STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Raymond P. Taffora
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

February 22, 2008

Mr. David R. Schanker
Clerk of Supreme Court
110 East Main Street
Madison, WI 53703

Dear Mr. Schanker:

The Wisconsin Supreme Court has requested comment on three issues that have been raised during the Court's discussion of Rule Petition No. 07-11, which proposes a rule governing the discretionary transfer of civil cases from a Wisconsin circuit court to an Indian tribal court in situations where both courts possess concurrent jurisdiction. This letter is the Wisconsin Department of Justice's response to the Court's request.

INTRODUCTION

The proposed rule provides that whenever an action is brought in a Wisconsin circuit court and a tribal court of a federally recognized Indian tribe has concurrent jurisdiction of the subject matter, the circuit court may—on its own motion or the motion of any party and after notice and hearing—cause the action to be transferred to the appropriate tribal court. The proposed rule enumerates nine factors, grounded in principles of comity, that the circuit court shall consider in making its determination. If the circuit court orders a transfer and the tribal court declines to accept the case within 60 days, then the proposed rule provides that jurisdiction shall remain with the circuit court. The proposed rule expressly "does not apply to any case in which controlling law grants exclusive jurisdiction to either the circuit court or the tribal court." In addition, the rule expressly is intended not to alter, diminish, or expand state or tribal sovereignty, the jurisdiction of state or tribal courts, or the rights or obligations of parties under any applicable law.

FIRST ISSUE

Under what circumstances is jurisdiction concurrent between tribal and state courts or exclusive in tribal or state court?

Questions of tribal and state court jurisdiction are notoriously complex and fact-specific. The two main factors affecting such jurisdiction are: (1) whether the cause of action arises inside

or outside of Indian country[1] (and, if inside, whether on privately owned land or tribal trust land); and (2) the tribal or non-tribal status of the involved parties. Even these purportedly "bright-line" factors, however, can be complicated to apply in practice. In addition, certain categories of cases—*e.g.*, divorce, probate, and child custody cases—have their own jurisdictional principles and may involve the application of additional factors, such as the domicile of the parties or of a child. Furthermore, jurisdictional determinations may be influenced, or even controlled, by federal statutes, such as the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963, federal laws related to interstate domestic violence, or specific federal provisions governing some Indian property. It is thus impossible, in the limited context of the present comments, to comprehensively outline the kinds of circumstances in which tribal courts and state courts may have concurrent or exclusive jurisdiction. A few summary observations can be provided, however.

State courts generally have exclusive jurisdiction over disputes that arise *outside* of Indian country. If such a dispute is between non-Indians, the exclusivity of state court jurisdiction is evident. Even if the off-reservation dispute involves an Indian (or is between two Indians), state courts will generally have jurisdiction. *See, e.g., Jicarilla Apache Tribe v. Bd. of Cty Com'rs*, 883 P.2d 136, 140-41 (N.M. 1994). In such cases, a tribal court may or may not also have concurrent jurisdiction, depending on the extent to which the subject matter of the dispute relates to internal tribal concerns involving tribal members. The areas of concurrent jurisdiction in cases arising outside of Indian country are thus likely to be small, however.

Concurrent jurisdiction can be more frequent in cases that arise *inside* Indian country. Where such cases involve only non-Indian litigants, state courts are likely to have jurisdiction. Absent a specific congressional delegation of power, however, states do not have the authority to adjudicate a civil action against an Indian defendant that arises in Indian country. *Williams v. Lee*, 358 U.S. 217, 222 (1959). In such cases, the inherent authority of tribal courts to decide cases that involve tribal members and arise in tribal territory is thus exclusive.

In Public Law 280, however, Congress has expressly given certain states (including all of Wisconsin except the Menominee reservation) concurrent adjudicatory jurisdiction over most actions involving Indians and arising in Indian country:

> Each of the States listed . . . shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general

[1] "Indian country" is a legal term of art that includes all lands within reservation boundaries, dependent Indian communities, and parcels allotted to Indian individuals. *See* 18 U.S.C. § 1151.

> application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State . . . .

28 U.S.C. § 1360(a). This grant of power, however, does not preclude tribal courts from exercising their own inherent authority over the same subjects. The statute also does not authorize states to adjudicate rights in Indian trust property or to interfere with tribal treaty rights. 28 U.S.C. § 1360(b). Therefore, where Public Law 280 applies, state and tribal courts generally possess concurrent jurisdiction over most reservation-based claims involving Indians.

