

State-Tribal Justice Forum



February 15, 2008

**FILED**

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**CLERK OF SUPREME COURT  
OF WISCONSIN**

Clerk of the Supreme Court  
ATTN: Carrie Janto  
PO Box 1688  
Madison, WI 53701-1688  
**VIA U.S. MAIL AND E-MAIL**

**RE: Rule Petition 07-11 – Discretionary transfer of jurisdiction to tribal court**

Dear Clerk of Supreme Court:

We write in response to Supreme Court Clerk David Schanker's invitation of January 11, 2008 for further comment on Rule Petition 07-11. The proposed rule would give state court judges the discretion to transfer a case to tribal court after considering several factors similar to those found in Teague v. Bad River Band, 2003 WI 118, 265 Wis. 2d 64, 664 N.W.2d 899.

Mr. Schanker's letter poses three questions and we answer each in turn below.

**1. Under what circumstances is jurisdiction concurrent between tribal and state courts or exclusive in tribal or state court?<sup>1</sup>**

Public Law 83-280 is the federal statute which plays a major role in the tribal jurisdictional landscape in Wisconsin. Passed in 1953, PL-280 grants the State of Wisconsin, criminal and partial civil jurisdiction over all the reservations in Wisconsin except the Menominee Indian Reservation. The statute is codified at 28 USC § 1360 and 18 USC § 1162.

The exercise of tribal and state criminal jurisdiction is therefore concurrent.<sup>2</sup> (Indian tribes' criminal jurisdiction has been constricted since the enactment of PL-280. In 1978, the U.S. Supreme Court ruled Indian tribal courts could not exercise criminal jurisdiction over non-Indians. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). Also, the Indian Civil

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<sup>1</sup> Tribal court jurisdiction over non-members depends on tribal law and federal court decisions on the issue and is therefore different for each reservation. A directory of Wisconsin tribal courts published by Wisconsin Judicare is enclosed with this letter and can be found on the Internet at <http://www.judicare.org/ilo.htm>.

<sup>2</sup> Three court decisions have squarely addressed the issue of whether PL 280 divested Tribes of their criminal jurisdiction and all three found it did not. The three cases are: Walker v. Rushing, 898 F.2d 672 (8<sup>th</sup> Cir. 1990); State v. Schmuck, 121 Wash.2d 373 (1993) and Cabazon Band of Mission Indians v. Smith, 34 F.Supp.2d 1195 (C.D. Cal. 1998). The United States Department of Justice has also taken this position in its November 9, 2000 memorandum (copy enclosed).

**Hon. James B. Mohr, Chairperson**

**Coordinator: Director of State Courts, Office of Court Operations**

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Rights Act, 25 USC § 1302, while articulating rights similar to those found in the Bill of Rights, limits tribal court penalties to no more than one year of incarceration and \$5,000 in fines.)

With respect to civil jurisdiction, the U.S. Supreme Court, in its only opinion on PL-280, stated that PL-280 does not grant states civil *regulatory* jurisdiction on reservations. Rather, the statute grants to the affected states only civil *adjudicatory* jurisdiction over civil causes of action arising on an Indian reservation. Bryan v. Itasca County, 426 U.S. 373, 385-86 (1976). Consistent with the grant of civil adjudicatory jurisdiction, state courts have concurrent jurisdiction with tribal courts over matters such as “tort, marriage, divorce, [and] insanity.” Bryan, 426 U.S. at 384, n.10.

Although Public Law 280 did not confer any civil regulatory jurisdiction to the State of Wisconsin, Bryan, 426 U.S. at 384, the U.S. Supreme Court and Wisconsin Supreme Court nonetheless have found in cases decided since Bryan that a state can exercise civil regulatory jurisdiction on Indian reservations, in certain narrow circumstances, when not preempted by federal law. Rice v. Rehner, 463 U.S. 713 (1983); County of Vilas v. Chapman, 122 Wis. 2d 211, 361 N.W.2d 699 (1985).

In addition to limiting PL-280 state courts to civil adjudicatory jurisdiction over reservation Indians, Bryan also set up a dichotomy where state laws were either categorized as civil/regulatory or criminal/prohibitory. The latter falls within PL-280’s criminal grant of jurisdiction to states and permits state enforcement on Indian reservations. When an activity falls within the civil/regulatory category, PL-280 and Bryan foreclosed enforcement of state laws over those activities on the reservations. How state laws are categorized—as civil regulatory or criminal--has been the subject of debate and litigation.

