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STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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The Honorable Patience Drake Roggensack
Justice
Wisconsin Supreme Court
16 East, State Capitol
Madison, WI 53701

Dear Justice Roggensack:

This letter is in response to your letter of March 12, 2009, in which you requested further input from the Wisconsin Department of Justice ("DOJ") regarding several issues related to Wis. Stat. § 801.54, which authorizes the discretionary transfer of civil cases from a Wisconsin circuit court to a tribal court of a federally recognized Indian tribe in circumstances where both courts possess concurrent jurisdiction.

SUBJECT MATTER JURISDICTION OF TRIBAL COURTS OVER NON-MEMBERS

The first issue on which you have requested input is the subject-matter jurisdiction of tribal courts over non-members of the tribe. In particular, your letter expresses concern that Wis. Stat. § 801.54 may be inconsistent with U.S. Supreme Court decisions holding that tribal court jurisdiction over cases involving a non-member litigant is extremely limited in scope.

As you are aware, DOJ previously discussed the subject-matter jurisdiction issue in written comments on the rule petition that led to the adoption of Wis. Stat. § 801.54. *See* DOJ's February 22, 2008, letter to Clerk of Supreme Court David R. Shanker, at. 1-4 (copy enclosed). Those comments recognized the limited scope of tribal court jurisdiction over non-members and noted that, under *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) and *Nevada v. Hicks*, 533 U.S. 353, 359-65 (2001), tribal courts generally lack jurisdiction over cases involving a non-member defendant unless it can be shown that the exercise of tribal jurisdiction is justified under one of the two exceptions articulated in *Montana v. United States*—*i.e.*, if the non-member has entered a consensual relationship with the tribe, as through certain commercial dealings, or the non-member's conduct threatens or directly affects the political integrity, economic security, health, or welfare of the tribe. *Montana*, 450 U.S. 564-66 (1981).

After DOJ submitted its previous comments on the rule petition, the U.S. Supreme Court again addressed the issue of tribal court jurisdiction over non-members in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, ___ U.S. ___, 128 S. Ct. 2709 (2008). In that decision, the U.S. Supreme Court strongly reiterated its previous statements on the limited scope of such

jurisdiction. *Id.* at 2718-20. In addition, the U.S. Supreme Court held that, under the facts of that case, the two *Montana* exceptions did not apply to a tort claim, brought by tribal members, arising out of a land sale transaction between non-members involving non-member-owned fee land located on a tribal reservation. *Id.* at 2720-27. The U.S. Supreme Court thereby apparently narrowed the range of factual circumstances in which tribal courts may be found to have subject-matter jurisdiction over cases involving non-members, but it did not change the general jurisdictional principles previously articulated in such cases as *Strate* and *Hicks*. Accordingly, it does not appear that *Plains Commerce Bank* requires any amendment to DOJ's previous comments on the limited scope of tribal court subject matter jurisdiction over non-members.

Moreover, Wis. Stat. § 801.54(1), on its face, authorizes the transfer of a case to a tribal court only "where a circuit court and a court or judicial system of a federally recognized American Indian tribe or band in Wisconsin ('tribal court') have concurrent jurisdiction." Similarly, Wis. Stat. § 801.54(2) reiterates that a transfer is authorized only "when, under the laws of the United States, a tribal court has concurrent jurisdiction of the matter in controversy." Accordingly, before a case is transferred, "[t]he circuit court must first make a threshold determination that concurrent jurisdiction exists." Wis. Stat. § 801.54(2). In making that determination, the circuit court must follow the jurisdictional principles set out in the U.S. Supreme Court decisions discussed above. *See Plains Commerce Bank*, 128 S. Ct. at 2716 ("whether a tribal court has adjudicative authority over nonmembers is a federal question"). Given the narrow scope of tribal court jurisdiction over non-members under those decisions, there may be relatively few situations in which Wis. Stat. § 801.54 will actually authorize the transfer to tribal court of a case involving a non-member defendant. The U.S. Supreme Court has not said, however, that state and tribal courts will *never* have concurrent jurisdiction over such a case. Accordingly, the number of cases involving a non-member defendant that could be properly transferred to a tribal court under Wis. Stat. § 801.54 may be small, without being non-existent.