The most difficult jurisdictional questions arise in cases in which an Indian plaintiff sues a non-Indian defendant over a claim arising in Indian country. Under Public Law 280, state courts clearly have jurisdiction of such actions. Recent decisions of the U.S. Supreme Court, however, have significantly reduced tribal court jurisdiction over non-Indians.

The Supreme Court recognized, in the seminal case of *Montana v. United States*, that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana,* 450 U.S. 544, 564 (1981). Accordingly, the Court concluded that a tribe has no authority to regulate the conduct of non-members on non-member-owned fee land within the tribe's reservation, unless the non-member has entered a consensual relationship with the tribe, as through commercial dealings, or the non-member's conduct threatens or directly affects the political integrity, economic security, health, or welfare of the tribe. *Id.* at 565-66.

Subsequently, in *Strate v. A-1 Contractors*, the Court extended the *Montana* rule to tribal *court* jurisdiction, holding that a tribe's *adjudicatory* jurisdiction (the authority of its courts to resolve disputes) is no broader than its *regulatory* jurisdiction (the power of its legislature to regulate conduct). *Strate,* 520 U.S. 438, 453 (1997). In other words, tribal courts may not exercise adjudicatory jurisdiction over cases involving nonmembers when they lack authority under federal common law to apply tribal law to regulate the conduct or determine the legal rights of those nonmembers. In addition, in *Nevada v. Hicks*, the court extended *Montana's* presumption against tribal authority over non-members to include Indian trust land, as well as non-member-owned fee lands. *Hicks,* 533 U.S. 353, 359-65 (2001).

As a result, the general rule today is that tribal courts lack jurisdiction over non-member defendants—both with respect to their conduct on privately owned land and on Indian trust land—unless the tribe can show that one of the two *Montana* exceptions justifies the application of tribal authority.

It is also worth noting that the application of the proposed transfer rule may give rise to issues of personal jurisdiction, as well as subject matter jurisdiction. As currently drafted, the

rule applies when a tribal court "has concurrent jurisdiction of the matter in controversy"—*i.e.*, concurrent subject matter jurisdiction. The proposed rule appears to assume that, in the event of a transfer, the tribal court will be capable of exercising personal jurisdiction over the parties. It is possible, however, that there could be some unusual circumstances in which a litigant in the state-court action might lack sufficient contacts with the reservation to justify an exercise of personal jurisdiction by the tribal court. Accordingly, it may be appropriate for a circuit court's exercise of discretion under the proposed rule to include consideration of whether the tribal court will be able to exercise personal jurisdiction over the parties.

It is also unclear what happens to the jurisdictional status of a case under Wisconsin law after a "transfer" to a tribal court. The proposed rule plainly anticipates that the circuit court retains jurisdiction over the case for the shorter of 60 days or until the tribal court either accepts or declines the case. If the tribal court takes the case, however, the rule does not specify whether state-court jurisdiction ceases or whether the state court continues to exercise some kind of dormant jurisdiction. This issue could be significant, since there may be some circumstances in which it is desirable to permit the matter to be returned to circuit court—*e.g.*, if one of the parties brings a successful jurisdictional challenge in the tribal court. One possible method of accomplishing this could be for the circuit court to dismiss the state-court case without prejudice when the tribal court accepts the transfer. The plaintiff could then re-file in state court if the case is dismissed from the tribal court without a decision on the merits.[2] Alternatively, the rule could specify that the circuit court retains a dormant jurisdiction that can be reactivated if the merits of the dispute are not decided in the tribal court. This kind of approach would spare the plaintiff the burden and expense of having to re-file in state court, but it could raise administrative problems related to ensuring that a complete record of the tribal case is forwarded to the state court. In any event, it may be advisable to amend the proposed rule to clarify these questions, so as to avoid jurisdictional uncertainties that could spawn future litigation.

