

Michigan State University College of Law

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**Tribal-State Relations:
Michigan as a Case Study**

Matthew L.M. Fletcher, Director

Alicia Ivory, 2009-2010 Fellow

Adrea Korthase, 2L

Sheena Oxendine, 3L

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Executive Summary

This paper explores the working relationship with the Anishinaabe tribes of the Great Lakes region and the State of Michigan. Across the United States, many tribes have entered into cooperative agreements with their respective states. Such agreements aim to divide management of a resource, for example, or provide a method by which each respective sovereign interacts in situations such as law enforcement or taxation of goods and services. In a best case scenario, the state and tribe(s) successfully envision the scope of the issue and the potential consequences of agreements to divvy “responsibilities” among themselves. In a worst case scenario, rather than negotiate in good faith, the parties use a “cooperative agreement” as a jurisdictional power grab.

More often than not, however, the situation is one of a “no case scenario” – the tribes and state have never entered into or even attempted to develop a cooperative agreement; this is a particularly problematic situation for the many states with tribal and state lands forming a jurisdictional “checkerboard.” Since the 1970s, the Anishinaabe Tribes and Michigan have flirted across the table with one another in several areas of negotiations, and although the processes were often ones of stops and starts, tribal/state relations are generally amicable today. Tribal/state relations in Michigan, therefore, may provide a “best practices” example for tribes and other states.

Many of the individuals interviewed for this paper point to the existence of several factors which all overlapped to create an atmosphere in which these agreements could thrive. One is that the state and tribes built their relationship over a series of years, and in a variety of circumstances. It smoothed the process that after many years, parties would come to see the same faces across the table. Although it depends on the good faith of all parties, in Michigan that good faith was based in a form of gentle realpolitik. Another oft cited factor is that of practicality, the acknowledgment by the parties that negotiation is less expensive and more likely to generate acceptable results than litigation. Michigan tribes and the State saw federal government or federal court intervention as an unknown. Another factor influencing successful negotiations is the willingness of parties to compromise for the sake of achieving stability. For instance, while there is no single Michigan tribal identity, and each tribe is unique in its history, the

tribes were able to succeed by first negotiating amongst themselves on major points in order to face the State with a unified front.

The paper begins with a brief history of tribal/state relations in Michigan, followed by discussion of three cooperative agreements. Part I discusses the Inland Consent Decree of 2007, which came several decades after the decidedly more contentious Great Lakes Consent Decree. Part II discusses Michigan Court Rule 2.615, sometimes referred to as the “comity” rule. Part III discusses the Uniform Tax Agreement, in which the advantageous concept of an “agreement area” was created.

Although the circumstances varied in time, place, and subject matter, the reader will see several commonalities of each process, which may successfully be employed by other tribes in other states.

About the Michigan State University Indigenous Law and Policy Center

The Indigenous Law and Policy Center was created to help provide competent, experienced, and inexpensive legal services to tribal governments in an effort to assist them in attaining their judicial and governmental goals. Since its inception in 2005, the Center has provided services to tribes and tribal organizations in Michigan, and to tribal courts across the country. We have delivered testimony to the Michigan Law Revision Commission and provided written comments on Proposition 2 (a constitutional amendment eliminating affirmative action) to the Michigan Civil Rights Commission. The Center's students have presented to the Michigan Legislature on Michigan's Tribal Economies through the Legislative program, "House University." We have drafted and filed *amicus curiae* briefs before the Michigan Supreme Court and the Fifth Circuit Court of Appeals. We also co-host the Building Strong Sovereign Nations program designed to offer training to newly-elected Michigan Indian tribal leaders.

Center faculty and staff have published papers in the *Federal Lawyer*, the *Kansas Journal of Law and Public Policy*, the *Michigan State Law Review*, the *Yellow Medicine Review*, the *Intercultural Human Rights Law Review*, the *Harvard Journal on Legislation*, the *Tribal Law Journal*, the *George Mason Law Review*, the *Hastings Law Journal*, and many others. Center faculty and staff have presented papers and research at the NCAI, the Federal Bar Association's Indian Law Conference, Harvard Law School, Boalt Hall, the University of Michigan, the University of New Mexico Law School, the University of Arizona College of Law, the University of Colorado Law School, UCLA Law School, and at numerous other symposia.

In late 2009, Michigan State University Press will publish the first edited collection of essays derived from Center programs – *Facing the Future: The Indian Child Welfare Act at 30*, co-edited by Professor Fletcher, Center Staff Attorney Kathryn E. Fort, and Professor and Co-Director Wenona T. Singel.

About the Co-Authors

Matthew L.M. Fletcher is an Associate Professor at Michigan State University College of Law and Director of the Indigenous Law and Policy Center. He also sits as Chief Justice of the Poarch Band of Creek Indians Supreme Court, as an appellate judge for the Pokagon Band of Potawatomi Indians and the Hoopa Valley Tribe, and is a consultant to the Seneca Nation of Indians Court of Appeals. Professor Fletcher will be co-author of the sixth edition of *Cases on Federal Indian Law* (Thomson West) with David Getches, Charles Wilkinson, and Robert Williams. He recently published *American Indian Education: Counternarratives in Racism, Struggle, and the Law* with Routledge. Professor Fletcher graduated from the University of Michigan Law School in 1997 and the University of Michigan (B.A. 1994). He is currently writing a casebook on American Indian tribal law. He is a citizen of the Grand Traverse Band of Ottawa and Chippewa Indians, located in Peshawbestown, Michigan. He provides the introduction to this paper.

