

**TRIBAL/STATE PROTOCOL**  
**For the Judicial Allocation of Jurisdiction**  
**Between the**  
**Four Chippewa Tribes of**  
**Northern Wisconsin and the**  
**Tenth Judicial District of Wisconsin**

**DECEMBER 7, 2001**

Tribal/State Protocol for the Judicial Allocation of Jurisdiction Between the Four  
Chippewa Tribes of Northern Wisconsin  
and the 10th Judicial District of Wisconsin

Sec. 1. Purpose.

The purpose of this Tribal/State Court Protocol is to effectively and efficiently allocate judicial resources by providing a legal mechanism which clearly outlines the path a legal dispute will follow when both a tribal court and a circuit court have jurisdiction over a matter. This protocol does not apply to any case in which controlling law commits exclusive jurisdiction to either the tribal court or the circuit court.

Sec. 2. Scope.

This Protocol applies to each Circuit Court within the Tenth Judicial Administrative District of the State of Wisconsin approving the Protocol by Local Rule and to each Tribal Court approving the Protocol by appropriate authority.

Sec. 3. Authority.

This protocol is promulgated to effectuate the holding set forth in *Teague v. Bad River Band*, 236 Wis. 2d 384, 612 N.W. 2d 709 (2000). It is authorized by Local Rules as adopted by the Circuit Courts and appropriate approvals by the Tribal Courts.

Sec. 4. Applicability.

(a) Every party in every action commenced in any circuit court shall in the first pleading filed by the party, or in an attached affidavit, disclose under oath whenever a party is a party in any related action in any tribal court. Every party in every action commenced in any tribal court shall in the first pleading filed by the party, or in an attached affidavit, disclose under oath whenever a party is a party in any related action in any circuit court. If a party is required under this paragraph to disclose the existence of any action, the party shall state the names and addresses of the parties to the action, the name and address of the court in which the action is filed, the case number of the action, and the name of judge assigned to the action.

(b) Any party desiring a dismissal or stay of an action pursuant to this Protocol shall file a motion to that effect in the court where the stay or dismissal is desired, and shall include in the motion a request for temporary stay pending allocation of jurisdiction under this Protocol. The temporary stay pending allocation of jurisdiction may be ordered ex parte upon the sworn allegations required under paragraph 4(a).

(c) Whenever a court issues a temporary stay pending allocation of jurisdiction, the court shall transmit a copy of a notice of stay to the court where the related action is pending. The court receiving notice of the temporary stay pending allocation of jurisdiction shall automatically issue a stay of proceedings of the related action.

Sec. 5. Jurisdictional Dismissal.

Notwithstanding the stays issued under section 4, if either court determines after notice and hearing, sua sponte or by motion of a party, that it lacks jurisdiction, the court may dismiss the action. The court shall provide notice of the dismissal to the other court.

Sec. 6. Judicial Conference for Allocation of Jurisdiction.

(a) The court issuing the first temporary stay shall contact the other court for the purpose of scheduling a joint hearing on the issue of allocation of jurisdiction. The judges from both courts shall establish a briefing schedule, if any, and shall conduct a hearing at which both judges preside. The location of the hearing and the conduct of the hearing shall be determined by the judges jointly in their discretion. If the two judges cannot be present in the same courtroom, one judge may preside by telephone. The hearing shall be on the record.

(b) At the close of the hearing and applying the standards set forth in section 7 of this Protocol, the judges shall confer to decide the allocation of jurisdiction, and shall decide which case shall be dismissed or stayed. A dismissal without prejudice of one of the cases shall be ordered, except:

(1) If there is a doubt about the jurisdiction of the court in which the case is not dismissed, or if there is a concern for the expiration of a statute of limitations or if other equitable considerations exist, a stay may be issued instead of an order for dismissal, and

(2) The judges may determine that some issues or claims are more appropriately decided in one court and some issues or claims are more appropriately decided in the other court and may make orders appropriate to such circumstances.

The deliberations of the judges shall not be on the record. The judges shall thereafter state on the record their decision and the reasons therefor.

