation operating its own child support agency. It was also able to identify what the membership defined as the most important issues in the delivery of child support related services. The community survey ultimately gave the members of the Oneida Nation the opportunity to have a voice and participate in the up front development of the tribal child support agency.

Along with conducting a community survey, the staff of the Oneida Child Support Program spent time researching current tribal laws and judicial procedures to ensure steps could be taken to provide the Oneida Nation with the proper legal authority, under its existing judicial system, to meet the judicial requirements of operating a federally funded tribal child support agency. During this same time, the staff of the Oneida Child Support Program was networking with existing tribal child support agencies from across the country to determine what actions had been found to work for other Tribes and what issues would likely present as the Oneida Nation continued to move forward with its intent to operate its own agency. As a result of this work it became very clear that the issue of jurisdiction over matters related to child support would need to become a primary

focus in the design of a functional child support agency. (L. Schwartz, personal communication, June 2008)

Since the Oneida Nation is a P.L. 83-280 Tribe in a mandatory P.L. 83-280 state, it was crucial for the staff of the Oneida Child Support Program, the staff of the legal team from the Oneida Law Office, members of the Legislative Operating Committee, members of the Oneida Nation Judicial System, and members of the Oneida Business Committee to understand the impact this could have on the provision of services to enrolled members and the expansion of self-governance of civil matters. In the process of defining jurisdiction of matters related to child support, the Oneida Nation had to take into consideration the fact that there are members of the Oneida Nation residing all around the United States of America, some members have existing child support cases under state jurisdiction, and some members have children with individuals who are not members of the Oneida Nation or any other Tribe. A decision was made to utilize personal and subject matter jurisdiction in the context defined at *Montana v. United States* (1981).

On June 20, 2007 the Oneida Business Committee approved the establishment of an Oneida Child Support Enforcement Agency (Oneida Business Committee Meeting, 2010, June 20). This approval was granted with the understanding that the necessary Tribal laws were being drafted and would need to be adopted in order for the Oneida Nation to be eligible for Title IV-D federal funding. The Legislative Operating Committee; with input from the staff of the Oneida Law Office and the Oneida Child Support Program; drafted the Oneida Code of Laws (OCL) Chapter 77-Paternity and

Chapter 78-Child Support based on a review of the content of Wisconsin State Statutes related to paternity and child support, federal standards regarding the calculation of child support, and Oneida culture. The approval granted by the Oneida Business Committee, for the creation of a child support enforcement agency, was also an action in support of an increase in the personal and subject matter for which the Oneida Nation would exercise jurisdiction. The increase in personal and subject matter jurisdiction of these civil matters would greatly increase the scope by which the Oneida Nation exercised its right to self-governance as a sovereign nation.

Once approval to move forward was granted, the Oneida Child Support Program was able to submit a proposal and plan for comprehensive service provision to the Federal Office of Child Support Enforcement. Even though the Oneida Nation had not yet adopted the necessary laws for the establishment of paternity and the establishment, modification, and enforcement of child support, it was able to provide a draft copy of each law accompanied by an outlined timeline for adoption in the comprehensive service plan. The Oneida Nation was also able to outline the specific procedures utilized by the Oneida Tribal Judicial System to provide substantive due process to individuals involved in actions addressed by the court, and the procedural due process to be used by the agency to assure the protection of the due process rights of individuals involved in all actions of the Tribal IV-D program; as required by the Tribal Child Support Enforcement Programs Final Rule of 2004; in the submitted plan (P. Stenzel, personal communication, July 13, 2009). Based upon the completeness of the plan submitted, the detailed supporting documentation, and the Oneida Nation's commitment to develop and adopt

the necessary laws; the Oneida Nation was awarded its Comprehensive Child Support Enforcement grant in April of 2008 (L. Schwartz, personal communication, June 2008).

Chapter VII

Child Support and the Oneida Nation of Wisconsin

Upon receipt of the Comprehensive Child Support Enforcement grant the Oneida Nation was officially able to operate a Title IV-D Tribal Child Support Enforcement Agency. The Federal Office of Child Support Enforcement granted the Oneida Nation its Comprehensive Child Support Enforcement grant on the condition that the necessary Tribal Codes/Laws were to be in place by July 1, 2008 (Oneida BC Resolution 06-30-08-C Emergency Adoption of Child Support Law and 06-30-08-D Emergency Adoption of Paternity Law, 2008). Since the Oneida Nation was still finalizing the necessary laws at the time it received this grant, the child support program transitioned to the status of an agency, brought in additional staff to prepare for the operation of a fully functional tribal child support agency, worked with the Tribal Trial Court to expand its function, and continued to work on the identified issue of transferring the jurisdiction of existing, referred to as post-judgment, child support cases involving at least one enrolled tribal member from the State to that of the Oneida Nation. Thus the Oneida Child Support Enforcement Agency (OCSEA) was officially created.