SECOND ISSUE

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

A state may not arbitrarily restrict or deny access to its courts, nor may it limit such access where that access is necessary for the exercise of fundamental constitutional rights. *See Boddie v. Connecticut*, 401 U.S. 371, 382-83 (1971). Where such fundamental rights are not implicated, however, a state may, for a legitimate purpose, impose reasonable and non-arbitrary regulations on court access. *See United States v. Kras*, 409 U.S. 434, 446 (1973); *In re Paternity of James A. O.*, 182 Wis. 2d 166, 175, 513 N.W.2d 410 (Ct. App. 1994). Here, the limits that the

[2]The current version of the proposed rule also does not indicate whether any applicable state statute of limitations would be tolled during the period when the case was in the tribal court.

proposed transfer rule places on the ability of litigants to assert their claims in state court appear to be a reasonable and non-arbitrary means of accomplishing the legitimate purpose of furthering the orderly administration of justice by effectively and efficiently allocating judicial resources in situations where state and tribal courts have concurrent jurisdiction, so as to avoid the undesirable consequences of conflicting exercises of jurisdiction by the two coordinate sovereigns. Therefore, in my opinion, a litigant in this state does not have an absolute constitutional right to have his or her case heard in a Wisconsin court, rather than a tribal court.

It does not follow, however, that there would be no constitutional restrictions on a circuit court's discretion to transfer a case to tribal court under the proposed rule. For example, where a litigant has a cause of action under substantive Wisconsin law, article I, § 9 of the Wisconsin Constitution guarantees that litigant access to the courts for the purpose of asserting that cause. *See Aicher v. WI Patients Compensation Fund*, 2000 WI 98, ¶ 43, 237 Wis. 2d 99, 613 N.W.2d 849. Stated differently, Wisconsin courts should always be available to provide a forum for vindicating rights that exist under Wisconsin law. This does not mean that a Wisconsin court can never transfer a case to some other adjudicatory forum, but it probably does mean that such a transfer is permissible only if the other forum affords the litigants a fair opportunity to assert claims substantially equivalent to the claims they could have asserted in a Wisconsin court. Accordingly, in circumstances in which a transfer of a case from state to tribal court would deprive a litigant of the opportunity to vindicate any legal right that could have been asserted in state court, such a transfer would appear to raise constitutional concerns under article I, § 9. When exercising its discretion under the proposed rule, therefore, a circuit court should take care to assure itself that the tribal court will provide an adequate forum for the litigants to assert all of their legal claims.

Similar reasoning should also apply to claims arising under federal law. As previously noted, the Supreme Court has held that a tribal court's adjudicatory jurisdiction extends only to subjects that are within the tribe's legislative or regulatory jurisdiction. *See Strate*, 520 U.S. at 453. It follows that a tribal court, unlike a state court, is not a court of general jurisdiction capable of adjudicating all subjects of litigation between any parties that may come before it—including claims that arise under federal law. *See Hicks*, 533 U.S. at 367-69 (holding that a tribal court cannot entertain a federal civil rights claim under § 1983). Accordingly, before transferring a case to tribal court under the proposed rule, a state circuit court should consider whether any litigant is asserting any federal law claims that the tribal court might be unable to adjudicate.

In addition, a litigant in a tribal court is not protected by the provisions of the Wisconsin or U.S. Constitutions. *See Talton v. Mayes*, 163 U.S. 376, 382-84 (1896). Many tribes may offer similar protections under their own tribal constitutions and statutes, but there is no across-the-board or enforceable guarantee of such protections and the tribal provisions in question are likely to vary from one tribe to another. The federal Indian Civil Rights Act

("ICRA") statutorily imposes on tribes some of the requirements of the federal Bill of Rights—including due process and equal protection guarantees. *See* 25 U.S.C. § 1302. In civil cases, however, the requirements of ICRA can be enforced only in tribal court, with no federal judicial review. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-73 (1978). Even if due deference and respect are afforded to the ability and willingness of tribal courts to assiduously enforce the requirements of ICRA themselves, those courts still are not required to give the statutory provisions the same meaning that state and federal courts have given to similar rights under the state and federal constitutions.