POTENTIAL IMPACT OF § 801.54 ON RIGHTS OF TRANSFERRED PARTY

The second issue on which you have requested input is the potential impact of Wis. Stat. § 801.54 on the constitutional rights of a party transferred to tribal court. That issue, too, was discussed in DOJ's previous comments on the rule petition. *See* DOJ's February 22, 2008, letter to Clerk of Supreme Court David R. Shanker, at. 4-7. Those comments noted that, in cases in which the law to be applied in a tribal court would not afford a litigant the opportunity to assert claims substantively equivalent to those that could be asserted in a Wisconsin court, the transfer of the case to the tribal court could violate Wis. Const. art. I, § 9, which guarantees every person access to the courts of this state for the purpose of asserting and protecting rights that exist under Wisconsin law. DOJ's comments also noted that, because tribal courts are not required to afford litigants all of the same constitutional rights protected by the United States Constitution and the Wisconsin Constitution, the transfer of a case to tribal court could, in some cases, deprive a litigant of such a constitutional right. *See also Hicks*, 533 U.S. at 383-84 (Souter, J., concurring).

In order to address these constitutional concerns, DOJ recommended that the text of the originally proposed version of Wis. Stat. § 801.54 be amended to expressly require a circuit court, before transferring a case to tribal court, to determine: "(a) that the tribal court will provide an adequate forum for the litigants to assert all of their legal claims, including claims arising under federal law, as well as Wisconsin law; and (b) that equivalent rights and procedures are available in both court systems, including constitutional rights and, in particular, the right to a jury trial."

Following the period for commenting on the original rule petition, DOJ received from the office of the Clerk of Supreme Court a draft of a revised version of Wis. Stat. § 801.54 which would have added several items to the list of factors to be considered by a circuit court under subsection (2) of the rule, including "[w]hether each court will provide an adequate forum for the litigants to assert all state and federal legal claims" and "[w]hether each court will provide adequate protection of a litigant's rights under the Wisconsin constitution and the Constitution of the United States." Those factors, however, were not included in the final version of Wis. Stat. § 801.54 adopted by the Wisconsin Supreme Court on July 31, 2008. Instead, a published but non-promulgated Comment was appended to the rule which provides, among other things, that "[i]n considering the factors under sub. (2), the circuit court shall give particular weight to the constitutional rights of the litigants and their rights to assert all available claims and defenses."

To the extent that the published Comment on Wis. Stat. § 801.54 brings these constitutional issues to the attention of the circuit courts, it is a welcome improvement over the originally proposed version of the rule. Given the overriding importance of protecting the constitutional rights of litigants, however, it would have been preferable if the Court had more forcefully highlighted these concerns by expressly incorporating them into the body of the promulgated rule itself.

Nonetheless, there is nothing in the language of Wis. Stat. § 801.54, as adopted, that can reasonably be construed as *requiring* a circuit court to transfer a case to tribal court in circumstances that would deprive a litigant of a constitutional right. On the contrary, the rule clearly gives a circuit court discretion to grant or deny a transfer in a given case and expressly requires the court, in addition to the specifically enumerated factors in subsection (2), to also consider "[a]ny other factors having substantial bearing upon the selection of a convenient, reasonable and fair place of trial." Wis. Stat. § 801.54(2)(k). The rule is thus readily capable of being applied in a way that is consistent with the state and federal constitutions and, accordingly, should be construed as incorporating constitutional limits on a circuit court's authority to transfer a case to tribal court. *See American Family Mut. Ins. Co. v. DOR*, 222 Wis. 2d 650, 667, 586 N.W.2d 873 (1998) ("A court should avoid interpreting a statute in such a way that would render it unconstitutional when a reasonable interpretation exists that would render the legislation constitutional.").

COMMENT ON DCF's PROPOSED AMENDMENT TO § 801.54

The third issue on which you have requested input is a proposed amendment to Wis. Stat. § 801.54 that has been requested by the Wisconsin Department of Children and Families ("DCF").

Currently, a circuit court is authorized to transfer a case to a tribal court only "after notice and hearing on the record on the issue of the transfer." Wis. Stat. § 801.54(2). According to your letter, the current version of the proposed amendment would provide a separate procedure for transferring "a post-judgment child support, custody or placement provision of an action in which the state is a real party in interest pursuant to s. 767.205(2) to a tribal court located in Wisconsin that is receiving funding from the federal government to operate a child support program under Title IV-D of the federal Social Security Act (42 U.S.C. 654 et al.)." Under the proposed new procedure, parties in this category of cases would have to be given notice of their right to object to a proposed transfer to tribal court. Following such notice, if no objection is received, a case in this category could be transferred without a prior hearing.