On June 30, 2008 the Oneida Business Committee granted a six month emergency adoption of the OCL Chapter 77- Paternity and Chapter 78- Child Support (OBC Meeting, 2008, June 30). The emergency adoption of these laws was granted by the Oneida Business Committee in order for the Oneida Nation to maintain compliance with the grant and enabled the Oneida Business Committee to grant a six month extension,

which occurred on December 10, 2008, prior to the permanent adoption of the laws on June 24, 2009 (Oneida BC Resolution 06-24-09-B Child Support Law and 06-24-09-C Paternity Law, 2009). By the time of the permanent adoption of the Paternity and Child Support Laws, the Legislative Operating Committee of the Oneida Nation also developed and brought forward for adoption OCL Chapter 79- Child Custody, Placement, and Visitation (Oneida Code of Laws 06-24-09-D Custody, Placement, and Visitation, 2009).

With the paternity and child support laws in place as of June 2008, OCSEA had a stronger position from which to request the transfer of jurisdiction of post-judgment cases, in which the Oneida Nation would be a party of interest base on the definition of jurisdiction as it pertains to issues related to child support, from the State of Wisconsin to the Oneida Nation. OCSEA was also able to open its doors for the provision of service to new cases, entered into an agreement with the State of Wisconsin to expunge birthing costs assessed to enrolled fathers of the Oneida Nation, and begin to enforce the laws of child support as they related to honoring judgments or child support orders against individuals employed by the Oneida Nation. Each of these actions required a great deal of work and helped to set the pace for the expansion of the Oneida Nations scope of exercising its sovereign rights of self-governance over civil matters.

Jurisdictional Transfer of Post-Judgment Child Support Cases

The jurisdictional transfer of post-judgment civil action cases was not a new concept for the State of Wisconsin. The Forest County Potawatomi Community, Lac du Flambeau Band of Lake Superior Chippewa Indians, and the Menominee Tribe of

Wisconsin had already transferred such cases in the operation of their Tribal Child Support Agencies. These transfers occurred prior to July 31, 2008 when the Supreme Court of Wisconsin created Wis. Stat. § 801.54. This statute, titled Discretionary transfer of civil actions to tribal court, identified the ability to transfer civil matters with concurrent jurisdiction from state to tribal court and created the requirements of notice to the parties and a hearing on record prior to the transfer of jurisdiction (“Supreme Court Orders:”, 2010). By the time the Oneida Nation was in a position to transfer jurisdiction of post-judgment child support cases, OCSEA had identified approximately 4,000 cases that met the criteria of having concurrent jurisdiction between the State of Wisconsin and the Oneida Nation and would need to comply with the affirmative notice requirements of the statute (*Petition to create a rule governing the discretionary transfer of cases to tribal court*, 2009). Based on the anticipated cost of complying with the affirmative notice requirements, the Wisconsin Department of Children and Families submitted a letter on February 9, 2009 to the Supreme Court of Wisconsin on behalf of the Oneida Nation requesting the creation of a narrow exception to Wis. Stat. § 801.54 to facilitate the transfer of these cases (*Petition to create a rule governing the discretionary transfer of cases to tribal court*, 2009).

Following discussions during the open administrative conferences on March 9, 2009 and May 1, 2009 the Supreme Court of Wisconsin confirmed its decision to grant the request for a narrow exception to Wis. Stat. § 801.54 for the specific transfer of post-judgment child support cases (“Supreme Court Orders:”, 2010). On July 1, 2009 Wis. Stat. § 801.54 was amended through the creation of Wis. Stat. § 801.54(2m) Tribal Child

Support Programs thus allowing for the transfer of a post judgment child support, custody, or placement provision once concurrent jurisdiction has been determined and the parties have been noticed of their right to object (*Petition to create a rule governing the discretionary transfer of cases to tribal court*, 2009). As a result of this amendment, if neither party objects in a timely manner the case will transfer under what is referred to as a negative notice. If either party files a timely objection to the transfer of jurisdiction, a hearing must be held on record with a decision regarding the transfer rendered by the circuit court currently holding jurisdiction of the case. The courts original order dated July 31, 2008 stated that the “court would review the operation of this rule in two years from its effective date of Jan. 1, 2009” (“Supreme Court Orders:”, 2010). On October 18, 2010 a public hearing was held to review the rule in its entirety and the statute passed once again with a new date of review set out five years (W. Thomas, personal communication, November 20, 2010).