Even more significantly, some constitutional limitations on federal and state governments are not included in ICRA—*e.g.*, the guarantee of a republican form of government, the prohibition against an established religion, the requirement of free counsel for an indigent accused, the right to a jury trial in civil cases, the provisions broadening the right to vote, and the prohibitions against denial of the privileges and immunities of citizens. It thus appears that the judicial independence of tribal courts may not necessarily be protected by the same separation-of-powers principles that apply to federal and state governments and that tribal court decisions may include religious considerations that would be impermissible in a state court. Perhaps most important for present purposes, tribal courts, unlike Wisconsin courts, are not uniformly required to afford all litigants the right to a jury trial in civil cases. *See* Wis. Const. art. I, § 5 ("The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law."). It follows that, unless a tribe's own law provides an equivalent opportunity for jury trials, it is possible that a circuit court, in transferring a case under the proposed rule, could deprive a litigant of this constitutional right. It could be an abuse of discretion for a circuit court to therefore transfer a case to a tribal court without first assuring itself either that the litigants have waived their right to a jury trial or that an equivalent right will be available to them in the tribal forum. More generally, it may be appropriate for the list of factors guiding the circuit court's discretion under the proposed rule to be amended to include consideration of the extent to which equivalent rights and procedures are available in both court systems.

Where a transfer under the proposed rule could affect an individual's constitutional rights, the procedures available for appealing the transfer decision may also be important. The text of the proposed rule does not address appeals. It is thus unclear whether a transfer decision would be considered an interlocutory order, subject to permissive appeal, or a final order, appealable as a matter of right. *See* Wis. Stat. § 808.03. Furthermore, however that question may be answered, the proposed rule does not address the jurisdictional status of the transfer if an appeal is taken. The rule provides that, if the tribal court does not accept the case within 60 days of the circuit court's transfer decision, then jurisdiction shall remain with the circuit court. By implication, it appears that, if the tribal court does accept the case within the 60 days, then the transfer would take effect immediately and the circuit court would cease to have jurisdiction over

the case. But what if one of the litigants takes an appeal before the tribal court accepts the case? Would the transfer of jurisdiction to the tribal court system deprive the state appellate court of jurisdiction over the appeal? Conversely, if the state appellate court proceeds and decides that the circuit court abused its discretion in ordering the transfer, would it have the power to order the tribal court to return the case to the circuit court? It appears that any appeal process would not provide meaningful protection for the rights of litigants unless it protected state appellate jurisdiction by including an automatic stay of the transfer to tribal court pending completion of the appeal.

THIRD ISSUE

How does the proposed rule impact the application of Wis. Stat. § 806.245?

Article IV, § 1 of the United States Constitution requires the states to give "[f]ull faith and credit . . ." to the final judgments of other *states*, but this constitutional provision does not apply to judgments of Indian tribes. The federal statute implementing the full faith and credit clause, 28 U.S.C. § 1738, requires all courts within the United States to honor the judgments of the courts of "territories" of the United States, but the U.S. Supreme Court has not decided whether a tribal reservation is a "territory" within the meaning of that statute and other courts have divided on the issue. The states have thus been left to decide for themselves how to recognize the judgments of tribal courts. Some states accomplish this through a state full faith and credit statute, while other states apply the common-law doctrine of comity, which courts use when recognizing the judgments of the courts of foreign nations. Wisconsin is somewhat unique in that the Legislature has enacted a full faith and credit statute for tribes in this state, Wis. Stat. § 806.245, while the Wisconsin Supreme Court has limited the applicability of that statute in circumstances of concurrent jurisdiction where a rigid application of the statute could harm the orderly administration of justice by generating a "race to judgment" in the two court systems. *See Teague v. Bad River Band of Chippewa Indians*, 2000 WI 79, ¶¶ 33-35, 236 Wis. 2d 384, 612 N.W.2d 709 (commonly referred to as *Teague II*) and *Teague v. Bad River Chippewa Indians*, 2003 WI 118, ¶¶ 57-69, 265 Wis. 2d 64, 665 N.W.2d 899 (commonly referred to as *Teague III*). In the latter circumstances, the Supreme Court has substituted its own list of comity principles in place of the legislatively mandated requirements of Wis. Stat. § 806.245. *See Teague III*, 265 Wis. 2d 64, ¶ 71.

The list of discretionary factors enumerated in the proposed transfer rule—which follows the *Teague III* factors in some, but not all, respects (*see* below)—does not include some of the conditions that a state court judge must evaluate when deciding whether a tribal court judgment is entitled to full faith and credit under Wis. Stat. § 806.245. For that statute calls upon state court judges to evaluate both the tribal court's procedures and the specific judgment at issue in several respects, including: whether the tribal court is a court of record; whether the judgment in question is a valid judgment; whether the tribal court had both personal and subject matter

jurisdiction; whether the judgment is final under tribal law; whether the judgment was procured in compliance with the tribal court's own required procedures; whether the judgment was procured without fraud, duress, or coercion; and whether the tribal court's proceedings comply with the requirements of the ICRA. *See* Wis. Stat. § 806.245(1)(c)-(d) and (4)(a)-(f). These factors are absent from the list of factors in the proposed rule.