Alicia Ivory is the Center's 2009-2010 Fellow. She is a graduate of the University of Michigan (B.A. 1999), and graduated with honors from the Michigan State University College of Law in 2008. Her prior work experience includes an internship with the legal department of the Little Traverse Bay Bands of Odawa Indians. She is the primary researcher and author of Section I of this paper.

Adrea Korthase is a second-year law student at the Michigan State University College of Law. She holds degrees from the University of Michigan (B.A. 1999) and from Wayne State University (M.A. 2004). She is a citizen of the Sault Ste. Marie Tribe of Chippewa Indians. She is the primary researcher and author of Section II of this paper.

Sheena Oxendine is a third-year law student at the Michigan State University College of Law. She graduated from the University of North Carolina at Chapel Hill (B.A. 2007), and is a citizen of the Lumbee Tribe of North Carolina. She is the primary researcher and author of Section III of this paper

Tribal-State Relations: Michigan as a Case Study

Brief History of Tribal-State Relations in Michigan

Whether they understood it or not, or accepted it or not, Michigan's Indian tribes and the State of Michigan have had a close relationship from before the entrance of the State into the Union in 1837. It was because of the 1836 Treaty of Washington, 6 Stat. 491, in which several Ottawa and Chippewa bands ceded their claims to the lands that now comprise about one-third of the entire land mass of the State of Michigan that finally convinced Congress that the Territory of Michigan was a viable State.

Michigan's relationship with the Indian people living within the state borders has been schizophrenic to say the least. In the late 1830s, the State's leaders pressed for the forced removal at gunpoint of virtually all Indians living south of a line bisecting the State near Clare, Michigan. But that removal effort mostly failed, and in 1850, Michigan's voters amended its Constitution to grant state citizenship and the right to vote to Michigan's Indians, so long as they demonstrated their "civilization" by abandoning their tribal relations and, in particular, giving up their treaty rights. In the decades that followed, however, leading up to the modern era of Michigan tribal-state relations that began in the 1970s, the State of Michigan and its political subdivisions disclaimed any responsibility to the Indians in the state. Meanwhile, the United States Department of Interior largely did the same, leaving Michigan Indians in an extremely harsh political gray area.

In the late 1960s and early 1970s, the Department of Interior recognized only four Indian tribes in Michigan – the Bay Mills Indian Community, the Hannahville Indian Community, the Keweenaw Bay Indian Community, and the Saginaw Chippewa Indian Tribe (there are now 12 federally recognized tribes in Michigan). The State Department of Natural Resources began to crack down on tribal treaty fishers and hunters in force,

leading to the important treaty rights cases arising out of state criminal convictions of tribal fishers, *People v. Jondreau*, 384 Mich. 539, 185 N.W.2d 375 (1971), and *People v. LeBlanc*, 399 Mich. 31, 248 N.W.2d 199 (1976). Later, Judge Noel Fox issued his massive opinion in *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), roundly affirming the treaty fishing rights on Lake Michigan and parts of Lakes Huron and Superior for the tribes who were signatories to the 1836 Treaty of Detroit.

The Fox Decision forced the 1836 Treaty tribes – which now include the Bay Mills Indian Community, the Grand Traverse Band of Ottawa and Chippewa Indians, the Little River Band of Ottawa Indians, the Little Traverse Bay Bands of Odawa Indians, and the Sault Ste. Marie Tribe of Chippewa Indians – to negotiate with the State of Michigan, the United States, and with non-Indian sports and commercial fishers over how to divide, regulate, and conserve the limited fishery at issue. The initial negotiations over the regulation of fishing in the Great Lakes were deeply antagonistic, personal, and complicated, but still resulted in a Consent Decree in 1985. Upon the expiration of the 1985 agreement in 2000, the parties negotiated a modified Consent Decree. Over the course of three decades, the relationship between the State Department of Natural Resources and the treaty tribes has improved dramatically. The tribes and the Department cooperate on a host of conservation and resource projects.

The Fox Decision, however, left open a very large question – whether the same treaty rights preserved on the Great Lakes would apply inland. Some tribes promulgated hunting regulations allowing tribal citizens to hunt and fish off-reservation for longer periods and with larger harvests than allowed under state law. Eventually, the State of Michigan in 2003 brought a claim under the rubric of *United States v. Michigan* asserting that inland hunting and fishing rights had been terminated, forcing another round of intensive negotiation over treaty rights. This negotiation concluded in 2007 with the so-called Inland Consent Decree, the first of the focus areas of this study.

Also helping to usher in improved State-tribal relations was the development of Michigan Supreme Court Rule 2.615 that provided a formal process by which state courts would grant comity to Michigan's tribal court judgments, provided the tribal courts did the same. The rule, first recommended in 1992, became final in 1996. In 1997, largely on the strength of that court rule, the Grand Traverse Band and Leelanau County entered

into a modern cross-deputization agreement, still in effect. The Michigan Supreme Court's support for continued tribal court-state trial court relations resulted in the development of an Indian Child Welfare Act benchbook designed with Michigan trial judges in mind. Virtually all of the tribes, numerous state trial judges and tribal court judges, and the Supreme Court Administrative Office collaborated on the benchbook from 2007, finalizing it in 2009. The Michigan court rule is the second focus area of this study.

In the 1990s, several tribes opened negotiations with the State of Michigan's Department of Treasury in regards to an omnibus tax agreement. The State and certain tribes had entered into tax agreements in years past, over sales taxes for on-reservation sales of automobiles, gasoline, and tobacco. Federal Indian law circumscribed the State's authority to tax on-reservation sales or to force tribes to collect valid state taxes, but at the same time did little to protect tribes and reservation Indians as a practical matter from otherwise invalid state taxes. The negotiations concluded in 2003, with about half of the tribes in the state entering into the tax agreement, which covers sales and use taxes, income tax, motor fuel and tobacco products taxes, and the Single Business Tax. These tax agreements are the final focus area of this study.

