

## **TRIBAL/STATE PROTOCOL**

### **For the Judicial Allocation of Jurisdiction Between the Bad River Band of the Lake Superior Chippewa Indians, Forest County Potawatomi Community, Ho-Chunk Nation, Lac du Flambeau Band of Lake Superior Chippewa Indians, Sokaogon Chippewa Community (Mole Lake) Stockbridge-Munsee Band of the Mohicans and the Ninth 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 each determined it has 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 Ninth Judicial Administrative District of the State of Wisconsin and to each approving Tribal Court.

#### **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 District Rule as adopted by the Ninth Judicial Administrative District 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.
- (d) The protocol is prospective in nature. It applies to actions commencing in Tribal and State courts on or after the date of the signing of this protocol.

**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.

- (3) The deliberations of the judges shall not be on the record. The judges shall thereafter state on the record their decision and the reasons therefore.
- (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 Ninth Judicial Administrative District. The Chief 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 Judges 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 pre-emptorily 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.

## **Sec. 7. Standards for Allocation of Jurisdiction.**

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

- (a) Where the action was first filed and the extent to which the case has proceeded in the first court.
- (b) The parties' and courts' expenditures of time and resources in each court and the extent to which the parties have complied with any applicable provisions of either court's scheduling orders.

- (c) The relative burdens on the parties, including cost, access to and admissibility of evidence and matters of process, practice, and procedure, including whether the action will be decided most expeditiously in tribal or state court.
- (d) Whether the nature of the action implicates tribal sovereignty, including but not limited to the following:
  1. The subject matter of the litigation.
  2. The identities and potential immunities of the parties.
- (e) Whether the issues in the case require application and interpretation of a tribe's law or state law.
- (f) Whether the case involves traditional or cultural matters of the tribe.
- (g) Whether the location of material events giving rise to the litigation is on tribal or state land.
- (h) The relative institutional or administrative interests of each court.
- (i) The tribal membership status of the parties.
- (j) The parties' choice by contract, if any, of a forum in the event of dispute.
- (k) The parties' choice by contract, if any, of the law to be applied in the event of a dispute.
- (l) Whether each court has jurisdiction over the dispute and the parties and has determined its own jurisdiction.
- (m) Whether either jurisdiction has entered a final judgment that conflicts with another judgment that is entitled to recognition.

## **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.