Under the current draft of the proposed rule, therefore, a state circuit court that possesses jurisdiction over a controversy could require litigants to have that controversy adjudicated by a court of another sovereign, even if the judgment of the latter court might not subsequently be entitled to receive full faith and credit in the courts of Wisconsin. Such an anomalous outcome could be tantamount, in some circumstances, to depriving the litigants of any opportunity at all to obtain a remedy from Wisconsin's judicial system, which would give rise to constitutional concerns. Accordingly, it seems appropriate that the factors to be considered before a Wisconsin circuit court declines to exercise its jurisdiction in deference to a tribal court should include consideration of whether the tribal court's proceedings meet the conditions that the Wisconsin Legislature has established for according full faith and credit under Wis. Stat. § 806.245.

The list of comity factors set out in the proposed rule also does not encompass some of the principles that courts traditionally apply when determining whether to enforce a foreign judgment. The U.S. Supreme Court has defined comity as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). This definition makes it clear that the doctrine of comity seeks to protect not only the interests of the respective sovereigns, but also the rights and interests of the individual litigants. The factors contained in the proposed rule, however, appear to be primarily aimed at protecting the interests of the two sovereigns—and particularly the interests of the tribe—while giving relatively little weight to the interests of the parties to the litigation.

The classic formulation of comity principles appears in *Hilton*, where the U.S. Supreme Court required proof that

> there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to

> show either prejudice in the court or in the system of laws under which it is sitting, or fraud in procuring the judgment . . . .

159 U.S. at 202. Applying these principles, a court that is asked to enforce a foreign judgment may refuse to do so if it determines that the foreign court lacked jurisdiction, that the judgment was reached through procedures that the enforcing court views as fundamentally unfair, or that enforcing the judgment would violate a strongly held public policy of the enforcing state. In addition, some courts recognize foreign judgments only if the other sovereign affords reciprocal recognition to judgments of the state's courts (a factor that is included in Wis. Stat. § 806.245(1)(e), but not in the proposed transfer rule).

The Ninth Circuit, in a case involving federal recognition of a tribal court judgment, has further noted that due process, as that term is employed in the comity doctrine

> encompasses most of the *Hilton* factors, namely that there has been opportunity for a full and fair trial before an impartial tribunal that conducts the trial upon regular proceedings after proper service or voluntary appearance of the defendant, and that there is no showing of prejudice in the tribal court or in the system of governing laws. Further, as the Restatement (Third) [of Foreign Relations Law of the United States] noted, evidence "that the judiciary was dominated by the political branches of government or by an opposing litigant, or that a party was unable to obtain counsel, to secure documents or attendance of witnesses, or to have access to appeal or review, would support a conclusion that the legal system was one whose judgments are not entitled to recognition."

Wilson v. Marchington, 127 F.3d 805, 811 (9th Cir. 1997). These "due process" or "fundamental fairness" factors are absent from the list of factors in the proposed rule.

It is also worth noting that the list of factors in the proposed rule is less extensive than the list of comity factors in *Teague III*. Furthermore, even where the two lists closely correspond, the rule factors are sometimes articulated in a more abbreviated fashion that omits certain aspects of the corresponding factors as articulated in *Teague III*. For example, the first factor listed in the proposed rule calls for consideration of "[w]hether issues in the action require interpretation of the tribe's constitution, by-laws, ordinances or resolutions[.]" The implication is that this factor will favor a transfer to tribal court whenever tribal law is implicated in the case. In contrast, the corresponding *Teague III* factor calls for consideration of "[w]hether the issues in the case require application and interpretation of a tribe's law *or state law*." 265 Wis. 2d 64, ¶ 71 (emphasis added). By expressly providing for consideration of the role of state law in the case, as well as the role of tribal law, the *Teague III* factor encourages the use of a more balanced choice-of-law analysis which, in addition to weighing the tribe's interest in the application of