I. United States v. Michigan 2007 Consent Decree on Inland Hunting, Fishing, and Gathering

In Michigan, as with all tribes across the United States, the unfettered ability to protect the rights of and provide for its people is of paramount concern for any tribal government. This right to self-govern as a sovereign nation is expressed in many ways, perhaps none of which as important as the right to support one's family via subsistence and earned income; and to that end, to freely engage in the methods of fishing, hunting and gathering that meet those needs and which have been a traditional part of tribal life since before European contact.

Access to waters and wildlife is an essential component of those rights to hunt and fish. Tribal citizens depend upon that access for subsistence, commercial exploitation, and recreation. So important is this right that during the earliest days of treaty negotiations with Europeans, leaders of what would eventually become known as the "Michigan tribes" negotiated to protect the right to hunt, fish and gather on traditional lands for Anishinaabe descendants via treaty. Article 13 of the 1836 Treaty of Washington between the Odawa, Ojibwe, and the United States reserved for the signatory tribes "the right to hunt and the usual privileges of occupancy until the land is required for settlement." TREATY OF WASHINGTON, 6 Stat. 491 (1836). Not until the 1970s did the precise language of the 1836 treaty come before a court to be judicially determined.

In *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), a citizen of the Bay Mills Indian Community set a gill net trap in Lake Superior. The fisherman was "caught" by the Michigan Department of Natural Resources, and charged based on the prohibition of gill net use under state regulations. At trial, the state argued that the rights in the Treaty of Washington no longer existed, resulting in state jurisdiction to regulate fishing and hunting within its borders. At about the same time, tribes made a request to the United States to file a case on their behalf to prevent the state from imposing its laws against the tribe and its citizens. Judge Fox held that the signatory tribes (then represented by the Bay Mills Indian Community, but now including the Sault Ste. Marie Tribe of Chippewa Indians, the Grand Traverse Bay Bands of Ottawa and Chippewa

Indians, the Little Traverse Bay Bands of Odawa Indians, and the Little River Band of Ottawa Indians) still held the right to fish in those waters under their own regulations, and moreover that the Great Lakes could never be “settled” within the meaning of the Treaty. *United States v. Michigan*, 471 F. Supp. at 218. After that decision, the state and the tribes had to resolve the issue of allocation and biological management of the Great Lakes fish species.

The period leading up to *United States v. Michigan* and the period during which the tribes and state attempted to negotiate allocation was contentious and bitter. User groups – non-Indian commercial and sports fishermen who sought licenses from the state – were particularly hostile toward tribal rights and toward tribal citizens themselves. Personal Interview with Nick Reo, Interim Director of the Native American Institute at Michigan State University, August 21, 2009. It was not uncommon to see anti-Indian signs, or to read about gas tanks filled with sugar or shots fired near traditional tribal fishing spots. Telephone Interview with Kathryn Tierney, Attorney for Bay Mills Indian Community, September 3, 2009. In that atmosphere, not surprisingly, the parties did not easily come to fair terms of allocation in the beginning. In fact, the Bay Mills Indian Community, which is traditionally a fishing community, backed out of the negotiations, citing the proposed allocations were unfair and narrowed its citizens’ access far too sharply. *Id.*

Although the State lost on nearly every key legal question, their delaying strategy forced the United States and the 1836 Treaty tribes into the long process of negotiating a final agreement, resulting in the 1985 Consent Decree. See ROBERT DOHERTY, *DISPUTED WATERS: NATIVE AMERICANS & THE GREAT LAKES FISHERY* 124 (1990). Judge Enslin, who ordered the parties to negotiate a settlement if at all possible, noted: “[That] the public interest in a peaceful, and practically enforceable resolution of this matter mandates as preferable a resolution by settlement rather than trial.” Order of Reference 2, *United States v. Michigan*, No. M26-73 (W.D. Mich., Sept. 28, 1984), *quoted in* Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 *UNIVERSITY OF CHICAGO LAW REVIEW* 440, 458 n. 96 (1986). Judge Enslin himself, however, expressed skepticism that the parties could ever reach agreement, only to then

express shock and deep satisfaction when they did. See *United States v. Michigan*, 12 INDIAN L. REP. 3079, 3080 (W.D. Mich., May 31, 1985).

Although *United States v. Michigan* upheld tribal treaty rights to fish in the Great Lakes, the decision left open the issue of whether a tribal right to inland hunting, fishing and gathering still existed. In anticipation of another round of litigation determining the existence and scope of inland treaty rights, the state and tribes engaged in extensive litigation and discovery. Both sides were well aware that taking the issue to court could result in a decision in anyone's favor; the outcome was too difficult to predict. On the one hand, given the decision in *United States v. Michigan*, the tribes had legal precedent – of sorts – on their side, since the question of the existence of inland rights would ultimately be answered by looking to the same treaty language that reaffirmed tribal rights to fish in the Great Lakes.

On the other hand, federal courts rarely upheld tribal treaty rights as against state sovereign rights, so the tribes could not be too comfortable in predicting an outcome in their favor. Furthermore, in court, the only question that would be decided is whether there was an existing right at all. It would not decide the scope of that right, or whose regulations would govern the exercise of that right. Interview with John Wernet, Deputy Counsel to the Governor of the State of Michigan, September 22, 2009. Many of the same concerns were held by the state – although many cases of tribal treaty rights were found in favor of non-Indians, *United States v. Michigan* had already held in tribes' favor based on interpretation of the same language that would be at issue in determining inland rights. No doubt in consideration of the difficulties that arose in negotiating the Great Lakes consent decree, the parties came to the conclusion that trying to settle the dispute among themselves might be a fairer and more cost effective way to determine the scope of tribal inland rights:

The exchange of thousands of pages of reports and supporting documents, along with depositions, gave the parties a chance to thoroughly grasp the strengths and weaknesses of their respective cases. This intensive litigation and discovery process reinforced the obvious: that all parties would be throwing the dice by leaving the interpretation of Article 13, as it related to inland rights, to the federal court system. [Electronic Mail

Interview with James Bransky, General Counsel for the Little Traverse Bay Bands of Odawa Indians, September 14, 2009.]