From the beginning, when the transfer of jurisdiction of post-judgment child support cases was being looked into, OCSEA had made the decision that when the time came it would start case transfers in Brown County and then proceed with one county at a time. This decision was made in order to facilitate the most effective transition for all involved. Once Wis. Stat. § 801.54 was amended and OCL Chapter 79- Child Custody, Placement, and Visitation was adopted, OCSEA was able to effectively and efficiently move forward with the jurisdictional transfers of post-judgment child support cases.

OCSEA outlined a process to ensure notification was provided to the parties of cases identified as eligible for a jurisdictional transfer. The process was set to begin with

an informational notice of intent to transfer being sent by OCSEA. The informational notices were created as a courtesy to the parties in order to provide them with general information about the transfer of jurisdiction and contact information for OCSEA in case they had any questions. Following the notice of intent to transfer sent by OCSEA, a notice of case transfer would be sent by the county child support agency. This notice explained that the case was identified as eligible to be transferred to the Oneida Nation and what had to be done within what time frame if the party objected to the transfer. The notice also explained that if neither party filed an objection the case would be transferred. It went on to explain that if one of the parties filed an objection, within the stated time frame, a hearing would be held and the county court would make a ruling regarding the transfer.

Once cases were identified as cases that would transfer they began the procedural process set in place regarding the jurisdictional transfer of post-judgment child support cases. The act of transferring begins with the State Court entering an order to transfer jurisdiction and closing its case to transfer the file to the Tribal Child Support Agency. Once the Tribal Child Support Agency receives notice of the state court's order to transfer and the file, the agency files a motion with the tribal court to accept jurisdiction of the case granting Full Faith and Credit to the Child Support Order and its contents. The filing of this motion typically requires a copy of the most recent order to be attached. As soon as the tribal court enters an order accepting jurisdiction and granting Full Faith and Credit to the existing child support order from the state, the case comes under the tribe's jurisdiction and laws. The Tribal Child Support Agency is now able to work the case

according to Tribal laws regarding child support. (J. Archibald, T. Lorbecke, J. Pische, personal communication, August 6, 2008).

Full Faith and Credit for Child Support

A requirement of both state and tribal courts is that they must comply with the Full Faith and Credit for Child Support Orders Act (FFCCSOA) of 1994. This means that the courts must give full faith and credit to valid child support orders of other states and tribes. A Tribe or Tribally-owned business is not required to honor a State income withholding order due to tribal sovereign immunity. However, if a tribe operates a federally funded Title IV-D Child Support Agency, a State Title IV-D agency can request the assistance of the tribal agency in processing the State income withholding order. If this request for assistance is made, the tribal agency is required by federal regulation to serve the State withholding order on the employer (Tribal Child Support Enforcement Programs, 2004). Requesting assistance in this manner does not create any legal enforcement grounds via the tribal court as nothing in this process has brought the matter under the tribal court's jurisdiction. Simply serving the State income withholding order on a Tribal employer or Tribally-owned business does not guarantee direct income withholding from the employee as tribes are not required to honor direct withholding requests (Tribal Child Support Enforcement Programs: Final Rule, 2004). Another option is to ask the tribal court to recognize and enforce the State support order pursuant to FFCCSOA.

A valid State child support order registered with and recognized by a tribal court is enforceable by Tribal law pursuant to FFCCSOA. When a non-tribal member chooses to work for a Tribe or Tribally-owned business, the non-tribal member has entered into a consensual relationship with the tribe thus consenting to the Tribe's jurisdiction of personal and subject matters related to the consensual relationship. This would include the enforcement of a child support obligation as the consensual employment relationship involves income. While this does not impact the fact that Tribes or Tribally-owned business are not required to honor direct income withholdings, tribes may choose to require employers to honor direct income withholding through the enactment of Tribal laws (Tribal Child Support Enforcement Programs: Final Rule, 2004).