Over the years, Wisconsin state courts have weighed in on this debate over how to categorize state laws. Here are the results:

- Wis. Stat. § 29.224(2) prohibiting the possession or transportation of uncased or loaded firearms in vehicles was deemed civil/regulatory and therefore the state was unable to enforce the law against two tribal members on their reservation. State v. Lemieux, 106 Wis. 2d 484, 317 N.W.2d 166 (Ct. App. 1982) affirmed on different grounds in State v. Lemieux, 110 Wis. 2d 158, 327 N.W.2d 669 (1983).
- OAR 3<sup>rd</sup> and 4<sup>th</sup> offenses and operating while intoxicated, third offense, were deemed criminal prohibitory. State v. St. Germaine, 150 Wis. 2d 171 (Ct.App. 1989).
- Circuit court did not have jurisdiction over a petition for a domestic abuse restraining order where the Tribe had its own similar law. St. Germaine v. Chapman, 178 Wis. 2d 869, 505 N.W.2d 450 (Ct.App. 1993).
- The state’s fireworks sale statute was ruled civil regulatory and therefore unenforceable against Indians on the reservation. State v. Cutler, 1994 WL 656820 (Wis.App.)(Unpublished decision).

- State ex rel. Lykins v. Steinhorst, 197 Wis. 2d 875 (Ct.App. 1995) held Wisconsin's extradition laws are criminal/prohibitory and therefore are fully applicable to an Apache tribal member arrested on Ho-Chunk trust land.
- In State v. Burgess, 2003 WI 71, 262 Wis. 2d 354, the Wisconsin Supreme Court held that Wis. Stat. Ch. 980 governing the incarceration of sexually violent persons is criminal/prohibitory in nature and therefore the State had jurisdiction to enforce it against a tribal member living on his own reservation.

The Wisconsin Supreme Court has twice addressed PL 280. First, in County of Vilas v. Chapman, 122 Wis. 2d 211 (1985), the Court ruled Vilas County had jurisdiction to enforce a noncriminal traffic ticket issued to a Lac du Flambeau tribal member on Highway 47 within the boundaries of the Lac du Flambeau Indian Reservation. The Court discussed Public Law 280, but did not rely on it for the holding. Rather, the Court adopted a "tradition-of-self-government" test and ruled that since the Tribe did not have a tradition of traffic enforcement, state jurisdiction was lawful. The Court cited to Rice v. Rehner, 463 U.S. 713 (1983), for the U.S. Supreme Court's use of the tradition-of-self-government test.<sup>3</sup> (The Court decided that PL-280's failure to grant civil/regulatory jurisdiction, as found in Bryan, did not preempt Wisconsin's assertion of civil/regulatory jurisdiction. See Chapman, 122 Wis. 2d at 218-19.)

The second case where the Wisconsin Supreme Court addressed Public Law 280 is In re Commitment of Burgess, 2003 WI 71, 262 Wis. 2d 354, 665 N.W.2d 124. In that case, Mr. Burgess, a Lac du Flambeau tribal member living on his reservation, challenged the state court's jurisdiction over his commitment as a sexually violent person under Wis. Stat. Ch. 980. The state court asserted jurisdiction. The Wisconsin Supreme Court ruled that Wis. Stat. Ch. 980 was civil/adjudicatory in nature and therefore fell within PL-280's grant of state jurisdiction over reservation Indians. (In Mr. Burgess' subsequent habeas action, the Seventh Circuit affirmed the result from In re Commitment of Burgess, but disagreed with the categorization of Wis. Stat. Ch. 980 as a criminal statute. Burgess v. Watters, 467 F.3d 676 (7<sup>th</sup> Cir. 2006)).

Aside from PL-280, tribal court jurisdiction is arguably exclusive under the Indian Child Welfare Act (ICWA) when the child who is the subject of the action is domiciled or resides on his or her reservation. 25 USC § 1911(a). (It is still an open question in Wisconsin whether Public Law 280 removes exclusive tribal jurisdiction established under the ICWA. The Wisconsin Attorney General has opined that PL-280 does not affect ICWA's grant of exclusive jurisdiction. 70 Op. Att'y Gen. 237 (1981). No Wisconsin court has ruled on the issue to date. Several tribes in Wisconsin have unquestionably reassumed exclusive jurisdiction pursuant to 25 USC § 1918.)

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<sup>3</sup> The Court of Appeals adopted and arguably extended the reasoning from Chapman in St. Germaine v. Chapman, 178 Wis. 2d 869, 505 N.W.2d 450 (Ct.App 1993). That case arose out of a Lac du Flambeau tribal member seeking a domestic abuse restraining order against another Lac du Flambeau member in state court. The Court of Appeals ruled since the Lac du Flambeau Tribe did have a domestic abuse restraining order ordinance, the tribal court had exclusive jurisdiction over the matter. The state court matter therefore had to be dismissed.

When the child covered by ICWA is domiciled off the reservation, the state court is obligated to transfer the matter to tribal court in the absence of good cause to the contrary. 25 USC § 1911(b).

