Land & Water Law Review

Volume 30 | Issue 2 Article 9

1995

# The Wyoming Tribal Full Faith and Credit Act: Enforcing Tribal Judgments and Protecting Tribal Sovereignty

Darby L. Hoggatt

# Comments

# THE WYOMING TRIBAL FULL FAITH AND CREDIT ACT: Enforcing Tribal Judgments and Protecting Tribal Sovereignty

## I. INTRODUCTION

In 1994 the Fifty-Second Wyoming Legislature enacted the Wyoming Tribal Full Faith and Credit Act (WTFF&CA) requiring Wyoming state courts to recognize judicial records, orders, and judgments of the Eastern Shoshone and Northern Arapaho Tribes[1] as long as tribal courts recognize Wyoming's judicial records, orders, and judgments.[2] Prior to passage, Wyoming state courts were not obligated to recognize tribal

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1. Hereinafter, this comment will refer to these tribes as the Shoshone and Arapaho Tribes. Note, this comment frequently refers to the Shoshone and Arapahoe Law and Order Code which spells Arapaho with an "e", but this comment spells Arapaho without an "e".

2. The Wyoming Tribal Full Faith and Credit Act (WTFF&CA), WYO. STAT. § 5-1-111 (1994):

(a) The judicial records, orders and judgments of the courts of the Eastern Shoshone and Northern Arapaho Tribes of the Wind River Reservation shall have the same full faith and credit in the courts of this state as do the judicial records, orders and judgments of any other governmental entity, unless at least one (1) of the following conditions is shown not to be met:

(i) The tribal documents meet the authentication requirements of subsection (b) of this section;

(ii) The court is a court of record;

(iii) The court judgment is a valid judgment; and

(iv) The court certifies that it grants full faith and credit to the judicial records, orders and judgments of the courts of this state.

(b) To qualify for admission as evidence in the courts of this state:

(i) Copies of acts of a tribal legislative body shall be authenticated in accordance with the laws of the tribes and attested to by the appropriate tribal secretary;

(ii) Copies of records, orders and judgments of a tribal court shall be authenticated by the attestation of the clerk of the court. The seal, if any, of the court shall be affixed to the attestation.

(c) In determining whether a tribal court is a court of record, the Wyoming court shall determine that:

(i) The court keeps a permanent record of its proceedings;

(ii) Either a transcript or an electronic recording of the proceeding at issue in the court is available;

(iii) Final judgments of the tribal court are reviewable by a tribal appellate court; and

(iv) The court has authority to enforce its own orders through contempt proceedings.

government action unless they chose to as a matter of comity.[3] Now that the WTFF&CA is the law, Shoshone and Arapaho tribal court judgments are enforceable in Wyoming state courts as if the judgments were rendered in state courts, so long as the tribal judgments meet the criteria enumerated in the WTFF&CA.[4]

Only recently have states begun to extend full faith and credit to tribal court decisions.[5] Consequently, Wyoming citizens and tribal officials alike are unclear as to how the WTFF&CA will work and when it will apply. This comment explains the fundamental legal principles inherent in the full faith and credit doctrine and how they will operate when the State of Wyoming and the Shoshone and Arapaho Tribes reciprocally enforce each government's judicial orders and judgments.

Part II of this comment describes how other jurisdictions have approached recognition of tribal judgments and summarizes how the Wyoming Legislature eventually came to enact the WTFF&CA.[6] Part III describes the current status of state and tribal jurisdiction and criticizes the U.S. Supreme Court for eroding inherent tribal sovereignty. Part IV summarizes the prior adjudication doctrines of full faith and credit, *res judicata*, and collateral estoppel as they apply between sister states and how full faith and credit contributes to the cohesion of the federal union. Part V critically analyzes the WTFF&CA, examines how Wyoming state

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(d) In determining whether a tribal court judgment is a valid judgment, the Wyoming court on the motion of a party may examine the tribal court record to assure that:

(i) The court had jurisdiction of the subject matter and over the person named in the judgment;

(ii) The judgment is final under the laws of the rendering court;

(iii) The judgment was procured without fraud, duress or coercion;

(iv) The judgment was procured in compliance with procedures required by the rendering court; and

(v) The proceedings of the court comply with the Indian Civil Rights Act of 1968 under 25 U.S.C. §§ 1301 to 1341.

(e) No lien or attachment based on a tribal court judgment may be filed, docketed or recorded in this state against the real or personal property of any person unless the judgment has been filed following the procedures set forth in W.S. § 1-17-701 *et seq.*

(f) This section shall not apply to the Tribal Water Code nor any official documents, public acts, records or proceedings of the Eastern Shoshone and Northern Arapaho Tribes related to water rights or the administration of water laws.

(g) Nothing in this section shall be deemed or construed to expand or limit the jurisdiction either of the state of Wyoming or the Eastern Shoshone or Northern Arapaho Tribes.

3. The doctrine of comity gives forum courts *discretion* to enforce foreign judgments. *See infra* note 138. Under full faith and credit, the forum court *shall* enforce a valid foreign judgment. U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (1988) (enabling legislation for the Full Faith and Credit Clause). *See* full text *infra* note 17.

4. WYO. STAT. § 5-1-111(a)(i) to (iv) (1994). *See* full text *supra* note 2.

5. *See infra* notes 11-19 and accompanying text.

6. WYO. STAT. § 5-1-111 (1994).

courts and Shoshone and Arapaho tribal courts can apply these three prior adjudication doctrines as they apply to the WTFF&CA. Then it compares the WTFF&CA to similar legislation enacted by Wisconsin and South Dakota and anticipates issues that may constrain the WTFF&CA's effectiveness. Part V suggests that the Shoshone and Arapaho tribal governments should amend its Law and Order Code to include the prior adjudication doctrines of *res judicata* and collateral estoppel in order to limit a Wyoming state court's ability to deny recognition of tribal judgments.

Finally, Part V concludes that the WTFF&CA requires Wyoming state courts to recognize Shoshone and Arapaho tribal judgments only as a matter of comity because it gives state judges broad discretion to review tribal court due process violations of the Indian Civil Rights Act of 1968 (ICRA). Part VI begins by summarizing the key provisions of the ICRA and defines the congressional policies advanced by the ICRA. Part VI then explains different approaches available to states attempting to extend full faith and credit to tribes,[7] exposes the advantages and disadvantages of these approaches, and analyzes Wyoming's role as an enforcer of the ICRA. Finally, Part VI recommends changes to the WTFF&CA that will advance ICRA policies and preserve tribal sovereignty.

## II. BACKGROUND

The U.S. Supreme Court first announced the concept of extending full faith and credit to Indian tribes as early as 1855 in *Mackey v. Cox*[8] and reaffirmed its view in *Santa Clara Pueblo v. Martinez* dicta in 1978.[9] The U.S. Congress has enacted statutes extending full faith and credit to specific tribes and areas of law.[10] Some states extend full faith and credit

7. *See infra* notes 201-211 and accompanying text.

8. *See* 59 U.S. (18 How.) 100 (1855). Section 11 of the Act of June 24th, 1812 provided "letters testamentary or of administration" of the United States and its territories shall be enforced "in the same manner as if the letters testamentary or administration had been granted in the District." *Id.* at 103. The Supreme Court held that the Act compelled the District of Columbia to extend full faith and credit to all Cherokee Nation judicial orders.

9. 436 U.S. 49 (1978). "Judgments of tribal courts, as to matters properly within their jurisdiction, have been regarded in some circumstances as entitled to full faith and credit in other courts." *Id.* at 66 n.21.

10. *See, e.g.*, 28 U.S.C. § 1360(c) (1988) ("Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.") This statute only applies to Public Law 280 tribes. Public Law 280 gave California, Minnesota, Nebraska, Oregon, and Wisconsin civil and criminal jurisdiction over specific tribes within state borders. ch. 505, § 2, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 (1988)).

*See also* the Indian Child Welfare Act of 1978, 25 U.S.C. § 1911(d) (1988) which states:

to tribes[11] while others recognize tribal judgments only as a matter of comity.[12] States that extend full faith and credit do so in various ways. Some states extend full faith and credit statutorily[13] while others recognize tribal judgments pertaining only to select areas of law.[14] The courts of New Mexico[15] and Idaho[16] have held that tribes are "territories" within the meaning of the federal full faith and credit statute[17] which Congress enacted pursuant to its authority to legislate under the Constitution's Full

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The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

*See also* David M. Ujke, *Tribal Court Jurisdiction in Domestic Relations Matters Involving Indian Children: Not Just a Matter of Comity*, 66 WIS. L. REV. 10 (1993) (discussing the intricacies of the Indian Child Welfare Act of 1978).

*See also* the Maine Indian Claims Settlement Act, 25 U.S.C. § 1725(g) (1988) ("The Passamaquoddy Tribe, the Penobscot Nation, and the State of Maine shall give full faith and credit to the judicial proceedings of each other.").

*See also* the Indian Land Consolidation Act, 25 U.S.C. § 2207 (1988) ("The Secretary in carrying out his responsibility to regulate the descent and distribution of trust lands . . . shall give full faith and credit to any tribal action.").

11. *See, e.g.*, Shepard v. Shepard, 655 P.2d 895 (Idaho 1982) (categorizing Idaho tribes as territories pursuant to § 1738); *In re* Buehl v. Anderson, 555 P.2d 1334 (Wash. 1976) (finding that tribal judgments concerning child custody should be given full faith and credit); Jim v. C.I.T. Financial Services Corp., 533 P.2d 751 (N.M. 1975) (categorizing tribes within state borders as territories and then holding that they were entitled to full faith and credit pursuant to 28 U.S.C. § 1738 (1988)). *See also* Robert Laurence, *The Enforcement of Judgments Across Indian Reservation Boundaries: Full Faith and Credit, Comity, and the Indian Civil Rights Act*, 69 OREGON L. REV. 589, 657-60 (1990) (discussing rationale behind *Jim* and *Shepard*).

12. *See, e.g.*, Desjarlait v. Desjarlait, 379 N.W.2d 139 (Minn. Ct. App. 1985); Mexican v. Circle Bear, 370 N.W.2d 737 (S.D. 1985); Wippert v. Black Feet Tribe, 654 P.2d 512 (Mont. 1982); Malaterre v. Malaterre, 293 N.W.2d 139 (N.D. 1980); Red Fox v. Red Fox, 542 P.2d 918 (Or. Ct. App. 1975); Lynch's Estate, 377 P.2d 199 (Ariz. 1962). *See also* S.D. CODIFIED LAWS ANN. § 1-1-25 (1992) (enacted in 1986). *See infra* notes 145 and 161 for key provisions of the South Dakota statute.

13. *See, e.g.*, OKLA. STAT. ANN. tit. 12, § 728 (1995) (extending full faith and credit to any Indian nation, tribe, band or political subdivision); Wis. Stat. Ann. § 806.245 (West 1994) (extending full faith and credit to tribal court judgments within Wisconsin). *See infra* notes 149, 152, and 164 for key provisions of the Wisconsin statute. *See also* ME. REV. STAT. ANN. tit. 15, § 702 (West 1994) (extending full faith and credit to the Passamaquoddy Tribe and the Penobscot Nation).

14. *See, e.g.*, WASH. REV. CODE ANN. § 13.34.240 (1993) (extending full faith and credit to any Indian tribe or band for juvenile court judgments); N.M. STAT. ANN. § 40-13-6(D) (Michie 1994) (extending full faith and credit to tribal court domestic violence orders of protection); NEB. REV. STAT. § 43-1504 (1993) (extending full faith and credit to child custody proceeding of any tribe).

15. *Jim*, 533 P.2d 751.

16. *Shepard*, 655 P.2d 895.

17. 28 U.S.C. § 1738 (1988). "Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." *Id.*

Faith and Credit Clause.[18] No federal court subscribes to this interpretation, but if it is correct, the Supremacy Clause[19] would compel the states to extend full faith and credit to tribal judgments, making a statute such as the WTFF&CA superfluous.

Wyoming's choice to statutorily enforce tribal judgments in state courts was not without controversy. On October 27 and 28, 1993 the Joint Judiciary Interim Committee met in Lander and Fort Washakie to hear testimony on the issue.[20] Opponents[21] of the bill did not want to extend full faith and credit because they said tribal courts were not bound by the U.S. Bill of Rights,[22] the Shoshone and Arapaho governments were unstable,[23] and tribal judges lacked independence.[24] Proponents[25] of the bill categorized these opinions as uninformed. They pointed out that the tribes were subject to the Indian Civil Rights Act of 1968,[26] tribal judges received annual training,[27] tribal laws have become more consistent since the tribes passed the Shoshone and Arapahoe Law and Order Code,[28] and Shoshone and Arapaho tribal courts already recognize Wyoming state court judgments.[29] At the end of the hearing, the Joint Judiciary Interim

18. U.S. CONST. art. IV, § 1.

19. *Id.* at art. VI, cl. 2.