In the creation of OCL Chapter 78- Child Support, 78.9-2(b) specifically states that "No payor shall refuse to honor a wage withholding order executed pursuant to this law" and 78.9-2(h) specifically states that "Non-Indian off-reservation payors shall be subject to wage withholding under 28 U.S.C. §1738B" (OCL Ch. 78- Child Support, 2009). These specific statements within Oneida Tribal law, in conjunction with the requirements of FFCCSOA, set the best practice for State agencies to enforce income withholding orders on individuals employed by the Oneida Nation to be by means of registering the order with the Oneida Tribal Judicial System for recognition and enforcement. With the adoption of OCL Chapter 78- Child Support, registration and recognition of child support orders from other jurisdictions, also referred to as foreign jurisdictions, became a requirement prior to the Oneida Nation as an employer honoring any direct wage withholding orders.

OCSEA worked with the tribal court to outline the specific procedures for addressing requests of registration and recognition of foreign orders against individuals employed by the Oneida Nation. This process begins by directing all requests for registration and recognition of foreign orders through OCSEA so that a validity check can be done of the order. The process includes a requirement for the requesting agency to submit an authenticated copy of the most recent child support order for filing with the tribal court along with the federal standardized income withholding notice as required by the Tribal Child Support Enforcement Programs: Final Rule of 2004 before any further action will be taken. Upon receipt of the required documentation, OCSEA validates the employment of the individual named as the payor on the order, validates the requested amount for direct withholding, and prepares a case file for a court hearing to recognize and enforce the order. Once this is complete a hearing date is set so long as proof of service notifying the individual of the action to be taken is achieved at least 15 days prior to the hearing date. This notice allows for any possible objections to the recognition to be brought forward by the identified payor and addressed by the court. Once the hearing is held and recognition is granted and an order for enforcement entered by the court, a copy of the order to enforce and the income withholding is sent to Oneida's payroll department for action.

The Oneida Nation had been employing non-tribal members with direct income withholding orders for child support for many years prior to the adoption OCL Chapter 78- Child Support. OCSEA did not want to penalize those employed prior to the adoption of the law by ending the current action of the withholdings the Oneida Nation had been

honoring. In order to address this issue, OCSEA elected to have the Oneida payroll department continue to withhold on those cases while it worked to bring the requests for direct income withholdings in line with the current child support law. This procedural exception prevented those employed prior to the adoption of the law from falling behind in their payments while being afforded the opportunity to raise any objections they may have to the income withholding for child support once their hearing date arrived.

Chapter VIII

Growth of the Oneida Nation of Wisconsin as a Result of Child Support

The development of a Title IV-D Tribal Child Support Agency seemed to act as a catalyst in the growth and expansion of the Oneida Nation, more specifically the Oneida Tribal Judicial System (OTJS), also referred to as Tribal Court. As the child support case load continued to grow with cases flowing in from jurisdictional transfers, registration and enforcement of foreign judgments, and new referrals/applications for services; so did the subject matter that needed to be addressed by the courts. Most of the issues were able to be addressed by the laws related to child support the Oneida Nation had adopted, some were issues that would require new laws to be adopted in-order for the Oneida Nation to take jurisdiction of the primary subject matter, while still others were unexpected independent issues that came before the court as a result of the laws adopted for the purpose of child support. With the increase in actions coming before the court it became evident that OTJS was entering a time of growth and development as a court.

Once OTJS began to accept jurisdiction of the cases transferred from the state, inquiries about how to obtain modifications of child custody, placement, and visitation began to come in to OCSEA. Child support agencies are not a party of interest and therefore are not involved in matters of custody, placement, and visitation. All inquiries of this nature were directed to OTJS for direction on how to proceed with such requests. OTJS's Rules of Civil Procedure define the process for filing a motion to address civil matters with the courts, but the process between OTJS and OCSEA regarding existing

child support orders that may be impacted by these actions had not been defined. This was an area in which the Tribal Court had to develop a process to ensure that all aspects of a case before them were compliant with the appropriate laws.

Another unaddressed area that came to light was that of divorce or legal separation. The Oneida Nation had no law regarding such subject matter and since child support orders are often set in these situations it seemed that this could be an area that would continue to initiate a case in the State Court system only to later be looked at as falling under concurrent jurisdiction as a result of the child support order attached. At the same time, the lack of laws regarding divorce or legal separation could pose a potential problem to some cases that had been identified for jurisdictional case transfer. When a post-judgment child support case transferred from State Court to Tribal Court, the entire contents of the case had to transfer to ensure it would not end up as a bifurcated case; a case in which part of the case was under Tribal jurisdiction while another part was under State jurisdiction. As of April 28, 2010, the Oneida Nation adopted OCL Chapter 71-Marriage and Chapter 72-Divorce, Annulment, Legal Separation (OCL Ch. 71- Marriage and OCL Ch. 72- Divorce, Annulment, Legal Separation, 2010). This too would require the development of a process between OTJS and OCSEA in order for the appropriate child support obligations to be set and then enforced by OCSEA.