## **2. Is there a right under the United States or Wisconsin Constitution to have a case heard in state court rather than tribal court?**

Litigants do not have an absolute right to have a case heard in state court. While we could not find a case directly on point, as we demonstrate below, plaintiff's choice of forum is not controlling nor do any of the cases we examined mention a constitutional dimension to the issue. In a variety of areas of the law, courts transfer cases to other jurisdictions pursuant to statute or case law. We review those areas below.

### *A. Teague v. Bad River Band, 2003 WI 118, 265 Wis. 2d 64, 664 N.W.2d 899.*

The strongest support for the legality and constitutionality of the proposed rule is the Teague decision itself.<sup>4</sup> There is very little difference between a Teague situation and the kind of transfers contemplated under the proposed rule. Both situations contemplate concurrent jurisdiction and application of a list of factors. The only difference is that in Teague two cases were pending simultaneously, one in tribal court, one in state court. Under the proposed rule, only one action would be pending in state court.

The proposed rule simply creates a more efficient application of the principles of comity discussed in Teague.

The holding of the Teague case makes it clear that litigants do not have an absolute right to litigate in state court. In a Teague situation, the state court must consider the factors and reach a decision according to the principles of comity. A plaintiff's decision about where to bring the case is entitled to "great weight." Teague, 2003 WI 118 at ¶74. However, the significance of the plaintiff's choice of a forum and the application and interpretation of state law are outweighed by the fact that the litigation involves tribal sovereignty and the interpretation of tribal law, and that the material events occurred on tribal land.

Id., at ¶79.

The Teague case also provides a valuable safety valve for legal and constitutional concerns. If a litigant is unhappy with a decision by a judge under the proposed rule, he or she can always invoke the Teague case by filing in state or tribal court (as applicable). A conference between judges will be required and the state court will have to apply the Teague rule to the facts. The resulting determination will be appealable.

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<sup>4</sup> In addition to the Teague case, twenty-five counties in the Ninth and Tenth Judicial Districts are governed by Teague protocols entered into by the tribal and state judges in those areas.

B. *Transfer of jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act. Wis. Stat. Ch. 822.*

Wisconsin law already authorizes transfer to tribal courts under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The purpose of the UCCJEA is very similar to the general purpose of the proposed rule under Petition 07-11: to avoid jurisdictional conflicts and promote cooperation between court systems in child custody matters. Wis. Stat. § 822.01(2). The UCCJEA does this by establishing rules about where child custody matters should be heard when parties disagree about the forum for the dispute.

The UCCJEA requires tribes be given the same deference and accord as states for purposes of jurisdiction and enforcement:

(2) A court of this state shall treat a tribe as if it were a state for the purpose of applying subchs. I and II.

(3) A child custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of this chapter shall be recognized and enforced under subch. III.

Wis. Stat. § 822.04(2) and (3).

Wisconsin's decision to treat Tribes as states for purposes of the UCCJEA is persuasive evidence of the constitutionality of the rule in Rule Petition 07-11. See Vincent v. Voight, 2000 WI 93, ¶21, 236 Wis. 2d 588, 614 N.W.2d 388 (statutes enjoy a strong presumption of constitutionality).

C. *Wis. Stat. § 801.63.*

Wis. Stat. § 801.63 is another example where the law overrides a plaintiff's choice of forum in service of weightier policy issues. That statute, similar to the proposed rule, gives trial judges discretion to grant a stay to permit a pending action to be tried in a forum outside the state. Although it is not technically a transfer, it is nearly the same. (A trial judge, after granting a stay, is unlikely to re-try the matter after it has been litigated to judgment in another forum.) Like the proposed rule, courts applying Wis. Stat. § 801.63 must consider a list of factors and then make a decision in the interest of justice:

Whether to grant a stay is within the sound discretion of the trial court. See U. I. P. Corp. v. Lawyers Title Ins. Corp., 65 Wis. 2d 377, 386, 222 N.W.2d 638, 643 (1974). Under the statute, the trial court is directed to consider factors such as: the amenability of the parties to personal jurisdiction here and elsewhere, the convenience to the parties of the two competing fora, differences in rules of conflict of law, and any other factors bearing on the selection of a convenient, reasonable and fair place of trial. See § 801.63(3), Stats.

Precision Erecting Inc. v. Marshall, 224 Wis. 2d 288, 592 N.W.2d 5 (Wis.App. 1998)

D. *Interstate transfers of guardianships under In re Guardianship of Jane E.P., 2005 WI 106, 283 Wis. 2d 258, 700 N.W.2d 863.*

The Wisconsin Supreme Court's established guidelines for interstate transfer of guardianships reinforces the legality of Rule Petition 07-11. In the case of In re Guardianship of Jane E.P., 2005 WI 106, 283 Wis. 2d 258, 700 N.W.2d 863, Jane lived in Illinois near the Wisconsin border and had an established guardian under Illinois law. The guardian wanted to move Jane from Illinois to Wisconsin. Wis. Stat. Ch. 55 requires a petition for guardianship to be filed in the petitioner's county of residence. However, Jane couldn't move to a new location without first obtaining a valid Wisconsin guardianship order. The Wisconsin trial court refused her petition because of Wis. Stat. Ch. 55's residency requirements.