20. *Tribal Courts—Full Faith and Credit: Hearings on SF0172 Before the Joint Judiciary Interim Committee*, 52nd Wyoming Legislature (1993) [hereinafter *Full Faith and Credit Hearings*].

21. *Id.* Various state and tribal judges, attorneys, and citizens testified at these hearings.

22. Talton v. Mayes, 163 U.S. 376, 384 (1896).

23. *Full Faith and Credit Hearings, supra* note 20. The General Council is composed of every member of the tribe and resembles a true democracy. Opponents criticized this form of government for leaving tribal decisions unattended and because the tribal member in charge is often difficult to identify. Opponents cited other reasons for tribal government instability: use of lay judges, one judge often reverses another's decisions, *ex parte* actions, conflicts of interest between judges and the parties involved, lack of representation for non-Indians, frequent changes in tribal laws, inadequate notice, frequent rescheduling of hearings, insufficiency of records, nepotism, inconsistent enforcement, and impaired access to the court system. *Id.*

24. *Id.* According to opponents at the Joint Judiciary Interim Committee, judges who are retained are subject to a referendum, but even then the General Council can override the referendum for cause. *Id. But see* the Shoshone and Arapahoe Law and Order Code [hereinafter S&A LOC] § 1-3-5 (1993) ("Any judge may be removed from office prior to the expiration of his term of office by an affirmative vote of three-fourths (3/4) of the Joint Business Council only upon the grounds of neglect of duty or gross misconduct, and only after the holding of a public hearing, at which the judge, after being given at least 5 days notice, is given an opportunity to answer all charges and present evidence in defense.").

25. *Full Faith and Credit Hearings, supra* note 20. Various state and tribal judges, attorneys, and citizens testified at these hearings. *Id.*

26. 25 U.S.C. §§ 1301-41 (1988 & Supp. V. 1993).

27. *Id.* § 1311(3) (requiring training of tribal court personnel).

28. The S&A LOC sets forth tribal substantive and procedural laws. Where no procedural law applies, the court looks to the Federal Rules of Civil and Criminal Procedure and the Federal Rules of Evidence.

29. *Full Faith and Credit Hearings, supra* note 20.

Committee asked its staff to draft a bill using the Wisconsin statute[30] as a model. The committee introduced the bill on February 22, 1994, and after going through both the House[31] and Senate[32] Judiciary Committees, and the Conference Committee,[33] Governor Sullivan signed the bill on March 29, 1994. It became effective July 1, 1994.

## III. THE STATE AND TRIBAL STRUGGLE TO RETAIN JURISDICTION

The conflicting views of proponents and opponents of the statute demonstrate the divergent sovereign interests of the Wyoming and Shoshone and Arapaho tribal governments. Wyoming is reluctant to grant absolute full faith and credit to Shoshone and Arapaho tribal judgments because of perceived inadequacies in the their court system. Whereas the Shoshone and Arapaho Tribes want absolute full faith and credit in order to achieve greater respect for their relatively young governments. State and tribal competition to retain sovereignty is a fundamental part of Indian law and will influence how Wyoming state courts will enforce Shoshone and Arapaho tribal judgments and vice versa.

This comment only briefly summarizes the status of existing tribal jurisdiction in light of the subject's vast scope. The following review will show that recent U.S. Supreme Court decisions[34] have substantially eroded tribal territorial and inherent sovereignty which the Court originally recognized in the early nineteenth century.[35] Unquestionably, states now enjoy a sovereign status superior to that retained by Indian tribes.

### *Chief Justice John Marshall's Version of Tribal Sovereignty*

Tribal sovereignty and jurisdiction were initially recognized by Justice Marshall in *Johnson v. McIntosh*.[36] Marshall explained the European discov-

30. WIS. STAT. ANN. § 806.245 (West 1994). *See infra* notes 149, 152, & 164 for relevant sections.

31. The bill was introduced to the House Judiciary Committee on February 22, 1994, passed the Committee, and was sent to the Senate on March 7, 1994.

32. The Senate Judiciary Committee received the bill on March 8, 1994 and amended it on the Senate floor March 11, 1994.

33. After amending the bill, the Senate sent it to the House on March 16, 1994, but the House refused to accept the Senate amendments. Then the bill went to the Conference Committee where both chambers adopted a final version on March 17, 1994.

34. *See, e.g.*, McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973); Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978); Montana v. U.S., 450 U.S. 544 (1981).

35. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).

36. 21 U.S. (8 Wheat.) 543 (1823). *See also* Phillip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993) (explaining Chief Justice Marshall's tribal sovereignty approach).

ery doctrine[37] which gave the federal government power to proclaim its superior sovereignty by conquering the indigenous Indian tribes and their land. Then in *Cherokee Nation v. Georgia,*[38] he held that tribes retained inherent sovereignty to the extent tribes were "domestic dependent nations" and "wards" of the U.S. government.[39] He defined a tribe as "a distinct political society, separated from others, capable of managing its own affairs and governing itself."[40] *Cherokee Nation* was the first decision recognizing tribal governments as quasi-sovereign entities. In *Worcester v. Georgia*[41] which also involved the Cherokee Tribe, Marshall further defined the scope of state jurisdiction over tribes. He held that the exclusive sovereign-to-sovereign relationship between the federal government and the Cherokee Nation preempted Georgia law from applying on the reservation.[42]

Judge Canby[43] summarized four basic principles of tribal sovereignty derived during Marshall's era:

> First, the tribes are sovereign entities with inherent powers of self-government. Second, the sovereignty of the tribes is subject to exceptionally great powers of Congress to regulate and modify the status of the tribes. Third, the power to deal with and regulate the tribes is wholly federal; the states are excluded unless Congress delegates power to them. Fourth, the federal government has a responsibility to protect the tribes and their properties, including the responsibility to protect them from encroachments by the states and their citizens.[44]

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37. "[D]iscovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be *consummated by possession.*" Frickey, *supra* note 36, at 386 (emphasis added).

38. 30 U.S. (5 Pet.) 1 (1831).

39. *Id. See also* Christina D. Ferguson, Comment, *Martinez v. Santa Clara Pueblo: A Modern Day Lesson on Tribal Sovereignty*, 46 ARK. L. REV. 275, 281 (1993) ("According to Marshall's opinion, the tribe was 'domestic' in the sense that the tribe was physically located within the geographical borders of the United States, while 'dependent' in that it had limited authority.").

40. *Id.* at 16. *Cherokee Nation* initiated a trend towards recognizing tribal governments as dependent sovereigns within the borders of the U.S., distinct from the state and federal governments, but possessing less authority than the federal government which exercises absolute sovereignty over its citizens and territory. Frickey, *supra* note 36, at 392.

41. 31 U.S. (6 Pet.) 515 (1832).

42. Worcester, 31 U.S. at 543. Marshall made it apparent in *Worcester* that he disdained the colonialist principle of conquest as a source of sovereignty, but conceded that as chief judicial officer of the conquering government, he could not contradict the government and the people he represented. However, Marshall, a man whose heart went out to the Indians, recognized that the Supreme Court could define the limits of the United State's power over the Indians when tribes contest a state's efforts to destroy remaining tribal rights as domestic dependent nations. *Id. See also* Frickey, *supra* note 36, at 393-98.

43. Honorable William C. Canby Jr., *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1, 1-2 (1987) (summarizing Marshall's approach to tribal sovereignty as well as recent Supreme Court holdings).

44. This fourth principle described by Judge Canby actually came from *U.S. v. Kagama* which

Unfortunately for Native Americans, Chief Justice Marshall's school of thought seems to have lost favor. Recent U.S. Supreme Court decisions demonstrate that the current Court is unconcerned with protecting tribal sovereignty and the Native Americans' right to self-determination.[45]

*Modern Tribal Jurisdiction*

The Supreme Court still adhered to Marshall's approach a century after *Worcester*. In *Williams v. Lee*[46] the Court reaffirmed the tribes' right to self-government and upheld the presumption favoring tribal jurisdiction over its territory, except where Congress has explicitly provided for state jurisdiction.[47]

Marshall's time had come and gone by 1973 when the Supreme Court reversed the presumption and began to erode tribal sovereignty. In *McClanahan v. Arizona State Tax Commission,*[48] the Court found that a state can exercise jurisdiction over an Indian reservation, unless a federal statute or treaty preempts the state from doing so. By reducing the role of inherent sovereignty to a mere "backdrop,"[49] the Court reversed the presumption once favoring tribal jurisdiction over its territory.[50] Although the Court found tribal jurisdiction in *McClanahan*, it applied the new preemption test with less deference to tribal sovereignty in subsequent cases.[51]

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the court decided after the Marshall era. 118 U.S. 375, 384-85 (1886).

45. Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978); Montana v. U.S., 450 U.S. 544 (1981).

46. 358 U.S. 217 (1959).

47. "[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220.

48. 411 U.S. 164 (1973). In *McClanahan*, the issue was whether Arizona could impose its income tax on a reservation Indian who derived his income entirely from reservation sources. *Id.* at 165. The Court held that only the federal government and the tribes had such authority. *Id.*

49. "The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a *backdrop* against which the applicable treaties and federal statutes must be read." *Id.* at 172 (emphasis added).

50. Judge Canby of the Ninth Circuit explained how the reversed presumption operates:

> The inquiry is only whether Congress has curtailed this power [under the inherent sovereignty approach]. If not, the tribe's power exists and excludes the state from operating on the same subject. A preemption analysis poses a different question: has any federal treaty or statute preempted state power and thus buttressed the sovereignty of the tribe? Because that is the question, the beginning assumption must be that the state does have the power to apply its law unless preempted.

Canby, *supra* note 43, at 7.

51. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980), is another case showing how the new preemption test has worked to the disadvantage of the tribes. In *Colville*, the Court held the State of Washington could impose a tax on cigarette sales to Indians and non-Indians on the reservation because no federal law said the State could not impose a cigarette tax on the Confederated Tribes. *Id.* at 157.

*Colville* diminished tribal sovereignty by reducing the analysis of tribal sovereignty to a test balancing state, federal, and tribal interests. *Id.* at 154-59. State citizens were traveling to the reserva-

The first case to substantially reduce tribal jurisdiction using the preemption approach was *Oliphant v. Suquamish Tribe*.[52] Mark Oliphant, a non-Indian, successfully filed a writ of habeas corpus in federal court contesting the Tribe's criminal jurisdiction after the Tribe arrested him for assaulting a tribal officer and resisting arrest.[53] Oliphant asserted that tribal courts did not possess jurisdiction over non-Indian criminal defendants.[54] The Suquamish Tribe claimed jurisdiction based on inherent sovereignty as no federal statute had taken away the Tribe's criminal jurisdiction over non-Indians.[55] The Supreme Court disagreed. First it balanced the national government's interest in protecting the personal liberties of its citizens against the Tribe's interest in protecting tribal inherent sovereignty.[56] Then it found the Tribe had relinquished its criminal jurisdiction when it incorporated into the U.S. .[57]

Until *Oliphant*, the Supreme Court had only recognized two implied limitations on tribal sovereignty, one prohibiting tribes from entering into relations with foreign governments[58] and the other preventing tribes from alienating their land to non-Indians.[59] Consequently, when the Supreme Court found another implied limitation on tribal sovereignty in *Oliphant*, commentators seriously questioned the Court's use of legal precedent.[60]

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tion to buy cigarettes because the tribal tax was substantially less than the state tax and the state tax was not imposed on sales within the reservation. This allowed the Confederated Tribes to profit from the state cigarette tax exemption. The Court held that the Tribes' lost profits did not constitute a sufficient interest because those profits were not generated on the reservation. *Id.* at 155. The Court balanced the state and tribal interests and decided the Confederated Tribes' right to impose taxes on the reservation was subordinate to the State's interest in maximizing tax revenue. *Id.* at 157.

52. 435 U.S. 191 (1978).

53. *Id.* at 194.

54. *Id.* at 194-95.

55. *Id.* at 195-96. Prior to *Oliphant*, tribal courts held criminal jurisdiction over Indian and non-Indian criminal defendants, except federal courts had jurisdiction over serious crimes defined in the Major Crimes Act. 18 U.S.C. § 1153 (1988).

56. "But from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their *personal liberty*." *Oliphant*, 435 U.S. at 210 (emphasis added).

57. "By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." *Id.*

58. *Worcester*, 31 U.S. at 559. Georgia filed suit based upon the U.S. CONST. art. III, § 2, cl. 1-2, which gives the Supreme Court appellate jurisdiction over matters between states and foreign governments. Marshall dismissed the *Worcester* lawsuit for want of jurisdiction because tribes were not considered foreign nations and did not have the authority to negotiate with foreign nations. *Id.*

59. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667-68 (1974).