(c) If the judges are unable to allocate jurisdiction at their conference as provided for in section 6(b), above, a third judge will be selected. The judge will be selected from a standing pool of judges, composed of four circuit judges and four tribal judges. Circuit Judges shall be appointed to the pool by the Chief Judge of the Tenth Judicial Administrative District. The Tribal Judge of each Tribal Court which has approved this Protocol, or his or her designee, shall serve on the pool. If fewer than four Tribal Courts approve this Protocol, then the Chief Judge or Tribal Judge of the Tribal Courts which do approve this Protocol shall jointly select a sufficient number of judges to bring the number of Tribal Judges in the pool up to four. All judges appointed to the standing pool shall remain in the pool until replaced. In the event a case is referred to the pool, any judge who is a member of the pool and who is a judge of the Tribal Court or Circuit Court from which the referral arises shall be removed from the pool for purposes of that referral. The parties shall then be given the opportunity to mutually decide on the judge. If the parties cannot agree on a judge, each party shall be allowed to peremptorily strike one judge from the pool, and of those remaining one judge shall be drawn at random. That judge shall join the two judges from the courts where the actions are pending, and a hearing de novo before all three judges will be scheduled. At the close of the hearing, the judges shall deliberate and decide as set forth in section 6(b), above.

## 7. Standards for allocation of jurisdiction.

The following factors shall be considered in determining which court shall exercise jurisdiction in the matter:

- (1) Whether issues are present in the case which directly touch on or require interpretation of a Tribe's Constitution, By-Laws, Ordinances or Resolutions;
- (2) Whether the nature of the case involves traditional or cultural matters of the Tribe;
- (3) Whether the action is one in which the Tribe is a party, or where tribal sovereignty, jurisdiction, or territory is an issue in the case;
- (4) The tribal membership status of the parties.
- (5) Where the case arises.
- (6) If the parties have by contract chosen a forum or the law to be applied in the event of a dispute.
- (7) The timing of the motion to dismiss or stay, taking into account the parties' and courts' expenditures of time and resources, and compliance with any applicable provisions of either court's scheduling orders.
- (8) The court in which the action can be decided most expeditiously.
- (9) Such other factors as may be appropriate in the particular case.

## Sec. 8. Powers, Rights, and Obligations Unaffected.

Nothing in this protocol is intended to alter, diminish, or expand the jurisdiction of state or tribal courts, the sovereignty of state or tribes, or the rights or obligations of parties under state, tribal, or federal law.

Before all present on this the Seventh Day of December, in the year two-thousand-and one, each signatory below acknowledges the adoption of the preceding State/Tribal Protocols for the Allocation of Jurisdiction in their respective jurisdiction.

/s/ Edward R. Brunner  
Chief Judge 10<sup>th</sup> Judicial District

/s/ Hon. Ervin Soulier  
Chief Judge Bad River Band of the  
Lake Superior Tribe of Chippewa Indians

/s/ Hon. Robert W. Buffalo  
Chief Judge Red Cliff Band of the  
Lake Superior Tribe of Chippewa Indians

/s/ Louis Bearheart  
Chief Judge St. Croix Chippewa  
Indians of Wisconsin

/s/ Kris M. Goodwill on behalf of LCOTGB  
Representing the Lac Courte Oreilles Band of  
Lake Superior Chippewa Indians of Wisconsin

## State, tribal courts work to build cooperation

By Judge David Raasch, president  
Wisconsin Tribal Judges' Association

In Vilas County recently, a Wisconsin state trooper stopped a man on a state highway that runs through the Lac du Flambeau reservation and cited him for first-offense Operating While Intoxicated (OWI). While the man was a member of an Indian tribe, he was not a member of the Lac du Flambeau, which has been exercising jurisdiction in traffic matters (including first-offense OWI) involving tribal members for a number of years. The citation was returnable to Vilas County Circuit Court.

The defendant challenged the jurisdiction of the circuit court to hear the case, and a U.S. Supreme Court decision (U.S. v. Lara, 124 S. Ct. 1628) issued in April 2004 supported his argument that tribal courts may exercise jurisdiction over non-member Indians. The tribal prosecutor agreed to prosecute, and tribal Judge Alice Soulier advised circuit court Judge Neal A. Nielsen that she saw no limitations on her court's authority to exercise jurisdiction over the defendant. The case seemed headed for the tribal court, except for one problem: the State opposed a dismissal or transfer.



"The facts may be pretty simple," Nielsen said, "but there are enough issues involved to make a good law school exam question."

State court and tribal court judges listen to a discussion of the 'Teague Protocol' for determining when full faith and credit will be granted to a tribal court decision.