Rather than leave such a critical issue for the courts to decide, and spending the next ten or fifteen years in litigation, both parties came to the conclusion that if they could agree to the scope and management of tribal inland rights, they could define the parameters of such an agreement in ways that could work in each party's favor, even if that meant each party had to let some arguments go.

[The state sensed that] they could achieve a more favorable result that they could have greater influence over by negotiating before trial, rather than facing the prospects negotiating on allocation of resources after a Tribal victory in federal court. Additionally, while the Tribes developed a strong historic record and felt strongly about their position, they realized a trial could result in a worst case scenario of the federal courts ultimately adopting the state's position.

[*Id.*]

In Michigan, few subjects stoke anger and emotion the way the subject of hunting rights does. Like the tribes, "many of the user groups [hunters and fishers] also thought of hunting as a tradition handed down from generation to generation," and considered it just as important to their family traditions as the tribes claimed it was important to their citizens. Personal Interview with John Wernet, Deputy Counsel to the Governor of the State of Michigan, September 22, 2009. Naturally, then, non-Indian user groups such as Michigan United Conservation Clubs, Michigan Fisheries Resource Conservation Coalition, the U.P. Whitetails Association and Bays de Noc Great Lakes Sports Fisherman all paid close attention to the proceedings. Electronic Mail Interview with James Bransky, General Counsel for the Little Traverse Bay Bands of Odawa Indians, September 14, 2009. But unlike the charged atmosphere that surrounded negotiations some fifteen years earlier, by the time the parties sat down to determine the scope of inland treaty rights, the 1985 Great Lakes Consent Decree had been in place for some time, and all involved parties saw that a settlement agreement between the tribes and State concerning natural resources could, in fact, be workable. These intervening years of relatively amicable relations likely served to diffuse hostilities from non-Indian users

toward Indians (and vice versa). The question remained: would it be possible for the parties come up with an agreement that not only satisfied the state's constituents, but also the constituents of *each* of the signatory tribes?

Whether purposeful or not, one action by the tribes may have functioned to lay a foundation for negotiations right off the bat: unlike fishing rights in the Great Lakes Consent agreement, the tribes had relatively little *recent* cultural history of commercial exploitation of the species involved in the inland agreement. At the very beginning of the inland negotiating process, therefore, the tribes were able to extend a proverbial olive branch by stipulating they would not engage in commercial consumption of the target species. Personal Interview with John Wernet, Deputy Counsel to the Governor of the State of Michigan, September 22, 2009. If anything, tribal use of the target species would result in only a modest subsistence impact. That stipulation gave the state a tremendous amount of room in which to negotiate. It also gave the other parties incentive to stay at the table, and probably to make compromises of their own. *Id.*

Additionally, because of earlier experience negotiating with familiar faces, the state and the tribes likely did not bring in the same stereotypical beliefs that likely hampered the negotiation process in the Great Lakes decree. John Wernet, who participated in the Great Lakes negotiations, was initially skeptical that the parties could come to any sort of amicable decision.

It seemed like a situation that was all or nothing. The right existed, or it didn't; the land was required for settlement, or it wasn't. These threshold issues needed to be decided [before negotiations could begin]. Also, the state and the tribes had their constituents to answer to. What would the chairmen say to their people if they bargained away the citizens' treaty rights?

Personal Interview with John Wernet, Deputy Counsel to the Governor of the State of Michigan, September 22, 2009.

Despite these challenges, negotiations surrounding the inland rights consent decree were relatively smoother than those surrounding treaty fishing rights in the Great Lakes. Mr. Wernet largely credits the fact that the parties already had experience with one another; there were relationships in place because of the prior consent decree,

providing an atmosphere that was less characterized as wariness among strangers and more as debates among colleagues. “[Parties] negotiating the inland rights were able to build upon the relationships forged during the Great Lakes negotiations [which allowed them] to come to a compromise where the state recognized a limited right, and the parties agreed to work out the limitations of that right.” Personal Interview with John Wernet, Deputy Counsel to the Governor of the State of Michigan, September 22, 2009.

Perhaps the inland negotiations are considered successful only in comparison to the Great Lakes negotiations:

Anyone who lived through these negotiations would not describe them as ‘smooth.’ However, since we ultimately reached an agreement that did not make any party entirely happy, but protected all the parties’ core interests, it is also difficult to identify a main flaw. A minor flaw is that in some areas where pinning down every detail threatened to stall out the process, the parties intentionally left some things ambiguous to be figured out in the implementation process. In a few areas, passing the buck to a future time is already proving challenging.

Electronic Mail Interview with James Bransky, General Counsel for the Little Traverse Bay Bands of Odawa Indians, September 14, 2009.

After years of lengthy negotiations, which involved significant participation from the state as well as all five signatory tribes, the parties produced the 2007 Inland Consent Decree, which covered every species able to be exploited in Michigan’s state and tribal lands.¹ An important feature of the Decree is that flexibility is built in. Rather than basing each parties’ right on a set number of individual animals, the limits are based upon percentages, so that if a particular species is abundant in one year and scarce in another, the human right to exploit that species adjusts accordingly. Telephone Interview with Kathryn Tierney, Attorney for Bay Mills Indian Community, September 3, 2009.