60. *See, e.g.*, Peter C. Maxfield, *Oliphant v. Suquamish Tribe: The Whole is Greater than the Sum of the Parts*, 19 J. CONTEMP. L. 391 (1993); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WISC. L. REV. 219, 270.

Again, in 1981, the Court used the preemption test to limit tribal territorial jurisdiction and began expanding the *Oliphant* non-Indian criminal defendant exception to civil matters. In *Montana v. U.S.*,[61] the issue was whether tribes or states had jurisdiction to regulate hunting and fishing within the boundaries of the reservation on lands that had been acquired by non-Indians pursuant to the General Allotment Act of 1887.[62] The Court held in favor of state jurisdiction which significantly narrowed the scope of tribal territorial sovereignty as pronounced by Chief Justice Marshall in *Worcester*.[63] It affirmed the preemption test of *McClanahan*, with exceptions, by holding that tribes lack jurisdiction over the activities of non-Indians on fee lands acquired under the General Allotment Act unless Congress expressly grants tribal jurisdiction.[64] It created two exceptions to the preemption test which rebut the presumption favoring state jurisdiction. Under the exceptions, tribes will have jurisdiction when non-Indians enter into consensual relationships with tribal members or when non-Indian "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[65] The 1989 case of *Brendale v. Confederated Tribes and Bands of Yakima*[66] and the 1993 case of *South Dakota v. Bourland*[67] expanded the *Montana* holding.

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61. 450 U.S. 544 (1981).

62. Ch. 119, § 5, Stat. 388-89 (1887) (codified as amended 25 U.S.C. § 331 (1988)). The General Allotment Act was originally intended to convey reservation lands held in trust by the federal government, in fee, to individual Indians. Once Indians acquired fee ownership in the land, they could sell the land to anybody, including non-Indians. Subsequently, non-Indians acquired large tracts of reservation land. After realizing that non-Indians were taking over reservations, Congress passed the Indian Reorganization Act of 1934 which halted these mass conveyances of reservation land to non-Indians. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-79 (1988 & Supp. 1994)). The Indian Reorganization Act represented the end of Congress' policy of assimilating the indigenous Native Americans into the U.S. culture. For an extensive analysis of the assimilation era and its pervasive and seemingly dominant present-day consequences, *see* Judith V. Royster, *The Legacy of Allotment*, ARIZ. ST. L.J. (forthcoming March 1995) (manuscript at 22-28, on file with the *Land and Water Law Review*).

63. 31 U.S. (6 Pet.) 515 (1832).

64. 450 U.S. at 566.

65. *Id.* The first exception is now known as the consensual relations exception, and the latter is known as the direct effects exception. *See also* Royster, *supra* note 62, at 83 (criticizing the *Montana* exceptions).

66. 492 U.S. 408 (1989) (plurality opinion) (Stevens, J., concurring). Justice Stevens could not understand how tribes expected to retain control over lands sold to non-Indians, so the Court concluded states had jurisdiction over open areas of the reservation, i.e. those areas where non-Indians acquired fee ownership in a substantial portion of the reservation, and tribes retained jurisdiction over closed areas, i.e. those areas where tribal members retained ownership of most land. *Id.* at 437. In *Montana*, the Court gave states hunting and fishing jurisdiction over non-Indian owned lands, whereas in *Brendale*, the court went so far as to say states have jurisdiction to zone reservation areas predominately owned by non-Indians which include Indian owned lands as well. *Id.*

Justice Blackmun, joined by Justices Brennan and Thurgood Marshall protested the Court's application of the preemption test in *Montana* and *Brendale*. *Id.* at 448-68 (Blackmun, J., dissenting).

67. 113 S. Ct. 2309, 2316 (1993). The Court adopted a bright-line test by holding that the tribe relinquished all sovereign authority to regulate non-Indian owned land acquired pursuant to the

*The U.S. Supreme Court Refuses to Comply With Congressional Indian Policy*

*Montana*[68] demonstrates how today's Supreme Court adheres more closely to the pre-1934 "assimilation policy,"[69] a policy Congress has since abandoned. Congress ended the assimilation era and began to reorganize tribal governments when it enacted the Indian Reorganization Act of 1934 which asserted Congress' intention to advance tribal self-government within reservation boundaries.[70] Following World War II in the 1940s and 1950s, social forces revived the assimilation policy and instigated an era of termination.[71] However, the termination era ended shortly thereafter when President Johnson reasserted the tribal self-determination policy during the 1950s and 1960s.[72] Subsequent Legislatures and Presidents have carried on the policy of Indian self-determination until the present.[73] The holding in *Montana* and its progeny represent the Court's refusal to advance Congress' Indian policy of supporting tribal self-government on reservation lands.[74]

The Court's holding in *Oliphant* is a second example of contradictory judicial and congressional policies. It was completely unnecessary for the Court to create the non-Indian criminal defendant exception to tribal jurisdic-

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Flood Control Act of 1944. ch. 665, 58 Stat. 887 (pertinent section codified as amended at 16 U.S.C. § 460(d) (1988)). *Bourland* expanded the holding in *Montana* which gave states hunting and fishing jurisdiction over non-Indian owned lands acquired pursuant to the General Allotment Act of 1887. Future U.S. Supreme Court decisions could use *Bourland* as precedent to permit state jurisdiction over non-Indian owned lands acquired pursuant to any federal statute. *See* Royster, *supra* note 62, at 96-97 (criticizing the *Bourland* holding); John H. McClanahan, Note, *Congress, Please Help Again—The Cheyenne River Sioux Tribe Cannot Regulate Hunting and Fishing Because the Non-Indian Interest Controls*, 29 LAND & WATER L. REV. 505 (1994).

68. 450 U.S. 544 (1981).

69. *See* Royster, *supra* note 62, at 12-13, which described the assimilation policy:

> The 1880s witnessed the fundamental shift in federal policy from separatism within reservations to assimilation. And yet the goals of the allotment and assimilation era were in many respects continuations of the reservation goals: agriculture, Christianity, and citizenship were to be the ultimate outcome. Federal policy, however, was no longer content with separating the tribes, protecting their autonomy, and providing Indian agents as teachers of change. Instead, federal policy turned toward the assimilation of Indians into the general body of citizens.

*Id.*

70. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-79 (1988 & Supp. V. 1993)). *See supra* note 62 for a brief historical summary of the General Allotment Act and the Indian Reorganization Act.

71. "Termination was assimilation with a vengeance. Congress withdrew federal recognition, liquidated tribal assets, including the land base, and transferred jurisdiction over Indians to the states." Royster, *supra* note 62, at 28.

72. Royster, *supra* note 62, at 30.

73. Royster, *supra* note 62, at 30.

74. *See* Royster, *supra* note 62 at 29-30 (critically analyzing contradictory judiciary, executive, and legislative policies).

tion in *Oliphant*.[75] The Indian Civil Rights Act of 1968 (ICRA)[76] specifically provided for federal habeas corpus review of tribal action when tribes incarcerated criminal defendants.[77] This habeas corpus provision prevents tribes from exercising jurisdiction over defendants facing a criminal penalty greater than either six months of incarceration or a five-hundred dollar fine.[78] In the event that the tribal court somehow violated Mark Oliphant's civil liberties under the ICRA, a federal district court could have overruled the tribal court conviction. Instead, the Court adopted the *Oliphant* exception which was unnecessarily intrusive on tribal sovereignty and contradicted the express congressional policies underlying the ICRA.

The 1990 case of *Duro v. Reina*[79] is a third example of contradictory judicial and congressional policies. In *Duro,* the court expanded the *Oliphant* exception by concluding that tribes have no criminal jurisdiction over non-member Indians, that is, Indians who are members of other tribes. In a comforting demonstration of legislative conscience, Congress overruled *Duro* and acquiesced to tribal exercise of jurisdiction over non-member Indians.[80] This analysis of *Oliphant* and *Duro* shows how the Supreme Court continually contradicts express congressional Indian policy. Some commentators attribute the Court's anamolous policy to its distrust of tribal governments.[81]

The Wyoming Legislature has assumed a more significant role in the recognition of tribal sovereignty by enacting the Wyoming Tribal Full Faith and Credit Act (WTFF&CA).[82] A Wyoming state court should follow congressional policy when it faces the dilemma of interpreting contradictory congressional and judicial Indian policy, a situation which inevitably will arise when a Wyoming state court applies the WTFF&CA.

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75. *See* Canby, *supra* note 43, at 8-9.

76. 25 U.S.C. §§ 1301-41 (1988 & Supp. V. 1993). *See infra* text accompanying notes 170-74 for a more in depth analysis of the ICRA.

77. 25 U.S.C. § 1303.

78. *Id.* § 1302(7).

79. 495 U.S. 676 (1990).

80. 25 U.S.C. § 1301(2) (Supp. V. 1993) (amended 1990). *See infra* note 191 for full text of amended statute.

81. Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest For a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77 (1993) ("It should be apparent that the arcane, complex nature of much of the recently introduced federal Indian law doctrines governing the scope of tribal jurisdiction derives from an underlying distrust of tribal governance of nonmembers rooted deeply in notions of racial superiority that animated colonization. Unlike other racial distinctions, which society legally has condemned, these legacies of conquest have been at the heart of many of the recent Indian jurisdictional decisions. Of course, the written opinions never openly express such levels of distrust. Rather, they are couched in seemingly sound legal theories that, when closely analyzed, would appear ludicrous if applied in other contexts."). *See also* Williams *supra* note 60, at 270-71.

82. WYO. STAT. § 5-1-111 (1994). *See* full text *supra* note 2.

The following discussion lays further foundation for understanding the WTFF&CA by explaining how sister states recognize judgments from other jurisdictions. This comment will discuss full faith and credit and the related common law prior adjudication doctrines of *res judicata* (or claim preclusion)[83] and collateral estoppel (or issue preclusion)[84] as these doctrines apply within and through full faith and credit. It will cite Wyoming cases which apply these doctrines where they exist and will cite federal court holdings where they do not.

## IV. THE FULL FAITH AND CREDIT DOCTRINE; COHESION AMONG STATE JUDICIARIES

Since the U.S. Constitution was drafted, courts have only applied full faith and credit principles[85] between states, the federal government, and territories.[86] The Full Faith and Credit Clause[87] evidences that sister states share equivalent sovereign status by advancing the policies of protecting state sovereignty on the one hand and advancing interstate unity on the other.[88] More specifically, full faith and credit protects the sovereignty of a rendering state by requiring other states to enforce its judicial orders and judgments.[89] At the same time, the full faith and credit clause restricts the sovereignty of sister states by creating a reciprocal obligation between states to enforce judicial determinations in order to advance federal unity. States often struggle to retain their sovereignty while respecting the reciprocal status of sister states. For example, a conflict may arise where a rendering jurisdiction erroneously applies the enforcing jurisdiction's laws. In this situation, the enforcing court still must give full faith and credit to the rendering court's judgment, even though it resulted from a misapplication of the enforcing jurisdiction's laws.[90] Otherwise, the legal

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83. *Res judicata* is often called claim preclusion. FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE §11.3, at 582 (4th ed. 1992).

84. Collateral estoppel is often called issue preclusion. *Id.*

85. For a summary of basic principles of full faith and credit, *see* Laurence *supra* note 11, at 649-51.

86. 28 U.S.C. § 1738 (1988). *See* full text *supra* note 17.

87. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State.").

88. U.S. CONST. art. IV (governing relations between states).

89. *See* Clinton *infra* note 138, at 897 (Full faith and credit "assure[s] that the sovereign states comprising the union would show the requisite mutual respect for one another's judgments and laws."). *See also* John T. Moshier, Comment, *Conflicts Between State and Tribal Law: The Application of Full Faith and Credit Legislation to Indian Tribes*, 30 ARIZ. ST. L.J. 801, 803 (1981).

90. Fauntleroy v. Lum, 210 U.S. 230 (1908). *But see* Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518 (1986). When an enforcing court fails to give preclusive effect to a foreign judgment, its determinations bind any court in which a party subsequently seeks to enforce it. In *Parsons*

and factual basis of the rendering court's judgment would be subject to relitigation in the enforcing court, a result incompatible with the purpose of the full faith and credit requirement.

On the other hand, judges are required to extend full faith and credit only to valid foreign judgments. A judgment is *valid* if the rendering state had competent jurisdiction[91] and the judgment was not obtained by fraud or dishonesty.[92] An enforcing court can determine whether a rendering court's judgment was valid by reviewing the basis supporting the rendering court's jurisdiction,[93] provided that the jurisdictional question was not already litigated in the first action.[94] A defendant may waive personal jurisdiction by appearing in the forum court and not challenging jurisdiction.[95] Furthermore, an enforcing court may not reexamine the competency of subject matter jurisdiction as long as the challenging party appeared in the rendering court and could have litigated it, but did not.[96]

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the rendering jurisdiction misapplied the enforcing jurisdiction's law, and contrary to *Fauntleroy*, the enforcing court rendered a second judgment inconsistent with the rendering court's judgment. The Court held that if a party subsequently seeks to enforce the second judgment in any other court, that court must also enforce it. *Id.*

91. Penoyer v. Neff, 95 U.S. 714 (1877) (holding that a judge can review the competency of the foreign court's personal jurisdiction); Miller v. Amoretti, 181 P. 420 (Wyo. 1919) (holding that a judge does not violate full faith and credit by reviewing the foreign court's jurisdiction); *accord* Bank of Chadron v. Anderson, 48 P. 197 (Wyo. 1896).