According to information that DOJ has previously received from DCF, the purpose of the proposed amendment to Wis. Stat. § 801.54 is to facilitate the transfer of a large volume of cases in the specified category to the courts of Indian tribes in Wisconsin that have recently established their own federally-approved and federally-funded tribal child support programs. According to DCF, the proposed relaxation of the hearing requirement currently contained in Wis. Stat. § 801.54(2) is needed because the state child support program does not have sufficient funding or resources to participate in a hearing in every one of this large volume of cases.

The suggestion to require a full hearing in this category of cases only if a party objects to a proposed transfer following due notice appears to be a reasonable method of facilitating DCF's policy goal of reducing the volume of cases in the state child support system by transferring some of those cases to federally-approved tribal child support systems. After all, in its current form, Wis. Stat. § 801.54 does not require a hearing if all parties stipulate to the transfer. Similarly, under the proposed subsection (2m), a party who fails to object after receiving due notice could be deemed to have constructively consented to the transfer. To this extent, DCF's proposal does not appear to involve a major departure from the principles already contained in Wis. Stat. § 801.54.

However, it should be noted that the new subsection (2m) proposed by DCF, unlike subsection (2) of the existing rule, does not expressly require a circuit court to make a threshold determination that concurrent jurisdiction exists before transferring a case to tribal court. As previously discussed, Wis. Stat. § 801.54 generally authorizes the transfer of a case to a tribal court only where concurrent jurisdiction exists. It follows that Wis. Stat. § 801.54, considered as a whole, can only be reasonably construed as requiring a circuit court, in every case, to make a determination that concurrent jurisdiction exists before ordering a transfer. Accordingly, DOJ

would recommend that the proposed subsection (2m) be modified by adding the underlined text below:

> 801.54(2m) Tribal Child Support Programs. The circuit court may, on its own motion or the motion of any party, after notice to the parties of their right to object, transfer a post-judgment child support, custody or placement provision of an action in which the state is a real party in interest pursuant to s. 767.205(2) to a tribal court located in Wisconsin that is receiving funding from the federal government to operate a child support program under Title IV-D of the federal Social Security Act (42 U.S.C. 654 et al.). The circuit court must first make a threshold determination that concurrent jurisdiction exists. If concurrent jurisdiction is found to exist, [t]he transfer will occur unless a party objects in a timely manner or it is proven that there is good cause to prevent the transfer. Upon the filing of a timely objection to the transfer, the circuit court shall conduct a hearing on the record, considering all the relevant factors set forth in sub. (2).

Finally, it may be observed that federal regulations require Title IV-D tribal child support programs to "recognize child support orders issued by other Tribes and Tribal organizations, and by States, in accordance with the requirements under the Full Faith and Credit for Child Support Orders Act ["FFCCSOA"], 28 U.S.C. § 1738B." 45 C.F.R. § 309.120(b). It thus appears that, even if jurisdiction over a support order issued by a Wisconsin court has not been transferred to a tribal court—whether pursuant to Wis. Stat. § 801.54 or in some other manner—the tribal court would still be required by federal law to recognize and enforce the Wisconsin court's order. *See* 28 U.S.C. § 1738B(a)(1).

In addition, the FFCCSOA not only mandates inter-jurisdictional recognition and enforcement of child support orders, but also prohibits a state from modifying another state's order unless the modifying court itself has jurisdiction to issue such a child support order and the court of the issuing state no longer has continuing exclusive jurisdiction of the existing order either because all parties (including the child) no longer reside in the issuing state or because all parties have consented in writing to a transfer of continuing exclusive jurisdiction to the modifying court. *See* 28 U.S.C. § 1738b(a) and (h). It is unclear whether 45 C.F.R. § 309.120(b) imposes the latter modification restrictions on tribes, in addition to the inter-jurisdictional enforcement mandate. If it does, then it would appear that, as long as one or more of the parties resides in Wisconsin, written consent of all parties could be required before jurisdiction over a Wisconsin child support order could be transferred to a tribal court.

By contrast, Wis. Stat. § 801.54 permits transfers to tribal courts without the written consent of the parties. Therefore, if 45 C.F.R. § 309.120(b) is construed as requiring tribes to comply with the FFCCSOA's restrictions on the modification of existing child support orders, then it may be desirable to add to the proposed amendment to Wis. Stat. § 801.54 a provision reflecting those federal restrictions. Of course, even without such a provision, Wis. Stat.

§ 801.54 could not properly be construed or applied in a way that would permit a transfer that is prohibited by federal law.

We appreciate the opportunity to provide further comments on this important rule.

Sincerely,

Raymond P. Taffora
Deputy Attorney General

RPT:TCB:rk:lkw

Enclosure