Most, if not all, of the individuals involved in the various negotiations agree that a salient factor in successfully producing the agreement is that the parties already had a working relationship with one another. Both parties were willing to come to the table in

¹ Accessible at http://www.michigan.gov/documents/dnr/Proposed_Consent_Decreepages1-144_209977_7.pdf.

good faith, rather than take the risk of letting their rights and freedom to manage be decided by the federal courts. Personal Interview with John Wernet, Deputy Counsel to the Governor of the State of Michigan, September 22, 2009. Lessons taken away from the tribal/state negotiation process could be useful in other areas, even if the subject of the negotiations differs. Mr. Bransky, Mr. Wernet, and Ms. Tierney all expressed the belief that negotiations of any sort will fail when the parties talk at one another instead of to one another, and that the ability to engage in that kind of open communication is easier when the parties have a history to which they can reach back, a history which hopefully fosters open communication and mutual respect among them. Successful negotiations such as those governing inland rights and rights to the Great Lakes waters may become part of such a history in future cooperative agreements.

II. Michigan Supreme Court Rule 2.615 on Extending Reciprocal Comity to Tribal Court Judgments

In 1889, the Michigan Supreme Court decided a case in favor of a Native American in the Upper Peninsula of Michigan. *Kobogum v. Jackson Iron Co.*, 43 N.W. 602 (Mich. 1889). An Ojibwe woman, Kobogum, was trying to collect on a note promised to her deceased father from a mining company he led to an iron ore deposit. See Matthew L.M. Fletcher, *Laughing Whitefish: A Tale of Justice and Anishinaabe Custom*, Michigan State University Legal Studies Paper No. 06-16 (2008). According to Kathryn Tierney, attorney for the Bay Mills Indian Community, this case set the stage for Michigan's state-tribal relations and is an example that as far back as the 19th Century, Michigan showed a respect to tribes when issues arose. Telephone interview with Kathryn Tierney, Attorney for Bay Mills Indian Community, Sept. 3, 2009. In deciding the case, and in response to the attempt by the defense to claim they did not have to pay out on a note to plaintiff's father because he was a polygamist, the court recognized that the Constitution sets tribes apart from the State. The court also recognized that tribal laws, customs and traditions should be recognized by the State courts. See *Kobogum*, 43 N.W. at 605 ("They were placed by the constitution of the United States beyond our

jurisdiction, and we had no more right to control their domestic usages than those of Turkey or India.”).

In a 1999 address, Michigan Supreme Court Justice Michael F. Cavanagh points to an even earlier indication of the State of Michigan’s commitment to its tribes. In 1850, the Michigan legislature petitioned to set aside an order from President Zachary Taylor for the removal of Chippewa Indians from the Upper Peninsula. Justice Cavanagh, while still recognizing hardship and injustice that all Native Americans have experienced throughout history, believes that Michigan has managed to remain free of problems that other jurisdictions face even today. Hon. Michael F. Cavanagh, *Michigan’s Story: State and Tribal Courts Try to do the Right Thing*, 76 U. DET. MERCY L. REV. 709, 712 (1999).

Judge Michael Petoskey, tribal court judge for various tribes in Michigan, agrees with Justice Cavanagh and Ms. Tierney. Judge Petoskey says that the history of state-tribal relations in Michigan is fairly devoid of contentions issues because many Michigan tribes were historically ignored by the federal government and thus invisible to the State, at least until treaty fishing rights issues arose. Interview with Michael Petoskey, Tribal Court Judge, East Lansing, MI, Sept. 2, 2009.

The road to greater visibility began in 1992 when seven state and tribal judges met for an Indian Tribal Court/State Court Forum. The seven judges were Hon. Michelle Boyer, Hon. Bradley Dakota, Hon. William Ervin, Hon. Michael W. MacDonald, Hon. Michael Petoskey, Hon. Thomas A. Van Tiem, and Hon. Garfield Hood, who chaired the Forum. Both Judge Petoskey and Ms. Tierney credit Justice Cavanagh with bringing everyone together. Both agree that Justice Cavanagh saw it as the right thing to do among little fanfare. Judge Michael Petoskey says that the “stars were aligned” for the development of the rule and Kathryn Tierney labels the timing “serendipitous.” Both credited Justice Cavanagh many times for his commitment and efforts. They also give a lot of credit to Judge Garfield Hood, retired judge of Michigan’s 12th District. The forum was funded by the State Justice Institute, and by the National Center for State Courts. Hon. Michael F. Cavanagh, *The First Tribal/State Court Forum and the Creation of MCR 2.615*, Michigan State University College of Law Indigenous Law & Policy Center, Working Paper 2007-16, at 3 (2007). Justice Cavanagh says that “[a]s its first priority, the Forum indicated the need for a measure to ensure mutual recognition of state and tribal

judgments.” Cavanagh, *Michigan’s Story*, *supra*, at 713. The Forum discussed various ways to approach the measure, deciding on full faith and credit while still considering other ways of implementation, including statutory enactment or a rule based on comity. *Id.*

After the Forum, the court rule was considered from two different angles. The State Bar of Michigan American Indian Law Committee (created by the Forum itself) asked the State Bar to submit a proposal to the Michigan Supreme Court, which published the proposal for comment. *Id.* Justice Cavanagh talked about the Court’s decision as to whether the rule should come from them or from the legislature, concluding with:

In the end, we determined that it was an appropriate exercise of our constitutional authority. And a prudent one. To be honest, we were also aware that this is a procedural problem that we could probably handle better than the Legislature. [Cavanagh, *First Tribal/State Court Forum*, *supra*, at 11.]