The Wisconsin Supreme Court adopted neither of the lower court's approaches but rather embraced a Teague-like solution: in order to foster respect and cooperation, Wisconsin courts now use a set of standards when considering whether to receive or transfer a guardianship from or to another state. 2005 WI 106 at ¶31.

Similar to the proposed rule in Rule Petition 07-11, the Jane E.P. court established five standards for courts to consider based on the principles of comity as applied to guardianship cases. (Jane E.P. contains discussion of the Teague case as a positive example of interjurisdiction cooperation.) If successful, the result would be that the guardianship would be "imported" from Illinois and the residency requirement of Wis. Stat. § 55.06(3)(c) would be avoided.

The Jane E.P. guardianship standards support the legality and desirability of Rule Petition 07-11. A Wisconsin trial court, when confronted with a case where concurrent jurisdiction lies with a tribal court, should have the ability to foster the respect and cooperation discussed in Jane E.P.

### **3. How does the proposed rule impact the application of Wis. Stat. § 806.245 (full faith and credit)?**

The proposed rule does not impact the application of Wis. Stat. § 806.245. As the majority stated in Teague v. Bad River Band, 2003 WI 118, 265 Wis. 2d 64, 665 N.W.2d 899, when the proceedings are pre-judgment and both courts become aware of the other's jurisdiction, "Wis. Stat. § 806.245 does not apply at that moment in time. Rather, general principles of comity, including principles of abstention, must be used to resolve the jurisdictional" issues. Teague, 2003 WI 118 at ¶66.

Wis. Stat. § 806.245 does not address the situation contemplated by the proposed rule. Rather "[t]he statute addresses the situation where a court, whether a state or tribal court, holds proceedings and enters judgment, and a party goes to a court of the other jurisdiction to enforce the judgment." 2003 WI 118 at ¶67.

Once a case is transferred under the proposed rule, the analysis of any resulting tribal court judgment would take place under Wis. Stat. § 806.245. It is a separate analysis and how the case made it to tribal court is not an element.

During the discussion of the proposed rule on January 8, 2008, there was a concern about the substantive differences between state and tribal legal systems and what impact, if any, those differences should have on adoption of the proposed rule. Wis. Stat. § 806.245 helps mitigate those concerns. In order for a tribal court judgment to be granted full faith and credit, it must meet the requirements of the statute. Those requirements include that the judgment conform with the Indian Civil Rights Act, 25 USC § 1302, (which closely mirrors the Bill of Rights), that the tribal court's judgments are reviewable by a superior court, that the tribal court is a court of record, and that the tribal court had subject matter and personal jurisdiction in the case.

Tribal courts are likely to comply with the criteria in Wis. Stat. § 806.245 in order for their judgments to receive full faith and credit. Geography makes it a necessity in many cases for litigants to seek enforcement off the reservation. A tribal court judgment which does not receive full faith and credit from the state courts is diminished in value. This reality provides incentive for tribal courts to meet the minimum requirements of the statute.

### **Re-draft issues**

We would also like to comment on one of the issues identified by the Court as in need of re-drafting. Several comments were made that the transfers should be limited to Wisconsin tribal courts. We think such a limitation would detract from the rule for two reasons.

First, geographically speaking, several tribal courts in Michigan and Minnesota are closer to certain counties than some Wisconsin tribal courts. The application of the principles of comity should not be limited by geography. Second, in the context of the Uniform Child Custody Jurisdiction and Enforcement Act, both the Wisconsin Supreme Court and the Wisconsin legislature have applied it to tribes outside the state. In In re Custody of Sengstock, 165 Wis. 2d 86, 477 N.W.2d 310 (1991), the Court applied the UCCJEA and declined to exercise jurisdiction over a child custody dispute pending in the San Carlos Apache Tribal Court in Arizona. Similarly, the UCCJEA as codified in Wis. Ch. 822, requires Wisconsin courts to treat tribes as states and does not limit the application of the statute to Wisconsin tribes.

Finally, please note there are three enclosures with this letter:

1. A redline version of the rule incorporating the language changes discussed at the January 8, 2008 hearing.
2. The Judicare Tribal Court Directory.
3. U.S. Dept. of Justice memorandum regarding Public Law 280, dated November 9, 2000.

We hope our comments help the Court move forward with this historic rule.

Sincerely,

A handwritten signature in black ink that reads "James Mohr / P.G.". The signature is written in a cursive style with a large initial "J" and a clear "P.G." at the end.

Hon. James Mohr  
Wisconsin Tribal-State Forum

Cc: Susan Gray (via email)