92. *Bank of Chadron*, 48 P. 197, 200. *See also* 2 RICHARD A. GIVENS, MANUAL OF FEDERAL PRACTICE 428-29 (4th ed. 1991).

93. Andrews v. Andrews, 188 U.S. 14, 35 (1902) (holding that facts supporting the foreign court's jurisdiction are subject to inquiry by the forum court); *accord* Dozier v. Ford Motor Co., 702 F.2d 1189, 1190-91 (D.C. Cir. 1983).

94. Durfee v Duke, 375 U.S. 106, 111 (1963) ("From these decisions there emerges the general rule that a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment . . . . [S]ince the question of subject-matter jurisdiction had been fully litigated in the original forum, the issue could not be retried in a subsequent action between the parties."). The same rule applies when the foreign court independently determines that it has personal jurisdiction. Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 524-25 (1931). *See also* DELMAR KARLEN, CIVIL LITIGATION 113.

*But see* Boulter v. Cook, 236 P. 245 (Wyo. 1925) ("While the court must necessarily decide in the first instance whether it has jurisdiction or not, its decision that it has, when none in fact exists, and that fact appears of record, is of no avail. If that were not so, no judgment could ever be attacked collaterally, no matter how glaringly the face of the record would show such want of jurisdiction."). *Boulter* directly contradicts *Durfee* and *Baldwin*, but since it was decided before these U.S. Supreme Court cases, it is unclear whether the Wyoming Supreme Court will adopt the *Durfee* approach.

95. Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940) (holding that defendants can waive personal jurisdiction by contesting on the merits instead of taking a default judgment and not raising the issue of personal jurisdiction).

96. *See* discussion on *res judicata infra* note 103.

*Collateral Enforcement of Foreign Judgments in Wyoming*

A party seeking to enforce a foreign judgment under full faith and credit has two options in Wyoming. First, under the Uniform Enforcement of Foreign Judgments Act,[97] a party who has been awarded a valid foreign judgment may enforce it in any Wyoming state district court without filing a new suit.[98] According to the WTFF&CA,[99] Shoshone and Arapaho tribal court liens and attachments are only enforceable in a Wyoming state district court if the judgment is filed pursuant to the Wyoming Enforcement of Foreign Judgments Act.[100] The Wyoming Enforcement of Foreign Judgments Act does not foreclose a party's right to enforce a judgment by filing a new suit to enforce the judgment, but it provides a quicker and less burdensome alternative than collateral enforcement because filing a new law suit is unnecessary.[101]

The second alternative is collateral enforcement which occurs when a rendering jurisdiction awards a judgment and the successful party seeks to enforce the judgment in another court by filing a new suit.[102] The doctrines of *res judicata* (or claim preclusion) and collateral estoppel (or issue preclusion) strengthen the impact of full faith and credit. They require enforcing courts to give the same preclusive effect to rendering court determinations on claims and issues already litigated because the enforcing court must apply the rendering court's laws of claim and issue preclusion.

*Prior Adjudication Law Between Sister States*

When a party seeks to collaterally enforce a foreign judgment, the doctrine of *res judicata* gives the judgment full faith and credit effect by requiring the enforcing court to uphold the rendering court's rulings on legal claims that were asserted or which could have been asserted in the

97. UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT §§ 1-10, 13 U.L.A. 152-80 (1964). Wyoming adopted this act which is codified at WYO. STAT. §§ 1-17-701 to -707 (1977).

98. *See* KARLEN, *supra* note 94, at 111.

99. *See* WYO. STAT.§ 5-1-111(e) (1994). *See* full text *supra* note 2.

100. WYO. STAT. §§ 1-17-701 to -707.

101. *Id.* § 1-17-707.

102. *See* M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312, 325 (1839) (recognizing for the first time that collateral enforcement is an alternative).

first action.[103] *Res judicata* only applies when the parties in the first action and the second action are the same,[104] or when they are in privity.[105]

*Res judicata* is described in terms of merger and bar. When a party in the first action wins on the merits, any legal claims which could have been raised in the first lawsuit are extinguished or *merged*[106] into the judgment in that party's favor. On the other hand, if the party loses on the merits in action one, the party is *barred* from suing a party to the first action on any legal claim which could have been raised in the first lawsuit, but were not.[107]

The forum must enforce the judgment if the rendering jurisdiction would also have enforced it had a party brought suit there.[108] Moreover, the enforcing jurisdiction must apply the rendering jurisdiction's laws of claim preclusion and issue preclusion[109] if the enforcing jurisdiction's preclusion laws would provide a less preclusive effect to the judgment in question.[110] A

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103. *See, e.g.*, Reconstruction Finance Corporation v. First National Bank of Cody, 17 F.R.D. 397 (1955) (finding that counterclaims and compulsory counterclaims that could have been raised in the first action are waived); Delgue v. Curutchet, 677 P.2d 208 (Wyo. 1984) (finding that *res judicata* resolves disputes in a single action, thereby avoiding vexatious and expensive litigation and promoting public confidence in judicial economy); Graham v. Culver, 29 P. 270 (Wyo. 1892) (holding issues, claims, and defenses that could have been raised in first action are waived). *See also* RESTATEMENT (SECOND) OF JUDGMENTS §§ 21–23 (stating claim splitting occurs when a plaintiff raises one legal claim in a law suit and raises an alternative legal claim arising out of the same transaction in a subsequent law suit); *Id.* §§ 24–26 (finding the transaction approach defines the parameters and exceptions of the prohibition on claim splitting).

104. Harshfield v. Harshfield, 842 P.2d 535, 537 (Wyo. 1992); *accord* Matter of Paternity of JRW and KB, 814 P.2d 1256, 1265 (Wyo. 1991); Matter of Swasso, 751 P.2d 887, 890 (Wyo. 1988); Barrett v. Town of Guernsey, 652 P.2d 395, 398 (Wyo. 1982).

105. *Res judicata* applies to parties in privity, such as successors in interest, beneficiaries in trust, principal agents, bailors, bailees, and indemnetors. *See* Wight v. Chandler, 264 F.2d 249 (10th Cir. 1959); *accord* Texas West Oil and Gas Corp. v. First Interstate Bank of Casper, 743 P.2d 857 (Wyo. 1987) (opinion reconfirmed 749 P.2d 278 (Wyo. 1988)). *See also* Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111 (1911) (determining the existence of privity is left to the law of the forum).

106. RESTATEMENT (SECOND) OF JUDGMENTS § 18.

107. *Id.* §§ 19-20 (explaining the general rule of bar and its exceptions).

108. Mills v. Duryee, 11 U.S. (7 Cranch) 481 (1813) (holding that if a judgment would be given a *res judicata* effect by the rendering state, other states would have to give *res judicata* effect to the judgment as well).

109. 28 U.S.C. § 1738 (1988). *See* full text *supra* note 17. *See also* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 14.15, at 696-97 (2nd ed. 1993) ("[T]he language of [§ 1738] must be applied literally. Thus, it is necessary to look to the judgment-rendering court's law to determine all binding effect questions.").

110. Hart v. American Airlines, Inc., 61 Misc.2d 41 (N.Y. Sup. Ct. 1969) (holding it does not violate full faith and credit to give greater preclusive effect to a foreign judgment than the rendering court would have given to its own judgment). *See also* LARRY L. TEPLY ET. AL., CIVIL PROCEDURE 162, 702 (1991) ("At the very least, this would seem to mean that no less effect can ever be given to a state judgment than would be given to the judgment by the court that rendered the judgment.").

judgment must be final[111] and on the merits[112] to be given preclusive effect. Once a judgment is final, not even a subsequent change in the applicable law will prevent merger or bar.[113]

If *res judicata* does not foreclose a second suit on a different cause of action, then collateral estoppel may. Collateral estoppel prevents issues from being relitigated where three conditions are satisfied. First, the issue being raised in the second suit must be identical to an issue in the first suit. Second, the rendering court must have actually decided the issue in the first action. Finally, deciding the issue must have been essential to the judgment.[114] *Res judicata* forecloses a legal *claim* or cause of action, whereas collateral estoppel prevents parties from relitigating previously raised *issues*.[115] *Res judicata* only applies where parties or their privy in the first and second action are the same, whereas collateral estoppel can apply where a plaintiff in the second action was not involved in the first action.[116] A defendant in the first action can use collateral estoppel defen-

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111. Padlock Ranch v. Washakie Needles Irr. Dist., 61 P.2d 410 (Wyo. 1936). For a judgment to be final "it must be such as puts an end to the particular litigation or definitely puts the case out of the court." *Id.* at 412.

112. *Id. See also* Hennessy v. Chicago, 157 P. 698 (Wyo. 1916) (holding a judgment on demurrer is on the merits); Wilson v. Young 7 P.2d 216 (Wyo. 1932) (holding a judgment of dismissal by agreement of the parties is on the merits); Tutty v. Ryan, 78 P. 657 (Wyo. 1904) (interlocutory relief is on the merits).

113. Federal Department Stores Inc. v. Motie, 452 U.S. 394 (1981).

114. Three requirements must be satisfied before collateral estoppel will take effect. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1980). First, the issue in the second action must be identical to an issue fully and fairly litigated in the first action. Fay v. South Colonie Cent. School Dist., 802 F.2d 21 (2d Cir. 1986) (finding that courts will not give preclusive effect to a foreign judgment when the basis of the decision is too ambiguous to determine whether the parties actually litigated an issue). Second, the court in the first action must have actually decided the issue. *Id.* In bench trials where judges make findings of fact and law, the issues actually decided are easily found in the record. However, in jury trials where verdicts are often rendered without providing a basis for the decision, discovering whether the issue was actually decided becomes more difficult. *See* JAMES ET AL., *supra* note 83, § 11.19, at 611. Third, the court's decision must have been necessary to its judgment. *See* Cambria v. Jeffrey, 29 N.E.2d 555 (Mass. 1940). *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 17(3) (1980); JAMES ET AL., *supra* note 83, § 11.19, at 612. For example, suppose A sues B for negligence and the court finds that B was negligent, A was contributorily negligent, and finds in favor of B. In a subsequent action where B sues A for negligence, A cannot assert that B's negligence was already decided in the first action because B's negligence was not necessary to the holding that A's contributory negligence relieved B from liability. This example is derived from the holding in *Cambria*. 29 N.E.2d at 555.

115. Kremer v. Chemical Construction Corp. 456 U.S. 461, 466 n.6 (1982) (distinguishing between claim preclusion and issue preclusion: "Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from re-litigating issues that were or could have been raised in that action . . . . Under collateral estoppel, once a court decides an issue of fact or law necessary to its judgment, the decision precludes re-litigation of the same issue on a different cause of action between the same parties."); *accord Delgue*, 677 P.2d at 214.

116. The opportunity to be heard on notice, i.e. due process, is fundamental to determining whether collateral estoppel affects a particular party. *See* JAMES ET AL. *supra* note 83, § 11.23, at 617-18. Therefore, non-parties to the first action can not be bound by a prior judgment because justice demands that each citizen have a day in court. *Id.*

sively to prevent plaintiffs in a second action from relitigating issues already decided in the defendant's favor.[117] Alternatively, plaintiffs can use collateral estoppel offensively to prevent a defendant in the first action from relitigating issues already decided against the defendant, depending on the circumstances and on the relevant jurisdiction's law on the subject of non-mutual issue preclusion.[118]

Prior adjudication law encompasses the doctrines of full faith and credit, *res judicata*, and collateral estoppel. All three doctrines interrelate. First, the full faith and credit doctrine requires sister states to reciprocally honor val-

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The old rule of mutuality prevented strangers to the first action from being offensively or defensively estopped because they could not be bound by the first law suit. However, the California Supreme Court abolished the requirement that a litigant in the second action must have been a party in the first action to invoke defensive collateral estoppel. Bernhard v. Bank of America, 122 P.2d 892 (1942). So did the Tenth Circuit and the Wyoming Supreme Court. Atchinson v. Wyoming, 763 F.2d 388 (10th Cir. 1985); Rust v. First Nat. Bank of Pinedale, 466 F.Supp. 135 (D.C. Wyo. 1979); *Texas West Oil and Gas Corp.*, 743 P.2d at 857. Courts still categorize collateral estoppel in terms of mutual and non-mutual preclusion. When the parties in the first and second actions were the same or represented by their privy, it is mutual collateral estoppel. When at least one party was a stranger to the first law suit, it is non-mutual collateral estoppel.