Several models of the rule were considered. According to Justice Cavanagh, the decision makers felt that a reciprocal agreement would offer a better chance of enforcement and “omit much of the temptation to second-guess the other jurisdiction’s order.” *Id.* at 9-10. North Dakota Rule 7.2, a non-reciprocal rule, was among the model rules considered. Kathryn Tierney points out that the result is a broader rule than a standard full faith and credit rule because it deals with orders and warrants as well as judgments. Telephone interview with Kathryn Tierney, Attorney for Bay Mills Indian Community (Sept. 3, 2009).

Judge Petoskey speaks about the rule and the advantages of it (or lack thereof) in other jurisdictions. Speaking of his travel, he echoes Justice Cavanagh’s assertion that the way the court rule is set out benefits jurisdictions by clearing up confusion that might otherwise compromise its effectiveness:

I was just in Kansas and in Kansas there’s a federal statute that gives states jurisdiction over matters that occur on reservations. It’s called the Kansas Act, so there’s a lot of confusion between state courts and tribal courts about that concurrent jurisdiction, who has jurisdiction and who ought to

be exercising jurisdiction, to the point where both sovereigns feel so strong about the sovereignty, the people are being doubly prosecuted and doubly pursued by the courts...When I go and hear stories like that or I go to Public Law 280 states or I go out to Maine or go out to Rhode Island... and when I think about we have here in Michigan where a judge like me tends to see jurisdiction in black and white – it's a breath of fresh air because I think you look at a fact pattern and it's pretty easy to determine which court has jurisdiction and that's not always the case in other jurisdictions. [Interview with Michael Petoskey, Judge, East Lansing, MI, Sept. 2, 2009.]

Kathryn Tierney says that up until the 1990s, the relationships the tribal courts had were mostly local and cordial. There were efforts to make sure that there were not competing orders for divorces and similar matters. She sees the stakeholders of the process as the Court members themselves, recognizing that individuals do not necessarily know how to bring about uniformity and it is the judges' responsibility to do that. Telephone interview with Kathryn Tierney, Attorney for Bay Mills Indian Community, Sept. 3, 2009.

Judge Petoskey feels that the tribal governments are the larger stakeholders because they benefited from the adoption of the court rule. He says that “the two most significant challenges for tribal courts and for tribal judges was garnering respect from within the community itself and credibility from outside of the community so we were seen as credible institutions.” He continues by saying that when you look at MCR 2.615 it says that any judgment, order, subpoena, or warrant coming out of the tribal court is just as valid as if it came out of a State Court and as significant. It enhanced the stature of tribal courts and increased their visibility. Interview with Michael Petoskey, Judge, East Lansing, MI, Sept. 2, 2009.

Petoskey remembers that shortly after the court rule was in place, the Grand Traverse Band needed to compel the appearance of an inmate at the Michigan Department of Corrections. When the subpoena or writ was sent down to the prison, the first reaction to the subpoena was one of confusion and perhaps even stalling. Once the tribal attorney pointed to the court rule, however, things got easier. Petoskey says that the

court rule has made many things easier. In the beginning, he says, some tribal communities were reluctant to adopt a rule that would require them to recognize and enforce State Court orders and judgments because they saw it as an infringement of their sovereignty. As they saw the results for other tribes who adopted the rule, though, they began to view the rule as an expansion of their sovereignty and a recognition of the validity of their governments. *Id.*

The court rule has assisted in the procedural development of tribal courts as well. As an example, Petoskey talks about what happens if someone wants to file a garnishment action and outlines the two-step process:

In terms of a foreign judgment coming to the tribal court for recognition and enforcement, we've adopted court rules that lay out a procedure and provide for objection periods. So if you have a money judgment against an individual, first you have to register and file the foreign judgment and have it recognized by the tribal court and just like the grounds of objection in the Michigan Court Rule, most tribes have those same reasons... Secondly...we have them file the garnishment action once the judgment is recognized and then we have a garnishment process and procedure. [Interview with Michael Petoskey, Judge, in East Lansing, MI, Sept. 2, 2009.]

Before the rule there was no formal process for such situations and Judge Petoskey thinks the rule has helped to lay one out.

MCR 2.615 does not exist in isolation because visibility, something the rule promotes, is crucial to the rule's power. The 1992 Forum developed several other ideas that were implemented prior to the court rule and continue to work alongside MCR 2.615 to promote the State's relationship with tribal courts. The Michigan Bar Journal Directory lists tribal courts in Michigan and includes information ranging from the structure of the court systems to the Tribes' territorial jurisdiction. Judge Petoskey stated that for the first year, tribal courts were listed with federal courts, but following the advisement of Forum members, they were listed separately. *Id.*

Additionally, the State Bar of Michigan has both an American Indian Law Committee and an American Indian Law Section. The State Library and Hall of Justice,

where the Michigan Supreme Court is housed, both contain information about Michigan tribal courts in its learning center. The Michigan Judicial Institute helps to train tribal judges and includes information about tribal courts when training new state court judges. The rule is only one component of the way that the 1992 Forum helped to create a tribal court presence in the framework of the state.

The court rule is not all encompassing, of course. Although both Judge Petoskey and Ms. Tierney agree that the court rule has also helped with tribe-to-tribe relations, Ms. Tierney points out that there are a lot of matters that really need to be taken into account between different tribal jurisdictions. Telephone interview with Kathryn Tierney, Attorney for Bay Mills Indian Community (Sept. 3, 2009). According to Tierney, Bay Mills Indian Community has an acknowledged reciprocal agreement with Sault Ste. Marie Chippewa tribe. Not all tribes in Michigan have reciprocal agreements. The Model Codes Project of the Michigan Indian Judicial Association encouraged reciprocal recognition and enforcement between the Michigan tribes themselves. Furthermore, Tierney acknowledges that there are many interfaces between jurisdictions. Certain federal laws mandate “full faith and credit” recognition and enforcement of state and tribal court orders and thus pre-empt the “comity” requirements of the Michigan Court Rule. In any event, the rule itself opens the door for relationships that go beyond the court systems and promote a sense of understanding and unity in Michigan communities.