While controlling law in this case might have appeared to commit the matter to the tribal court, there was less than solid agreement among the parties. In many other instances, the jurisdiction question is even murkier. Working these issues out quickly and cleanly avoids confusion and results in more efficient use of the courts – which saves everyone time and money.

To lay the groundwork for improving how these jurisdictional disputes are handled, Wisconsin's state, federal, and tribal courts met in March 1999 for a program called On Common Ground. That conference identified the need for joint seminars on a number of topics. In October 2003, a joint training session was offered on Public Law 83-280, a law enacted in 1953 by the federal government, which hoped to reduce its own role in Indian affairs by giving states criminal and civil jurisdiction in matters involving Indians on reservation land. Prior to the enactment of Public Law 83-280, these matters were dealt with in either tribal or federal court.

Building upon the 1999 and 2003 sessions, the Wisconsin Tribal Judges Association (WTJA) has been presenting seminars in different parts of the state to encourage broad participation. The first was held in January at the Ho-Chunk Tribal Court in Black River Falls; the second was offered in April with the Stockbridge-Munsee Band of Mohicans Tribal Court hosting the event; and the third was offered in July, hosted by the Lac Du Flambeau Tribal Court. Together, the three seminars drew well over 100 attendees, including state judges, tribal judges, court commissioners, prosecutors, defense attorneys, court clerks, district court administrators, guardians ad litem, tribal government officials, and other interested parties.

The topic that generated the most interest and discussion revolved around the 'Teague Protocol'. Presenters included individuals who were involved in drafting the protocol, as well as people knowledgeable about the case itself. These discussions identified the needs for open communications between state and tribal courts. Communication was the greatest benefit of these sessions.

The WTJA considers these sessions a big success, and hopes to make this training project part of the permanent legal training landscape in Wisconsin.

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### **A word of thanks from Judge Raasch**

This project is the result of the cooperative efforts of the Wisconsin Supreme Court and the Wisconsin Tribal Judges' Association to improve the judicial services provided to their constituents.

These seminars could not have been provided without the cooperation and support of the Wisconsin Supreme Court, the Director of State Courts Office, the Office of Judicial Education, the members of the WTJA, and the State Bar of Wisconsin. Their cooperation and support made this project possible.

This idea would never have come to fruition without the expert coordination provided by James Botsford, director of the Indian Law Office of Wisconsin Judicare. Professor Carol Tebben from UW-Parkside worked with others to design and submit the curriculum continuing education credit for judges and attorneys.

The expertise of judges and attorneys right here in Wisconsin, and their willingness to volunteer their time to develop and present very informative materials made it possible for the WTJA to provide this program at no cost to the attendees. These experts are named below.

A popular addition to the binders is the accompanying CD. Judge David Raasch took all of the presenters' materials, designed a cover and burned them onto CDs. Lengthy court cases that were only outlined in the binders were made available in their entirety on the CD.

The WTJA thanks all of the people who attended these sessions and looks forward to future seminars. A special thanks is extended to: Atty. James Botsford, Chief Judge Edward R. Brunner, Judge Robert E. Eaton, Reserve Judge James B. Mohr, Atty. Michael P. Murphy, Atty. Kevin Osterbauer, Atty. Andrew J. Pyatskowitz, Judge Ernest St. Germaine, Atty. Paul W. Stenzel, Prof. Carol Tebben, Judge Kimberly Vele, and Atty. James E. Zorn.

Another word of thanks to the tribal courts and their staff who so graciously and generously provided the facilities and the lunches. The WTJA is committed to building positive and respectful working relationships with state courts, as well as continuing to learn how to better provide judicial services to the people of Wisconsin. We endeavor to keep the lines of communications open.

For a copy of the materials on CD, or to share thoughts and ideas, contact Judge David Raasch at (920) 432-8355 or [chief.david2@juno.com](mailto:chief.david2@juno.com).

## **Training session set for Kenosha**

Judges, attorneys, social workers, and others interested in Indian child welfare are invited to attend a free, one-day seminar set for Friday, October 15 at the University of Wisconsin – Parkside in Kenosha.

On the agenda are a discussion of the history of the Indian Child Welfare Act (ICWA), caselaw, nuts and bolts for judges handling ICWA cases, and much more. Lunch will be provided.

For registration materials, contact Judge David Raasch at (920) 432-8355 or 1498 Grignon St., Green Bay, WI 54301, or e-mail [chief.david2@juno.com](mailto:chief.david2@juno.com).

Registration deadline is October 1.

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