117. Simply stated, when collateral estoppel is used as a shield, it is defensive; when used as a sword, it is offensive. Collateral estoppel is used *defensively* when the defendant in the second law suit estopps the plaintiff from raising issues already decided in the first action. *See, e.g., Bernhard*, 122 P.2d 892. Where a group of beneficiaries sued an executor over rights to money left by the decedent, the first court found that the decedent made a gift to the executor and ruled against the beneficiaries. Subsequently the executor died, one of the original beneficiaries was appointed executor, and filed suit against the bank where the money was deposited. The bank raised non-mutual defensive collateral estoppel as a shield to preclude the beneficiary who was a party to the first suit from relitigating an issue the first court had already decided against the beneficiary. *See also* Blonder-Tongue v. University of Illinois, 402 U.S. 313 (1971); Israel v. Wood Dolson Co. 134 N.E.2d 97 (N.Y. 1956).

118. It is used *offensively* when the losing party in suit one is subsequently sued, the issue is the same, and the plaintiff in suit two collaterally estopps the losing party in the first action from relitigating the issue. *See, e.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). Where a class of stockholders, including Shore, sued Parklane for falsely issuing proxy statements, the SEC successfully sued Parklane on the same grounds after the suit was filed and before trial. The class of stockholders asserted non-mutual offensive collateral estoppel against Parklane and won. The Court concluded that applying offensive collateral estoppel was equitable because the stockholders could not have joined the SEC lawsuit. The Court described three other situations when applying offensive estoppel may not be equitable, even though the Court did not rely on these factors in rendering its decision. These situations arise when the defendant did not have incentive to vigorously defend in the first action because the potential damages were nominal; when the judgment being relied on for preclusive effect is inconsistent with other judgments previously rendered against the defendant; and when the defendant has procedural opportunities available in the second action that were unavailable in the first action. *See also* Bahler v. Fletcher, 474 P.2d 329 (Or. 1970); Zdanok v. Glidden Co., 327 F.2d 944 (2nd Cir. 1964).

Offensive collateral estoppel is not applied when the results would be inequitable. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1980) (explaining that offensive collateral estoppel should only be applied in rare circumstances where advanced by equity); *See also* TEPLY ET. AL., *supra* note 110, at 703-05 (explaining that the federal full faith and credit statute, 28 U.S.C. § 1738, permits enforcing courts to give less preclusive effect to a foreign judgment than the rendering jurisdiction would have given when a party seeks offensive collateral estoppel).

id[119] foreign judgments. Second, if the judgment was final and on the merits,[120] *res judicata* precludes a party from subsequently relitigating any legal claim that was litigated or could have been litigated in the first lawsuit. Third, if *res judicata* does not completely foreclose a subsequent cause of action, but the issue being raised in the second suit was identical to an issue in the first action, the parties fully and fairly litigated the issue in the first action, and deciding the issue was necessary to the judgment, then collateral estoppel prevents the issue from being relitigated.

## V. ANALYSIS OF THE WYOMING TRIBAL FULL FAITH AND CREDIT ACT (WTFF&CA)

Only recently have tribal judgments been given full faith and credit in state courts. States like South Dakota[121] and Wisconsin[122] enacted legislation which governs how their courts enforce tribal judgments. In 1994, Wyoming took similar action by passing the WTFF&CA[123] which codified segments of prior adjudication laws traditionally applied between states.

### *How Prior Adjudication Laws Might Apply Under The Wyoming Tribal Full Faith and Credit Act*

Full faith and credit requires enforcing courts to apply the rendering jurisdiction's prior adjudication laws when deciding whether to enforce a foreign judgment.[124] The WTFF&CA implies the same requirement.[125] The WTFF&CA states that "[t]he judicial records, orders and judgments of the courts of the Eastern Shoshone and Northern Arapaho Tribes of the Wind River Reservations shall have the same *full faith and credit* in the courts of this state as do the judicial records, orders and judgments of *any other governmental entity*."[126] The "any other governmental entity" language refers to Wyoming's sister states, the federal government, and United State's territories.[127] It is reasonable to interpret this clause to mean "full faith and credit" principles between sister states apply when a Wyoming state court enforces a Shoshone and Arapaho tribal judgment

119. A judgment is valid if the rendering state had competent jurisdiction and it was not obtained by fraud or dishonesty. *See supra* text accompanying notes 91-92.

120. *See supra* note 111-12.

121. S.D. CODIFIED LAWS ANN. § 1-1-25 (1992) (enacted in 1986).

122. WIS. STAT. ANN. § 806.245 (West 1994) (enacted in 1982 and amended in 1991).

123. WYO. STAT. § 5-1-111 (1994). *See* full text *supra* note 2.

124. 28 U.S.C. § 1738. *See* full text *supra* note 17.

125. WYO. STAT. § 5-1-111(a) (1994). *See* full text *supra* note 2.

126. *Id.*

127. *See* 28 U.S.C. § 1738. *See* full text *supra* note 17.

and vice versa. Therefore, Wyoming and Shoshone and Arapaho tribal governments must apply the rendering court's prior adjudication laws.

Shoshone and Arapaho tribal law has very underdeveloped prior adjudication laws. In fact, the tribal courts do not apply the prior adjudication doctrines of *res judicata* and collateral estoppel which govern enforcement of foreign judgments. The Law and Order Code only addresses how tribal courts will enforce their own judgments, not how the tribal courts will enforce foreign judgments. Shoshone and Arapaho tribal courts enforce their own judgments as follows. Sixty days after the tribal court enters judgment or sixty days after an appeal is finally resolved, a judgment creditor can request an execution hearing in tribal court[128] where a judgment debtor has the burden to show cause why the prior judgment should not be enforced.[129] The tribal judge has discretion to review the prior decision to see whether Rule 29 of the Law and Order Code provides any justifiable reasons not to enforce the judgment.[130]

Rule 29 specifies a very broad list of reasons for tribal judges to refuse to honor a prior tribal judgment. These reasons include mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, *or any other justifiable reason.*[131] Rule 29's language is very similar to Wyoming's Rule of Civil Procedure 60(b) which gives state courts discretion to deny enforcement of a judgment rendered in its own court. *Res judicata* and collateral estoppel govern enforcement of foreign judgments. Therefore, when a Wyoming state court looks to Shoshone and Arapaho

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128. S&A LOC Rule 35, Execution. An execution hearing gives the judgment debtor an opportunity to show cause why his or her property should not be used to pay the outstanding debt. Usually, a court will enforce the judgment by attaching the debtor's bank deposits, garnishing the debtor's wages, or liquidating the debtor's real property and chattel.

129. *Id.*

130. S&A LOC Rule 29 (emphasis added) states:

On motion and upon such terms as are just, the court *may*, in the futherance [sic] of justice, relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:

a) Mistake, inadvertance [sic], surprise, or excusable neglect;

b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 28 (1);

c) Fraud, misrepresentation or other misconduct of an adverse party;

d) When, for any cause, the summons in an action has not been personally served upon the defendant or services [sic] was not made by mail or no publication was made and the defendant has failed to appear in said action;

e) The judgment is void;

f) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been revised or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

g) *Any other reason justifying relief from the operation of the judgment.*

131. *Id.*

tribal law to decide whether to enforce a tribal judgment, it cannot review tribal *res judicata* and collateral estoppel rules. Until the Shoshone and Arapaho tribal governments adopt the prior adjudication doctrines *res judicata* and collateral estoppel, a Wyoming state court can only look to Rule 29 to determine whether to enforce a Shoshone and Arapaho tribal judgment. A Wyoming state court must enforce the Shoshone and Arapaho tribal judgment if Rule 29 would have required a tribal judge to enforce it had the judgement creditor sought enforcement in a Shoshone and Arapaho tribal court.

The broad language of Rule 29 provides much less preclusive effect in tribal courts than *res judicata* and collateral estoppel provide in Wyoming state courts. Moreover, Rule 29 is purely discretionary[132] whereas the affirmative obligation inherent in full faith and credit makes *res judicata* and collateral estoppel non-discretionary. Since Rule 29 is discretionary and has extremely broad language, Shoshone and Arapaho tribal courts have broad authority to relieve judgment debtors from legal obligations enforceable in tribal courts, but Wyoming state courts will enjoy the same authority to deny enforcement of tribal judgments. Yet when a party seeks to collaterally enforce a Wyoming state court decision in Shoshone and Arapaho tribal court, a tribal judge must observe the Wyoming's *res judicata* and collateral estoppel laws which prevents the tribal judge from reviewing legal claims and issues previously litigated in state court. Wyoming state courts will have a much broader scope of review over prior Shoshone and Arapaho tribal court decisions than the Tribes will have over prior Wyoming state court decisions.

A Wyoming state court enforcing a Shoshone and Arapaho tribal judgment will be faced with state and tribal jurisdiction issues as well. *Res judicata* prevents an enforcing court from reviewing whether the rendering court had competent jurisdiction as long as the rendering court decided the jurisdiction issue.[133] Of course that assumes the rendering jurisdiction has *res judicata* laws. By not having equivalent *res judicata* rules in the Shoshone and Arapahoe Law and Order Code, a party in Wyoming state court can re-litigate the competency of the Shoshone and Arapaho tribal court's jurisdiction. Once again, Wyoming state courts have the advantage.

A hypothetical situation where a state court erroneously decides that it has jurisdiction and a party seeks to collaterally enforce the Wyoming

132. "[T]he court *may* . . . relieve a party . . . from a final judgment." S&A LOC Rule 29 (emphasis added).

133. *See supra* notes 94 and 103.

state court judgment in a tribal court demonstrates this state court advantage. In this situation the Shoshone and Arapaho tribal court must apply Wyoming's *res judicata* and collateral estoppel laws which obligate the tribe to enforce the judgment even though the Wyoming state court lacked jurisdiction.[134] Now reverse the course of events. If a Shoshone and Arapaho tribal court erroneously decided it had jurisdiction and a party sought to collaterally enforce the tribal judgment in a Wyoming state court, the state court could hold a hearing to decide whether it should enforce the tribal judgment pursuant to Rule 29.[135] After finding that the Shoshone and Arapaho tribal court lacked competent jurisdiction, the Wyoming state court could disregard the tribal judgment.

Rule 29's[136] very expansive discretionary review leaves Shoshone and Arapaho tribal courts disadvantaged in scenarios such as the ones described above. One solution to this problem would be for the Shoshone and Arapaho governments to incorporate the doctrines of *res judicata* and collateral estoppel into their tribal laws. The Shoshone and Arapaho governments could incorporate these prior adjudication doctrines into their Law and Order Code or develop the doctrines in judicial opinions, depending on the sophistication of the tribal case reporting system. Otherwise, a Wyoming state court's only option will be to apply Rule 29 when enforcing tribal judgments, even though the Shoshone and Arapaho tribal governments only intended that Rule 29 apply when a tribal court enforced its own judgment. The effect of adopting the *res judicata* and collateral estoppel doctrines into Shoshone and Arapaho tribal law will be to substantially limit a Wyoming state court's ability to deny enforcement of a tribal court judgment. This will strengthen the Shoshone and Arapaho tribal governments' position in its inter-sovereign relationship with Wyoming.

*Reading Between the Lines of the Tribal Full Faith and Credit Act: Isn't It Really Comity?*

The following analysis addresses the issue of how closely the WTFF&CA[137] resembles the common law doctrine of full faith and credit and concludes the WTFF&CA merely requires state judges to enforce tribal judgments as a matter of comity.[138]

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134. *See supra* text accompanying note 94.

135. S&A LOC Rule 29(e).

136. S&A LOC Rule 29.

137. WYO. STAT. § 5-1-111 (1994). *See* full text *supra* note 2.

138. Hilton v. Guyot, 159 U.S. 113, 163-64 (1895) ("'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation [or state] allows within its territory to the legislative, executive, or judicial acts

Courts grant comity as a matter of *discretion*, whereas courts *must* recognize valid foreign judgments under full faith and credit.[139] U.S. courts traditionally apply comity in international situations where a litigant presented another country's judgment for enforcement in the U.S. .[140] The "comity of nations," as it is often called, is discretionary because an enforcing country is not bound to enforce a foreign country's judicial orders but retains discretion to enforce them if the foreign court had competent jurisdiction and upheld due process.[141] Courts apply the comity of nations and full faith and credit out of respect for another government's sovereignty, but comity is discretionary and permits enforcing courts to review more aspects of the rendering courts decision than full faith and credit.