This expansion of laws was not the end for the Oneida Nation but rather the beginning. On April 28, 2010 when the Marriage and Divorce, Annulment, and Separation laws were adopted, and the OCL Chapter 67-Real Property Law of 1996 was amended in 2010 by Oneida BC Resolution 04-28-10-E. It would not be a far reach to

expect to see a Probate Law, Child Welfare or Child Protection Law, Guardianship Law, or a review of the legislative and judicial processes in the near future. The reality is that work has already begun for some of these laws and the Oneida Nation's Administrative Procedures Act, governing the legislative and judicial decision making process, has been in the process of review and adjustment.

On November 20, 2010 the General Tribal Council (GTC) of the Oneida Nation was called to order for a specially called meeting to address what had been identified as a need for a separation of powers. The OCL Chapter 1- Administrative Procedures Act of 1991 placed the lawmaking provisions of the Oneida Nation in the same Code of Law that governs the judicial decision making process and administrative procedures of the Oneida Nation. The proposal brought before GTC was one requesting approval to revamp the legislative process and revise the Tribal Judicial System in one action. The intent of the proposed action was to separate the judicial system and the law making system into two separate laws. The new laws would be the Judiciary Law which would re-structure and govern the Oneida Tribal Judicial System and the Legislative Procedures Act which would govern the law making process. Ultimately the proposal was requesting that the legislative actions of the Oneida Nation; those which create the laws; be separated from the judicial actions; those which interpret the laws.

The format in which this proposal was presented to GTC required an approval or denial of the entire matter. It was structured in such a way that one law could not be adopted without the other. While it is understandable that in order to replace one active law governing both the legislative and judicial entities would require two separate laws,

the fact that adoption of one proposed law automatically adopted the other was found to be a primary obstacle. GTC affirmed the need for the separation of powers between the legislative and judicial actions of the Oneida Nation. GTC also affirmed the need to re-structure the judicial system to more effectively meet the increased responsibility and expanded authority of the judicial system that had come with the addition of laws pertaining to civil matters. GTC did not concur with the proposed laws the way they were written or the fact that they came as a package deal. As a result GTC voted to defer action on the proposal and sent it back to the Legislative Operating Committee. The action was sent back with a directive that the matter be brought back to GTC in the form of two separate laws for adoption, each law to be eligible for adoption independent of the other, with all concerns raised at the meeting addressed and reported on in writing at a future meeting.

Conclusion

Tribal Sovereignty and the Growth of Nations

With even as much as a simplistic understanding of the definition of tribal sovereignty; as it pertains to Native American Nations within the United States of America (U.S.A.); it becomes more clear as to how the actions of the legislature of the U.S.A. have both a ripple and rebound effect on the provision of services to its citizens. When Congress passes legislation it often delegates the rule making authority to administrative agencies and these agencies promulgate rules and regulations creating administrative laws that impact the general public. It is not uncommon for this to happen when it comes to the provision of social service programs. The authority to oversee many of these programs ends up being passed on to the State level. It is at this point that the issue of tribal sovereignty begins to shine through.

As sovereign entities within the United States, Native American Nations are not required to take direction from the States when it comes to the application of federal legislation. The Federal Government has a responsibility to work with the Native American Nations and provide them with the opportunities that are being provided to the States as a result of federal legislation. When the Federal Government has failed to do so it has a responsibility to amend the oversight and comply with tribal sovereignty. Thus was the case with the concept of child support.

The correction in the federal legislation pertaining to child support opened the door for Native American Nations to receive direct funding from the Federal Government

for the operation of child support agencies under the direction of their own Tribal Governments. As a result, Native American Nations have begun to experience a growth in the provision of services they are able to provide to their membership and a growth in the scope of exercising their sovereign right of self-governance. As shown by looking at the Oneida Nation of Wisconsin, this can have a ripple effect of initiating growth with the Native American Nation via an expansion of Tribal laws/legislature. It can in turn have a rebound effect on the state within which the Native American Nation exists as the identified Tribe begins and continues to exert its sovereign rights over civil matters. To look back even a little further, it has a rebound effect on the U.S.A. as the Federal Government must work to be more cognizant in the legislation it passes and the way it delegates the rule making authority. Therefore, the simple issue of tribal sovereignty has an impact on the way in which multiple Nations grow and develop.

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