III. MICHIGAN TRIBAL-STATE UNIFORM TAX AGREEMENTS

Beginning in 2001, the federally recognized tribes of Michigan entered into negotiations with the State of Michigan regarding taxes. On December 20, 2002, seven of the twelve tribes signed the uniform tax agreements (collectively referred to as the “Uniform Tax Agreement” or “Agreement”) with the State. Matthew L.M. Fletcher, *The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Tax Agreements*, 82 U. DET. MERCY L. REV. 1, 5 (2004) (hereinafter Fletcher, *The Power to Tax*).

The Bay Mills Indian Community, the Hannahville Indian Community, the Little River Band of Ottawa Indians, the Little Traverse Bay Bands of Odawa Indians, the Nottawaseppi Huron Band of Potawatomi Indians, the Pokagon Band of Potawatomi

Indians, and the Sault Ste. Marie Tribe of Chippewa Indians entered into the Agreement. The original tax agreements are all available on the State of Michigan's website. *E.g.*, Tax Agreement Between the Bay Mills Indian Community and the State of Michigan (Dec. 20, 2002).²

“Other Michigan Indian Tribes that participated in the negotiations, but did not sign the agreement were: the Keweenaw Bay Indian Community, the Saginaw Chippewa Indian Tribe of Michigan, the Lac Vieux Desert Band of Lake Superior Chippewa Indians, and the Grand Traverse Band of Ottawa and Chippewa Indians.” Fletcher, *supra*, at 6. The Grand Traverse Band of Ottawa and Chippewa Indians entered into the tax agreement with the State in 2004. Tax Agreement Between the Grand Traverse Band of Ottawa and Chippewa Indians and the State of Michigan (May 27, 2004), *available at* http://www.michigan.gov/documents/GTBTaxAgreement_96417_7.pdf. Even though the Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians did not participate in the original negotiations, Fletcher, *The Power to Tax, supra*, at 6, the tribe entered into a tax agreement with the State in 2008. Tax Agreement Between the Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians and the State of Michigan (Sept. 17, 2008).³

After intense negotiations over a period of years, the finalized uniform tax agreement covered six categories of state taxes that include sales and use taxes, income tax, motor fuel tax, tobacco product taxes, and single business tax. Brief for Amici Curiae National Intertribal Tax Alliance et al., at 24-25, *Wagon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005) (No. 04-631) (hereafter *Wagon Amicus Brief*). “Intergovernmental tax agreements between the State and the Michigan Tribes are not a recent development. Since the 1970s, the State has entered into tax agreements on a tribe-by-tribe basis, covering a variety of state taxes, including the individual income tax, motor fuel tax and cigarettes tax.” *Wagon Amicus Brief, supra*, at 24-25. However, these individualized agreements resulted in “inconsistent tax treatment and [the imposition of] administrative burdens on the state.” *Wagon Amicus Brief, supra*, at 25. There were also aspects of the agreements that were illegal under state law, including the fact that the state treasury did not have the authority to enter into tax agreements.

² Accessible at http://www.michigan.gov/documents/BayMillsFinalTaxAgreement_61196_7.pdf.

³ Accessible at http://www.michigan.gov/documents/taxes/Match-E-Be-Nash-She-Wish_266049_7.pdf.

Interview with John Wernet, Deputy Legal Counsel to the Governor of the State of Michigan, in Lansing, Michigan, Sept. 21, 2009. If a tribe was going to be exempt from a state tax, it was a matter of federal law. In 1995, the State announced that it would no longer enter into agreements that had varying provisions for each tribe.

Therefore, to accomplish a more uniform tax agreement, the “state actually initiated the process by rescinding the individual agreements it had with a number of tribes. The state took the position that those agreements ‘compromised’ Michigan tax laws and that any deviation from Michigan tax laws required legislation, which required a uniform approach.” Interview with Bill Brooks, Tribal Attorney for Nottawaseppi Huron Band of Potawatomi Indians, Sept. 23, 2009. In its attempts to achieve that uniformity, the state entered into agreements with a few of the Michigan Indian tribes in the 1990s. Fletcher, *The Power to Tax, supra*, at 6. For example, in 1997, Michigan entered into an agreement with the Bay Mills Indian Community, which the state subsequently revoked. *Id.* Other tribes sought agreements similar to the Bay Mills agreement, but the “state had underestimated the uniqueness and autonomy of each tribe” and they refused to enter into a uniform tax agreement the negotiation of which they did not participate. Wagon Amicus Brief, *supra*, at 25.