The Shoshone and Arapaho Tribes would benefit more if the Wyoming Legislature extended full faith and credit *per se* rather than comity because the affirmative obligation to enforce valid foreign judgments inherent in full faith and credit elevates their tribal governments to a sovereign status equal to that of a sister state.[142] However, this comment concludes below,[143] that the WTFF&CA merely requires Wyoming state courts to enforce Shoshone and Arapaho tribal judgments as a matter of comity. The WTFF&CA reflects the Wyoming Legislature's efforts to retain discretion to refuse recognition of tribal judgments. These divergent state and tribal interests demonstrate how the political process that led up to enacting the WTFF&CA was yet another conflict between tribes and a state to preserve tribal sovereignty.

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of another nation."). *See also* Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 905 (1990) (Comity "represents a *voluntary* sovereign accommodation, rather than a binding legal obligation judicially enforceable by a body superior of the enforcing sovereign.").

139. "Rather than constituting a voluntary accommodation to an independent sovereignty, the responsibility to recognize the judgments and laws of constituent components of the federal union should constitute a federally enforceable legal obligation." Clinton, *supra* note 138, at 906.

140. *See, e.g., Hilton*, 159 U.S. at 113.

141. *Id.*

142. Of course, this elevated sovereign status would only apply between Wyoming and the Shoshone and Arapaho tribes, and would not impose similar obligations on other states. Only Congress has power to establish a federal union between states and tribes. This approach is advocated by at least one commentator. *See* Clinton *supra* note 138.

The argument in favor of extending full faith and credit to the Shoshone and Arapaho Tribes is strengthened by tribal government efforts to enact laws similar to those of sister states. The Shoshone and Arapaho Tribes took diligent steps towards legitimizing their form of government by passing the Shoshone and Arapahoe Law and Order Code in 1988. The Law and Order Code constructed a governmental structure similar to other state governments. The Law and Order Code provides for the creation of tribal trial and appellate courts, includes rules of criminal and civil procedure, a probate code, a traffic code, a housing code, a building code, a fish and game code, a domestic relations code, and regulations for natural resources and land.

143. *See infra* text accompanying notes 160-66.

The Wyoming Legislature used Wisconsin legislation[144] as a model for drafting the Wyoming WTFF&CA. According to one tribal judge, Wisconsin and South Dakota[145] have enacted statutes expanding "the very definition of full faith and credit" by permitting state judges to completely review tribal decisions each time a litigant seeks to enforce a tribal judgment in a state court.[146] The Wyoming Legislature modified the Wisconsin statute to reduce excessive review by Wyoming state judges when it enacted the Wyoming version.[147]

Consider the following distinctions between the Wyoming and Wisconsin legislation. Wyoming grants full faith and credit to tribal judgments "unless" the tribal court did not authenticate its judgment, the tribal court was not a court of record, the tribal judgment was invalid, or the Shoshone and Arapaho Tribes do not reciprocally grant full faith and credit to Wyoming state court judgments.[148] This places the burden of proof on the party collaterally attacking the foreign judgment to show why the forum court should not enforce the foreign judgment. The Wisconsin statute[149] does not presume the conditions are met and places the burden on the party seeking enforcement of the tribal judgment to prove the conditions were met. Therefore, review of Shoshone and Arapaho tribal rulings should occur less frequently in Wyoming.

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144. WIS. STAT. ANN. § 806.245 (1994). For text of relevant sections, *see infra* notes 149, 152, 164.

145. This is entirely possible in South Dakota because its state judges have *complete discretion* to enforce tribal judgments. S.D. CODIFIED LAWS ANN. § 1-1-25(2) (1992) ("If a court is satisfied that all of the foregoing conditions exist, the court *may recognize* the tribal court order or judgment.") (emphasis added).

146. Written statement of Judge John St. Clair, Chief Judge of the Shoshone and Arapaho Tribal Court, page 3 (Sept. 21, 1994) (on file with the *Land and Water Law Review*):

> Some states provide full faith and credit to Indian tribes by statute. Those statutes vary greatly from simply stating language similar to what is in the United States Constitution to those with numerous requirements questioning both the judicial and legislative process and procedures followed in obtaining the judgment. These latter statutes, such as Wisconsin's, South Dakota's, and Wyoming's, stretch the limits of the very definition of full faith and credit to the point of allowing almost complete review each time.

*Id.*

147. WYO. STAT. § 5-1-111 (1984). *See* full text *supra* note 2.

148. *Id.* §§ 5-1-111(a)(i)-(iv).

149. WIS. STAT. ANN. §§ 806.245(1)(b)-(e) (West 1994) (emphasis added):

> (1) The judicial records, orders and judgments of an Indian tribal court in Wisconsin and acts of an Indian tribal legislative body *shall* have the same full faith and credit in the courts of this state as do the acts, records, orders and judgments of any other governmental entity, *if all of the following conditions are met . . .*
>
> (b) The tribal documents are authenticated under sub. (2).
>
> (c) The tribal court is a court of record.
>
> (d) The tribal court judgment offered in evidence is a valid judgment.
>
> (e) The tribal court certifies that it grants full faith and credit to the judicial records, orders and judgments of the courts of this state and to the acts of other governmental entities in this state.

In Wyoming, only the litigants can move to have the validity of a foreign judgment reviewed,[150] whereas in Wisconsin, state judges can also move *sua sponte*[151] to review a judgment's validity.[152] Hence the WTFF&CA gives its judges less discretion to review the validity of a tribal judgment than does the Wisconsin statute.

As long as Wyoming state judges only review whether the tribal court had competent jurisdiction and whether the litigants procured the judgment by fraud or dishonesty,[153] they will not exceed the common law parameters of full faith and credit. By way of contrast, the doctrine of comity affords greater latitude by allowing enforcing courts to review aspects of the decision beyond its validity.[154]

Various courts have enforced foreign judgments as a matter of comity as long as the prior judicial proceedings did not deny a litigant due process of law,[155] doing so would not be contrary to the forum's public policy,[156] the foreign tribunal had competent subject matter and personal jurisdiction,[157] or the judgment was not obtained by fraud or dishonesty.[158] Comity permits a more expansive review of different aspects of the foreign judgment than by the doctrines of full faith and credit, *res judicata*, and collateral estoppel permit. For example, these common law doctrines prohibit enforcing courts from reviewing public policy and due process aspects previously decided by rendering courts.[159]

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150. WYO. STAT. §§ 5-1-111(d) (1994) (stating that a tribal judgment is valid if it was rendered with competent jurisdiction, it was final, it was not procured by fraud, duress, coercion, or in violation of the tribal courts procedures, and if those procedures comply with the Indian Civil Rights Act of 1968).

151. "Of his or its own will or motion; voluntarily; without prompting or suggestion." BLACK'S LAW DICTIONARY 1424 (6th ed. 1990).

152. WIS. STAT. ANN. § 806.245(4) (West 1994). "In determining whether a tribal court judgment is a valid judgment, the circuit court on its own motion, or on the motion of a party, may examine the tribal court record." *Id.*

153. For a definition of validity, *see supra* text accompanying notes 91-92.

154. *Hilton*, 159 U.S. at 166.

155. *Desjarlait*, 379 N.W.2d at 145; *Mexican*, 370 N.W.2d at 741; *Malaterre*, 293 N.W.2d at 145; *Red Fox*, 542 P.2d at 921.

156. *Hilton*, 159 U.S. at 165 (holding that comity "is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interests."); *accord Red Fox*, 542 P.2d at 921. *See also* Union Securities Co. v. Adams, 236 P. 513, 514 (Wyo. 1925) ("[F]oreign laws will not be given effect when to do so would be contrary to the settled policy of the forum, or, generally speaking, when the effect would be injurious to the state or its citizens."). *See also* Clinton *supra* note 138, at 905-06 ("Under the comity doctrine, states theoretically are not bound to enforce tribal judgments but will do so . . . when not contrary to the public policy of the state . . . .").

157. *Hilton*, 159 U.S. at 165; *Desjarlait*, 379 N.W.2d at 144; *Mexican*, 370 N.W.2d at 741; *Malaterre*, 293 N.W.2d at 145; *Red Fox*, 542 P.2d at 921; Union Securities Co. v. Adams, 236 P. 513, 514 (Wyo. 1925).

158. *Mexican*, 370 N.W. at 741; *Red Fox*, 542 P.2d at 921.

159. *See supra* notes 103-18 and accompanying text.

When the WTFF&CA[160] is compared to South Dakota's comity statute,[161] it becomes apparent that the WTFF&CA strongly resembles statutory comity. The statutes from Wyoming,[162] South Dakota,[163] and Wisconsin[164] all give state courts discretion to review whether the tribal court violated a litigant's due process rights. *Res judicata* and collateral estoppel proscribe this type of review.[165] The Wyoming Legislature gave its state courts permission to review Shoshone and Arapaho tribal court compliance with due process rights prescribed by the Indian Civil Rights Act of 1968 (ICRA).[166] By giving Wyoming state courts such broad authority, it made the WTFF&CA a comity statute and expanded the scope of review far beyond that permitted by full faith and credit.

The following discussion analyzes what role the ICRA provision in the WTFF&CA[167] should play when a state judge decides whether to recognize a tribal court judgment. Once again, the issue can be reduced to what extent the State of Wyoming is willing to recognize Shoshone and

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160. WYO. STAT. § 5-1-111 (1994). *See* full text *supra* note 2.

161. S.D. CODIFIED LAWS ANN. § 1-1-25 (1992) (emphasis added):

> [N]o order or judgment of a tribal court in the state of South Dakota may be recognized as a matter of comity in the state courts of South Dakota, except under the following terms and conditions:
>
> (1) Before a state court may consider recognizing a tribal court order or judgment the party seeking recognition shall establish by clear and convincing evidence that:
>
> (a) The tribal court had *jurisdiction* over both the subject matter and the parties;
>
> (b) The order or judgment was not *fraudulently* obtained;
>
> (c) The order or judgment was obtained by a process that assures the requisites of an *impartial* administration of justice including but not limited to *due notice* and *hearing*;
>
> (d) The order or judgment complies with the laws, ordinances and regulations of the jurisdiction from which it was obtained; and
>
> (e) The order or judgment does not contravene the *public policy* of the state of South Dakota.

162. WYO. STAT. § 5-1-111(d)(v) (1994). *See* full text *supra* note 2. The WTFF&CA gives state judges discretion to deny enforcement of a tribal judgment rendered in violation of the Indian Civil Rights Act of 1968 (ICRA) (25 U.S.C. § 1302 (1988)). WYO. STAT. § 5-1-111(d)(v) (1994). The ICRA makes due process rights similar to those in the U.S. Bill of Rights enforceable in tribal courts. *See infra* note 193. Therefore, Wyoming state courts can review whether a Shoshone and Arapaho tribal court violated a litigant's due process rights under the ICRA. *See also* Laurence *supra* note 11, at 664 (admitting that letting states review tribal ICRA violations exceeds the parameters of the full faith and credit doctrine).

163. S.D. CODIFIED LAWS ANN. § 1-1-25(c) (1992). *See* full text *supra* note 161.

164. WIS. STAT. ANN. § 806.245 (West 1994). "(4) In determining whether a tribal court judgment is a valid judgment, the circuit court on its own motion, or on the motion of a party, may examine the tribal court record to assure that: . . . (f) The proceedings of the tribal court comply with the Indian civil rights act of 1968 under 25 U.S.C. §§ 1301 to 1341." *Id.* § 806.245(4)(f).

165. *See supra* notes 103-18 and accompanying text.

166. WYO. STAT. § 5-1-111(d)(v) (1994) (hereinafter referred to as the ICRA provision).

167. *Id.*

Arapaho tribal sovereignty. But first, a brief review of the ICRA's provisions and the congressional policies it advances is helpful.

## VI. THE INDIAN CIVIL RIGHTS ACT OF 1968 (ICRA)

Indian tribes derived their sovereignty by occupying parts of North America prior to Columbus' discovery. Subsequently, U.S. forces conquered Indian land and proclaimed national sovereignty pursuant to the European discovery doctrine.[168] In light of this the U.S. Supreme Court held in *Talton v. Mayes*[169] that Indian tribes were not subject to the Bill of Rights because tribes derived their sovereignty prior to enacting it. Congress feared tribal governments were not protecting the civil liberties of tribal court litigants because tribes were not subject to the Bill of Rights. In response to these fears, Congress enacted the Indian Civil Rights Act of 1968 (ICRA)[170] which obligated the tribal courts to protect the civil liberties[171] of Indian and non-Indian parties.[172] The ICRA protects most of the civil liberties included in the Bill of Rights, but not all of them.[173]

One of the most controversial provisions of the ICRA provides a single federal court remedy, the writ of habeas corpus,[174] for tribal court violations of the ICRA. The habeas corpus provision limits federal appellate review of the ICRA to those circumstances when a tribe has incarcerated a criminal defendant. This prevents federal courts from exercising appellate jurisdiction over tribal civil cases and criminal cases where a

168. *See supra* note 37 for a discussion of the discovery doctrine.

