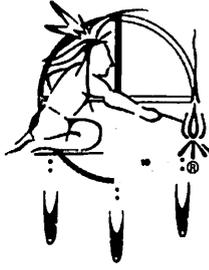


**EUGENE L. WHITE-FISH**  
**CHIEF JUDGE**

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**FOREST COUNTY POTAWATOMI**  
**TRIBAL COURT**

September 28, 2015

Clerk of Supreme Court  
ATTN: Deputy Clerk-Rules  
PO Box 1688  
Madison, WI 53701-1688  
**VIA E-MAIL (clerk@wicourts.gov)**  
**and U.S. MAIL**

**RE: Written Comment on Petition 7-11C**

Dear Supreme Court Justices:

I write on behalf of the Forest County Potawatomi (FCP) Tribal Court to comment on Petition 7-11C, the comprehensive review of Wis. Stat. sec. 801.54.

I am the Chief Judge of the Forest County Potawatomi Tribal Court and a tribal member at the Forest County Potawatomi Tribe. I have held the Chief Judge position for 19 years and been elected by tribal members four times to the position of judge.

I am also currently the President of the Wisconsin Tribal Judges Association; WTJA will be submitting comments separately. I write now only on behalf of the FCP Court.

Wis. Stat. sec. 801.54 is working well and should remain on the books. Not only has it worked as intended by permitting discretionary transfers of appropriate cases from state to tribal court, it has fostered a spirit of cooperation between tribal and state judges that benefits court users, tribal members and citizens of Wisconsin.

I understand that certain justices don't agree with the rule and that Justice Prosser suggested modifications. (See *Kroner v. Oneida Seven Generations*, 2012 WI 88, ¶¶ 55-64). Those concerns and modifications can and should be discussed and debated. What cannot be debated is that overall the rule is a success and should be preserved.

## **EXPERIENCES WITH THE RULE SHOW IT IS FUNCTIONING AS INTENDED**

In many cases in Forest County, transfers have occurred as a matter of course and are unremarkable. Judge Leon Stenz has been the circuit court judge during the existence of the rule. He and I enjoy a good working relationship. Judge Stenz has granted and denied requests for transfers. In those cases where the transfers have been denied, Judge Stenz has articulated his reasoning. In many cases he grants the transfer without any fanfare or controversy.

One case that Judge Stenz denied for transfer is worth noting. The case was a personal injury matter between two tribal members. Judge Stenz carefully reviewed the 801.54 factors. Judge Stenz was not convinced that the Tribe had enacted sufficient laws for the litigants to have fair notice of what law would be applied to the case. He denied the transfer. While I and the Tribe were not entirely happy about the decision, it is evidence that the rule is being applied independently, carefully and with all aspects of justice in mind.

One example of the benefits of Wis. Stat. sec. 801.54 comes to mind. There was an elderly tribal member in our community who had become frail and somewhat vulnerable. She had been found walking outside in the dead of winter without appropriate clothing. Forest County instituted protective proceedings in state court. Unbeknownst to the county, the Tribe also instituted proceedings in my court. When the two simultaneous proceedings came to light, I contacted Judge Stenz.

We held a joint hearing in my courtroom. Judge Stenz brought his court reporter. All necessary and relevant parties and staff were present. The welfare of the elderly tribal member was front and center. Eventually, after a good discussion with all involved, the tribal court proceeding went forward with the assistance of the county. The state court matter was dismissed.

Our Tribe has operated its own IV-D funded Child Support Agency for over 10 years. Forest County Circuit Court has used the rule to transfer paternity or child support cases to our court so they can be heard on the reservation and serviced by our IV-D agency.

Judge Stenz and I routinely talk and have a cooperative relationship. We understand that the goal is to better serve our respective constituencies. Wis. Stat. sec. 801.54 is a way to meet that goal.

## **REVOKING THE RULE ENTIRELY WOULD BE DETRIMENTAL**

Revoking the rule entirely would be a mistake for many reasons. First, it is a step backwards legally and would undermine the order established by the rule. Second, it would tarnish Wisconsin's judicial reputation as a pioneer and leader in tribal-state relations. Third, it would cast a cloud over the thousands of cases already transferred.

First and foremost, revoking the rule would be a step backward and undermine the order established by the rule. Revoking the rule will not change the fact that *Teague v. Bad River Band*, 2003 WI 118, is still good law. State trial court judges have the power to allocate jurisdiction to a tribal court under the procedures of the *Teague* case. Requiring one party to file another court case in another court in order to instigate a *Teague* conference is wasteful and unnecessary. Once a determined litigant wants a transfer, the case is eventually going to end up in a very similar spot whether 801.54 is on the books or not. Keeping the statute however, gives the Supreme Court more control over the procedures and principles to be applied.

Second, revoking the rule would tarnish Wisconsin's reputation for good state-tribal relations. I have been involved in tribal court affairs on a national level for most of judicial career. I am a past president of the National American Indian Court Judges Association. I attended the Common Ground series of conferences in the late 1990s and early 2000s. I have talked and listened to hundreds of tribal and state judges over the last two decades.

I can tell you unequivocally that based on everything I have heard and experienced, Wisconsin's state court system is looked at as a leader on the issue of tribal-state relations. As an example, I attended a tri-state conference last fall in Minnesota involving the tribal and state judiciaries from Michigan, Minnesota and Wisconsin. Two Supreme Court justices from Michigan attended. Michigan recently overhauled its court rules and procedures so it could be more like Wisconsin in the area of full faith and credit and tribal court transfers with respect to tribal courts.

In addition, the *Teague* case itself case has been cited favorably in other jurisdictions. Most notably: *Parry v. Haendiges*, 458 F. Supp. 2d 90 (W.D.N.Y. 2006)(Federal court applied *Teague* factors in a law suit between litigant and state court judge); *Meyer & Assocs. V. Coushatta Tribe of La.*, 965 So. 2d 930 (La.App. 3 Cir. 2007)(State court deciding whether contract dispute should continue to be heard in tribal court).

Third, revoking the rule would potentially cast a cloud over those cases already transferred. Thousands of cases (mostly family cases) have been transferred under the rule. Those cases are still subject to the five-year stay under Wis. Stat. sec. 801.54(3). What would be the legal status of those cases? Would litigants be able to seek to have the cases transferred back? Or would the tie to state court be broken once the rule is revoked? What about those cases where the five years has already expired? What about the status of all tribal court orders that have been entered since the cases were transferred? If the underlying transfers are questioned because the rule is revoked, are parents still required to follow placement schedules and pay child support as ordered by the tribal courts? Careful thought should be given to simply revoking the rule.

## CONCLUSION

Wisconsin's state motto is "Forward." The last 20 years have seen tremendous progress in the area of state-tribal relations. It is to the benefit of all when state and tribal judges work together to determine the best way to administer justice and the business of the courts. There cannot be any serious debate that Wis. Stat. sec. 801.54 contributes to that ongoing work in a positive way. I recommend you retain the rule.

Sincerely,

A handwritten signature in black ink that reads "Eugene Whitefish". The signature is written in a cursive, flowing style.

Hon. Eugene Whitefish  
Chief Judge  
Forest County Potawatomi Tribal Court

Cc: FCP Executive Council