In 1997, the state and the tribes first met to “lay out the parameters” of what would later constitute the Tax Agreement. Fletcher, *The Power to Tax, supra*, at 6. The Michigan Indian tribes met in 2000 to come up with a proposed agreement to present to the state. Interview with Bill Brooks, Tribal Attorney for Nottawaseppi Huron Band of Potawatomi Indians, (Sept. 23, 2009). Thus, “[a]fter nearly a year of inter-tribal negotiations, the Michigan tribes finalized a compromise proposal to submit to the State.” Wagon Amicus Brief, *supra*, at 26. The tribes and the state began face-to-face negotiations in 2001 in which each side presented its uniform proposal. Fletcher, *The Power to Tax, supra*, at 6. “The tax agreement proposed by the Michigan Tribes, and submitted to the State, reflect their interpretation of the tax immunities secured under federal Indian law.” Wagon Amicus Brief, *supra*, at 27. The Tribes were attempting to minimize their tax burdens and maximize the exemptions under the agreement that they had enjoyed under prior agreements, Interview with John Wernet, Deputy Legal Counsel to the Governor of the State of Michigan, Lansing, Michigan, Sept. 21, 2009, that

“optimized the Tribe’s ability to use sovereignty and tax immunities to develop a reservation economy.” Interview with Bill Brooks, Tribal Attorney for Nottawaseppi Huron Band of Potawatomi Indians, Sept. 23, 2009. The State however, was attempting to integrate the Tribes into its tax laws. *Id.*

During the negotiations, the concept of an “agreement area” was developed to incorporate a form of “Indian Country,” because there is a lack of clearly designated Indian land in the state for most tribes. Fletcher, *The Power to Tax, supra*, at 6. The parties agreed that the state did not have the authority to enforce “tax laws on tribal members in Indian Country.” *Id.* Michigan tribes have many members who do not live on tribally owned lands and the Tribes also have numerous parcels of land held in trust. Interview with John Wernet, Deputy Legal Counsel to the Governor of the State of Michigan, in Lansing, Michigan, Sept. 21, 2009. The agreement area became the heart of the tax agreement, in that the area was larger than reservation and trust lands, thereby making the benefits of the agreement available to more tribal members. *Id.* This broader recognition of exemptions for individuals, governmental functions, and business activities in setting up an “agreement area” was the “key compromise that probably led to the agreement’s approval and it continuing to work.” Interview with Bill Brooks, Tribal Attorney for Nottawaseppi Huron Band of Potawatomi Indians, (Sept. 23, 2009).

As mentioned earlier, there were six categories of taxation agreements. These categories were chosen because the Treasury had the ability to regulate these areas. Interview with John Wernet, Deputy Legal Counsel to the Governor of the State of Michigan, in Lansing, Michigan, Sept. 21, 2009. They were also the major tax categories that had been “addressed in individual agreements and were the state taxes that were impacted by Indian Country.” Interview with Bill Brooks, Tribal Attorney for Nottawaseppi Huron Band of Potawatomi Indians, Sept. 23, 2009. Property taxes were left out of the Agreement because the Treasury could do nothing to modify property taxes. Interview with John Wernet, Deputy Legal Counsel to the Governor of the State of Michigan, in Lansing, Michigan, Sept. 21, 2009. These categories dealt with the major taxes that were common to everyone and were comprehensive and pragmatic. *Id.*

“Unlike past tax negotiations, which generally involved the state and a single tribe, the state and all of Michigan Tribes cooperated to finalize the Uniform Tax

Agreement, which has resulted in improved, cooperative relationships.” Wagon Amicus Brief, *supra*, at 27. Even though the state had to recognize that each individual tribe is different, it was important to the Treasury that the basic agreement would be the same for all the tribes, since minute variations would become administratively impossible. Interview with John Wernet, Deputy Legal Counsel to the Governor of the State of Michigan, in Lansing, Michigan, Sept. 21, 2009. Michigan attempted to be reasonably consistent from tribe to tribe and tried to balance competing concerns. *Id.* The basic rules for the each agreement are the same and the only differing aspects of each agreement were the size and location of the agreement areas. *Id.* The State was cognizant of the tribes’ population and the size of trust lands. *Id.* “Any significant change in the fundamental legal principles upon which the tax agreement is based would undermine the entire process.” Wagon Amicus Brief, *supra*, at 28. The parties anticipated that there may be disagreements in the future and therefore agreed to attend an annual summit, and also agreed to a dispute resolution process. *Id.*

This Agreement has improved the relationship between the tribes and the State of Michigan. Interview with John Wernet, Deputy Legal Counsel to the Governor of the State of Michigan, Lansing, Michigan, Sept. 21, 2009, . The Uniform Tax Agreement has “brought predictability to a disputed area.” Wagon Amicus Brief, *supra*, at 28. This Agreement shows that the Tribes and the State “can set aside intractable disagreements on the law and negotiate, and reach compromises, over policy.” Interview with Bill Brooks, Tribal Attorney for Nottawaseppi Huron Band of Potawatomi Indians, Sept. 23, 2009. Overall, the Agreement is working, but the Tribes did have to make some compromises. *Id.* These compromises, however, are offset by the “relative certainty the agreement provides [no litigation] and the benefits to Tribal citizens in most cases.” *Id.* For the Treasury, the Uniform Tax Agreement has proven to be more expensive than anticipated. Interview with John Wernet, Deputy Legal Counsel to the Governor of the State of Michigan, in Lansing, Michigan, Sept. 21, 2009. The Tax Agreement represents a huge step toward improved relations between the tribes and the state, even though not all of the Michigan Indian tribes participate in the Agreement.

The Uniform Tax Agreement may prove useful in negotiations between the Tribes and the State in areas other than taxes. “There has been suggestion that this approach,

reaching agreement on ‘substantive outcomes’ based on policy negotiations, can work in other areas such that jurisdictional conflicts – whether those are based on disagreements about current federal Indian law, or disputed Reservation boundaries – can become less important and set aside.” Interview with Bill Brooks, Tribal Attorney for Nottawaseppi Huron Band of Potawatomi Indians, Sept. 23, 2009. The Agreement may also provide an example for other states and tribes to start negotiations and improve relations between two sovereigns. “States and tribes should begin to think outside the box and get beyond the bottom lines to figure out what really matters.” Interview with John Wernet, Deputy Legal Counsel to the Governor of the State of Michigan, in Lansing, Michigan, Sept. 21, 2009.