169. 163 U.S. 376, 384 (1896) (holding that the Fifth Amendment does not limit a tribe's right to self-government); *accord* Groundhog v. Keeler, 442 F.2d 674, 678 (10th Cir. 1971); Martinez v. Southern Ute Tribe of the Southern Ute Reservation, 249 F.2d 915, 919 (10th Cir. 1957). *See also* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 665 (1982 ed.) (discussing *Talton*) and Native American Church v. Navajo Tribal Council, 272 F.2d 131, 135 (10th Cir. 1959) (holding that the federal government does not have jurisdiction over tribal laws affecting religion).

170. 25 U.S.C. §§ 1301-41 (1988 & Supp. V. 1993).

171. "A central purpose of the ICRA . . . was to . . . 'protect individual Indians from arbitrary and unjust actions of tribal governments.'" Santa Clara Pueblo v. Martinez, 436 U.S. 49, 61 (1978) (quoting S.REP. No. 841, 90th Cong., 1st Sess., 5-6 (1967)).

172. "The cases that have considered § 1302 [of the ICRA] have held that in view of the legislative history, it applies to non-Indians as well as Indians who are under the jurisdiction of the tribe." Dry Creek Lodge, Inc. v. U.S., 515 F.2d 926, 933 (10th Cir. 1975).

173. 25 U.S.C. § 1302. Not every right prescribed in the U.S. Bill of Rights is included in the ICRA. The right to jury trial in civil cases, the right to counsel and grand jury indictments in criminal cases, the Establishment Clause, and the right to bear arms are not included in the ICRA. STEVEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES; THE BASIC ACLU GUIDE TO INDIANS AND TRIBAL RIGHTS 242 (2nd ed. 1992). *See also* COHEN *supra* note 169, at 667 nn. 34-39.

174. 25 U.S.C. § 1303. "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." *Id.*

tribe has not incarcerated a defendant. Prior to 1978, the Tenth Circuit ignored the ICRA habeas corpus provision and assumed jurisdiction in some circumstances.[175] The U.S. Supreme Court granted *certiorari* for one such Tenth Circuit case to address the jurisdictional requirements of the ICRA.[176]

*Santa Clara Pueblo v. Martinez:*[177] *The U.S. Supreme Court's Interpretation of the ICRA*

Julia Martinez and her daughter Audrey were members of the Santa Clara Pueblo Tribe which enacted an ordinance that denied tribal membership to the children of female members who married outside the tribe, but not to similarly situated children of male tribal members. Two years before the tribal ordinance became effective, Julia married a member of the Navajo Tribe, Audrey's father. The ordinance effectively denied Audrey, who had since grown up, the right to vote in tribal elections, to hold secular office in the Tribe, to remain on the reservation when Julia died, and to inherit Julia's home and possessory interests in the communal land.[178] Julia and Audrey Martinez sued the Tribe in federal court and subsequently the U.S. Supreme Court granted *certiorari.*

According to Justice Thurgood Marshall, the issue was "whether the [ICRA] may be interpreted to impliedly authorize such actions, against a tribe or its officer in the federal courts."[179] The Court relied substantially on the legislative history of the ICRA in rendering its decision. During the legislative process leading up to the passage of the ICRA, tribal representatives expressed concern that tribal autonomy and their right to self-government would be sacrificed. The tribes feared that if Congress imposed federal appellate review as a remedy for criminal and civil violations, the tribes would be forced into fed-

175. *Dry Creek Lodge Inc.*, 515 F.2d 926. A non-Indian owned Wyoming corporation constructed a lodge on Indian land. On the day the lodge was formally opened, members of the Shoshone and Arapaho Tribes and employees of the Bureau of Indian Affairs barricaded the road leading into the lodge because the corporation did not acquire a right to ingress and egress from the tribal members owning land adjacent to the lodge. The Tenth Circuit declared that it had jurisdiction to review whether the due process provision of the ICRA, 25 U.S.C. § 1302(8), was violated because the non-Indian lodge owners were denied access to tribal courts. *Id.* at 933. This holding has come to be known as the *Dry Creek* exception which gives the Tenth Circuit jurisdiction to hear ICRA disputes when non-Indians are denied access to tribal courts. For further discussion of the *Dry Creek* exception, *see infra* note 187.

176. Martinez v. Santa Clara Pueblo, 540 F.2d 1039 (10th Cir. 1976). The court assumed jurisdiction pursuant to 28 U.S.C. § 1343(4) (1988) which granted federal district court jurisdiction over civil matters to secure injunctive relief under any congressional civil rights act. *Id.* at 1042.

177. 436 U.S. 49 (1978).

178. *Id.* at 52-53.

179. *Id.* at 52.

eral district courts to defend their actions and subject them to considerable financial burdens.[180] Moreover, the U.S. Attorney General's office could have used its vast resources to enforce the claims of every party slighted by tribal decisions,[181] further undermining tribal sovereignty. Congress responded positively to these tribal concerns by providing a solitary federal remedy, the writ of habeas corpus.[182] The Court held that the habeas corpus[183] provision of the ICRA reflected Congress' intention to: restrict federal jurisdiction to cases where the tribe violated an individual's civil liberties by incarcerating criminal defendants;[184] recognize that tribal courts possessed exclusive jurisdiction over enforcement of the ICRA in civil cases;[185] and continue recognizing tribal sovereign immunity.[186] Despite this holding, the Tenth Circuit has continued to assume federal civil jurisdiction pursuant to the ICRA where non-Indians have exhausted their tribal remedies.[187]

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180. *Id.* at 64.

181. *Id.* at 68.

182. 25 U.S.C. § 1303.

183. *Id.*

184. *Santa Clara Pueblo*, 436 U.S. at 61 ("Congress' failure to provide remedies other than habeas corpus was a deliberate one.").

185. *Id.* at 65-66 ("Tribal forums are available to vindicate rights created by the ICRA.").

186. *Id.* at 59 ("Nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief."); *accord* Oklahoma Tax Com'n v. Potawatomi Indian Tribe, 111 S.Ct. 905, 909 (1991) ("Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.").

*See also* U.S. v. Testan, 424 U.S. 392, 399 (1976) ("[A] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'") (quoting U.S. v. King, 395 U.S. 1, 4 (1969); *accord* Bank of Oklahoma v. Muscogee (Creek) Nation, 972 F.2d 1166, 1169 (10th Cir. 1992). *See also* Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1344-46 (10th Cir. 1982) (holding that the Tribe did not waive its sovereign immunity when a violations of the ICRA was raised as a counterclaim).

187. Even after the Supreme Court's holding in *Santa Clara Pueblo*, the Tenth Circuit has not overruled the *Dry Creek* exception which gives the Tenth Circuit jurisdiction over the ICRA where non-Indians were denied access to tribal courts. *Dry Creek Lodge Inc.*, 515 F.2d at 926. For a discussion of the *Dry Creek* exception, *see supra* note 175. The *Dry Creek* exception contradicts the holding in *Santa Clara Pueblo* which unequivocally declared that federal courts only had jurisdiction over the ICRA when *criminal* defendants were incarcerated. In 1984 the Tenth Circuit conceded that the *Santa Clara Pueblo* decision limited federal jurisdiction over the ICRA, but proceeded to assume *civil* jurisdiction pursuant to the *Dry Creek* exception. White v. Pueblo of San Juan, 728 F.2d 1307 (10th Cir. 1984).

The Tenth Circuit expanded the *Dry Creek* exception by holding that federal courts have jurisdiction over the ICRA where the plaintiffs had exhausted their tribal remedies. *White*, 728 F.2d at 1312-13. In other words, the *Dry Creek* exception was originally intended to give the Tenth Circuit jurisdiction only where a tribe denied a non-Indian access to its courts, but now the Tenth Circuit assumes jurisdiction even if the non-Indian had access to tribal courts and exhausted all tribal remedies. This expanded interpretation of the *Dry Creek* exception has been followed as recently as 1992. *Bank of Oklahoma*, 972 F.2d at 1169. *See also* Nero v. Cherokee Nation of Oklahoma, 892 F.2d 1457, 1460 (10th Cir. 1989). The Tenth Circuit's adherence to the *Dry Creek* exception provides uncertainty as to how strictly the Tenth Circuit will advance the policies of the ICRA.

The holding denied Julia and Audrey Martinez equal protection of the law as recognized in state and federal courts.[188] Surprisingly, Thurgood Marshall, who was a leader in the civil rights movement of the mid-twentieth century, wrote for the majority. Marshall subordinated the equal protection rights of female tribal members to the Tribe's interest in self-determination. These points add credence to the Court's conclusion that tribal courts are better equipped than federal courts to protect civil liberties without sacrificing Indian tradition and heritage.[189] Marshall reasoned that permitting the federal judiciary to apply the ICRA civil liberties protections in civil matters would go against the tribes' identity as a distinct cultural and political sovereign.[190] By so holding, Justice Marshall struck a critical balance between preserving tribal self-government[191] and protecting Indian and non-Indian litigants from tribal governments which violate their civil liberties;[192] a balance representing two predominant congressional policies underlying the ICRA.

The Court in *Santa Clara Pueblo* also emphasized that rights proclaimed by the ICRA are not to be interpreted in lockstep with those of the U.S. Bill of Rights.[193] Once again, the source of tribal sovereignty

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188. *See* Carla Christofferson, Note, *Tribal Courts' Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act*, 101 YALE L.J. 169, 185 (1991) (criticizing the holding in *Santa Clara Pueblo* for having discriminatory effects on female tribal members).

189. *Santa Clara Pueblo*, 436 U.S. at 71. "[R]esolution of statutory issues under § 1302, and particularly those issues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts." *Id.*

190. *Id.* at 72 ("[E]fforts by the federal judiciary to apply the statutory prohibitions of § 1302 in a civil context may substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity."). *See also* Rebecca Tsosie, *Separate Sovereigns, Civil Rights, and the Sacred Text: The Legacy of Justice Thurgood Marshall's Indian Law Jurisprudence*, 26 ARIZ. ST. L.J. 495, 524 (1994) ("To the extent that the tribe remains a viable political entity, tribal members are able to preserve their cultural integrity, and ultimately they can enforce their rights within the tribal context. On the contrary, if the tribe's internal structure is subsumed within that of the dominant culture, the tribal members lose their cultural integrity and any hope of enforcing their rights within the tribal context.").

191. 25 U.S.C. § 1301(2) (Supp. V. 1993) (amended 1990). Congress specifically defined tribal powers of self-government in the ICRA which demonstrates its intention to advance tribal self-determination. *Id.* "[P]owers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." *Id.*

192. 436 U.S. at 62, 66-67. *See also* Tsosie *supra* note 190, at 516.

193. *Santa Clara Pueblo*, 436 U.S. at 62-63 ("Section 1302, rather than providing in wholesale fashion for the extension of constitutional requirements to tribal governments, as had been initially proposed, selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments."); *accord White*, 728 F.2d at 1312. "Congress passed the ICRA which provides individual persons with statutory rights similar, but not identical, to many of the parallel constitutional protections enjoyed by individuals against the state and federal governments." *Id.*

pre-dates Columbus. The Eurocentric influences in the Bill of Rights are inconsistent with Indian notions of communalism that are endemic in tribal culture and justice.[194] Professor Clinton attached the label "tribalism" to the distinct Indian notion of subordinating the individual autonomy of each tribal member to the superior interests of the community as a whole.[195] Other commentators have interpreted *Santa Clara Pueblo* to mean that legal interpretations of the U.S. Bill of Rights should not be imposed upon the rights in the ICRA, and that tribal courts should advance Indian culture and heritage when interpreting the ICRA.[196]

*What Role Should The Indian Civil Rights Act of 1968 Play in The Tribal Full Faith and Credit Act?*

From reviewing the ICRA and *Santa Clara Pueblo*, it should now be clear that federal review of tribal compliance with the ICRA is limited by tribal sovereign immunity and the habeas corpus provision. Therefore tribal courts are the exclusive enforcers of the ICRA except when a tribe incarcerates an Indian or non-Indian criminal defendant.[197] *Santa Clara Pueblo* limited federal ICRA appellate jurisdiction, but did not explicitly limit state review over tribal compliance with the ICRA because no state was involved in the litigation. However, state courts are subordinate to and derive authority from the U.S. Supreme Court pursuant to Article III of the Constitution. If tribal sovereign immunity prevents the Supreme Court from exercising appellate review over the ICRA, then tribal sovereign immunity and the habeas corpus provision impliedly prevent state

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*But see* Randall v. Yakima Nation Tribal Court, 841 F.2d 897, 900 (9th Cir. 1988) ("Where the rights are the same under either legal system, federal Constitutional standards are employed in determining whether the challenged procedure violates the [ICRA]."); *accord* U.S. v. Alberts, 721 F.2d 636, 638 n.1 (8th Cir. 1983); Howlett v. Salish and Kootenai Tribes, 529 F.2d 233, 238 (1976).

194. "As American political discourse has become increasingly 'individualistic, rights-centered, and insular,' American tolerance for different cultural values, such as community responsibility and tribalism, has diminished." Tsosie, *supra* note 190, at 530 (quoting Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365, 385 (1989)).

195. Robert N. Clinton, *The Rights of Indigenous Peoples as Collective Group Rights*, 32 ARIZ. L. REV. 739, 742 (1990) ("Deriving their legal vision from their tribal associations, tribal traditions, and the natural ecology with which they often seem more familiar than many western political philosophers, native peoples see humans as inherently social beings. As social beings, people never exist isolated from others in some mythic, disorganized state of nature. Rather human beings are born into a closely linked and integrated network of family, kinship, social and political relations . . . . Thus, an individual's right to autonomy is not a right *against* organized society, as it is in western thought, but a right one has *because* of one's membership in the family, kinship and associational webs of the society.").

196. "The cultural norms embodied in the Bill of Rights are in many ways alien to the original social structure of Indian tribes, and these protections . . . gradually are being integrated into tribal institutions." COHEN, *supra* note 169, at 663-64.

197. *But see* the *Dry Creek* exception *supra* notes 175, 187.

courts from reviewing tribal compliance with the ICRA.[198]

The ICRA provision of the Wyoming Tribal Full Faith and Credit Act (WTFF&CA)[199] gives Wyoming state courts a peripheral role in increasing Shoshone and Arapaho tribal compliance with the ICRA, even though the State does not assume ICRA jurisdiction. The ICRA provision will make Shoshone and Arapaho tribal courts more likely to enforce the ICRA because they will strive to have their judgments enforced in Wyoming state courts. The following analysis scrutinizes Wyoming's role as an enforcer of the ICRA and whether Congress would likely approve of this role.

Legislation providing for the recognition of tribal judgments can be symmetrical or asymmetrical.[200] A symmetrical model allows enforcing courts to enjoy reciprocal and equivalent discretion to review legal and factual determinations made by rendering courts. The doctrines of full faith and credit, *res judicata*, and collateral estoppel create a symmetrical system for recognizing foreign judgments between sister states. Symmetrical models place both sovereign entities on equal footing. Professor Clinton suggests that the symmetrical model should apply to the recognition of tribal judgments[201] and suggests the federal full faith and credit statute[202] imposes an obligation on state and tribal governments to reciprocally enforce foreign judgments.[203] He believes state courts generally have "extraordinary hostility"[204] toward recognizing tribal judgments and state courts prefer to "second guess" tribal compliance with the ICRA by holding ICRA

198. This view is also consistent with the holding in *U.S. v. Kagama* which requires the federal government to protect Indians from state encroachments on tribal sovereignty. 118 U.S. 375, 384-85 (1886).

*But see* the *Dry Creek* exception *supra* notes 175, 187. Unfortunately for the Shoshone and Arapaho Tribes, the Tenth Circuit permits broader federal court review of the ICRA than is permitted by *Santa Clara Pueblo*. The *Dry Creek* exception evidences the possibility that the Tenth Circuit will be less deferential to tribal enforcement of the ICRA if and when the Tenth Circuit ever decides the extent to which state courts can enforce tribal compliance with the ICRA.

199. WYO. STAT. § 5-1-111(d)(v) (1994). *See* full text *supra* note 2.

200. *See* P.S. Deloria and Robert Laurence, *Negotiating Tribal-State Full Faith and Credit Agreements: The Topology of the Negotiation and the Merits of the Question*, 28 GA. L. REV. 365 (1994) (analyzing the symmetrical and asymmetrical approaches and providing alternative approaches to recognizing tribal judgments in state courts).

201. *See* Richard E. Ransom, Christine Zuni, P.S. Deloria, Robert N. Clinton, Robert Laurence, Nell Jessup Newton, and M.E. Occhialino, Jr., *Recognizing and Enforcing State and Tribal Judgments: A Roundtable Discussion of Law, Policy, and Practice*, 18 AM. INDIAN L. REV. 239, 273-75 (1982).

202. 28 U.S.C. § 1738. *See* full text *supra* note 17.

203. *See* Clinton *supra* note 138.

204. "The extraordinary hostility to the enforcement of tribal judgments . . . highlights the reason why full faith and credit must be left to uniform federal law, rather, than case-by-case state initiative." Ransom et. al., *supra* note 201, at 275.

mini-trials.[205] Judge Christine Zuni of the Southwestern Intertribal Court of Appeals also supports a federal symmetrical model for enforcing tribal judgments because she has experienced difficulty in having tribal judgments rendered by her court enforced in other states.[206]

On the other hand, an asymmetrical approach gives one sovereign entity nonreciprocal authority to review aspects of the other sovereign's judgments. An asymmetrical model for enforcing tribal judgments permits state courts to review tribal compliance with the ICRA, but requires tribal courts to defer to state court compliance with the U.S. Bill of Rights. Professor Laurence believes the disparity in the federal system of appellate review over whether state and tribal courts are protecting civil liberties justifies some asymmetry in the recognition of tribal judgments. Laurence suggests the limited federal appellate review over tribal compliance with the ICRA provides little assurance that tribal courts will equivalently protect due process rights of tribal court litigants.[207] Whereas, state court litigants are guaranteed due process of law by federal appellate review over state court compliance with the Bill of Rights.[208] To equalize this disparity, Laurence thinks state judges should hold ICRA mini-trials ensuring tribal compliance with the ICRA,[209] and tribal judges should have discretion to

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205. "Resolving the question of procedural fairness and compliance with the [ICRA], I think, does result in [a] double trial problem." *Id.* at 274.

206. *Id.* at 265-66.

207. *Id.* at 248. Professor Laurence stated:

> [T]he main question that I perceive to exist in the mind of a *state* court judge receiving a tribal court judgment is whether the tribal court judgment was issued fairly and consistently with the [ICRA]. As you know, there's no federal court review for what went on at the tribal court level, at least on the civil side where our primary concern lies. The [ICRA] applies to tribal court proceedings, but there's no collateral review, and there is no appeal outside the tribal court system. I think the state court judge as the enforcing judge has a legitimate concern about whether the judgment was rendered consistently with the defendant's civil rights under the ICRA.

*Id.*

208. P.S. Deloria and Professor Laurence stated:

> [W]e think a state judge would appraise the judgments coming from state courts and needing to be enforced in tribal courts as having been issued in conformity with the United States Constitution and thereby worthy of tribal enforcement . . . . [T]he federal courts stand ready to review any judgment issued from a state court to see that it was granted in conformity with the Constitution. True, not many judgments in fact get reviewed by the federal courts, but the theoretical possibility is always there. That possibility, we would expect a state judge to say, keeps the judgments issued by the state courts fundamentally fair in a federal constitutional, due process sense.

Deloria et. al., *supra* note 200, at 425.

209. P.S. Deloria discussed Professor Laurence's view:

> Laurence argues that . . . state courts receiving tribal court judgments [should] be permitted inquiries different from those permitted to tribal courts receiving state court judgments . . . . If the parties cannot agree, then Laurence sticks to his guns and would permit

enforce state judgments that are inconsistent with tribal sensibilities related to Indian culture and heritage.[210]

Without reciprocal state and tribal review, a state's role as an enforcer of tribal compliance with the ICRA may encroach on a tribal court's role as an exclusive enforcer of the ICRA in civil cases.[211] This is exactly the problem with the ICRA provision[212] of Wyoming's WTFF&CA. The ICRA provision requires Wyoming state courts to honor Shoshone and Arapaho tribal court judgments as long as tribal courts comply with the ICRA. This implies that Wyoming state courts have authority to perform ICRA mini-trials. However, the WTFF&CA requires Shoshone and Arapaho tribal courts to defer to Wyoming state court compliance with the Bill of Rights. Shoshone and Arapaho tribal courts should at least be able to review whether a Wyoming state court in rendering a judgment violated some aspect of Shoshone and Arapaho tribal culture or heritage. This would add symmetry to the WTFF&CA and would advance Congress' ICRA policy of deferring to tribal courts as protectors of Indian culture and heritage.[213] The Wyoming Legislature working together with the Shoshone and Arapaho tribes can mitigate this tribal court disadvantage by amending the ICRA provision of the WTFF&CA.

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the state court an ICRA mini-trial, if it wants one, before enforcing the tribal judgment. *Id.* at 441, 444. See also Ransom et. al., *supra* note 201, at 247-49 (debating the rationale behind the asymmetrical approach).

210. Ransom et. al., *supra* note 201, at 248-49. Professor Laurence stated:

> I think the *real* concern of the tribal court judge is whether the substance of the law that gave rise to the judgment is seriously inconsistent with local sensibilities and local tribal law. I would like the tribal court judge to be permitted a re-inspection of the suit on the merits, to look for that serious inconsistency with tribal ways before the judge is made to enforce the state court judgment against on-reservation property.

*Id. See also* Laurence, *supra* note 11, at 667 ("To decide whether the tribal court comported with the ICRA in issuing its judgment, the state court must weigh the rights of the defendant resisting enforcement against the interest of the tribe in departing from Anglo-American norms."). Cultural barriers stand between colonialist influences in state courts and communal influences in tribal courts. *See supra* text accompanying notes 189-196. Laurence believes state and tribal governments should agree to defer to tribal judges as experts in preserving tribal culture and state courts as experts on the Bill of Rights. Laurence believes state and tribal governments should negotiate how the tribe could protect tribal sensibilities. *See* Deloria et. al. *supra* note 200, at 439-42.

211. *See supra* text accompanying note 198.

212. WYO. STAT. §§ 5-1-111(d)(v) (1994). *See* full text *supra* note 2.

213. *See supra* text accompanying notes 193-210 for a discussion of how the ICRA requires deference to tribal courts when Indian culture and heritage are involved. *See also supra* note 210 for Professor Laurence's suggestions on how state and tribal court can reciprocally enforce tribal judgments while protecting Indian culture and heritage.

*Recommendations for the Wyoming Legislature and the Shoshone and Arapaho Tribes*

As recommended in Part V, the Shoshone and Arapaho Tribes can unilaterally achieve greater symmetry by incorporating the prior adjudication doctrines of *res judicata* and collateral estoppel into tribal law, either by supplementing their Law and Order Code by amendment or by developing the doctrine in judicial opinions. This would require a Wyoming state court to enforce legal claims and issues previously litigated in a Shoshone and Arapaho tribal court. By making these changes to the Law and Order Code, the Shoshone and Arapaho Tribes can make it more difficult for the State to infringe upon the Tribes' sovereignty.

The Wyoming Legislature could resolve some problems with the WTFF&CA by clarifying its policy for recognizing Shoshone and Arapaho tribal judgments. On its face, the WTFF&CA appears to convey full faith and credit, but a closer analysis reveals that it is really statutory comity. If the Wyoming Legislature intends to extend full faith and credit *per se*, it should rescind the ICRA provision.[214] This alternative is symmetrical, complies with the ICRA and the Supreme Court's decision in *Santa Clara Pueblo*, and achieves the greatest inter-sovereign respect between Wyoming and the Shoshone and Arapaho Tribes. However, the foregoing analysis of the WTFF&CA suggests that the Wyoming Legislature already has decided to retain discretion to deny enforcement of a Shoshone and Arapaho tribal judgment that violates the ICRA. Alternatively, the Wyoming Legislature may comply with the ICRA and the *Santa Clara Pueblo* decision by amending the WTFF&CA to expressly give Shoshone and Arapaho tribal courts discretion to review whether a state court in rendering a judgment acted inconsistently with some aspect of tribal culture or heritage. Absent such an amendment, at least the Shoshone and Arapaho tribal courts can comply with the ICRA and the *Santa Clara Pueblo* decision by reviewing state judgments to guarantee that their culture and heritage are promoted.

## VII. CONCLUSION

The foregoing analysis of the Wyoming Full Faith and Credit Act (WTFF&CA) reveals that when traditional prior adjudication laws are applied between the Wyoming state courts and the Shoshone and Arapaho tribal courts, the State will have a considerable advantage in the recipro-

214. WYO. STAT. § 5-1-111(d)(v) (1994). *See* full text *supra* note 2.

cal exchange of full faith and credit. Shoshone and Arapahoe Law and Order Code Rule 29 permits much broader discretionary review than *res judicata* and collateral estoppel which gives Wyoming state courts tremendous discretion to deny enforcement of tribal judgments. Yet, the Shoshone and Arapaho tribal courts will not enjoy the same latitude when deciding whether to enforce Wyoming state court judgments. Furthermore, the WTFF&CA is really statutory comity because the ICRA provision gives Wyoming state courts discretion to review due process aspects of tribal judgments. The WTFF&CA is also one-sided because it requires Shoshone and Arapaho tribal courts to defer Wyoming state court compliance with the U.S. Bill of Rights. The Wyoming Legislature can easily mitigate these disparities by following the recommendations in Part VI.

This comment is very critical of the Wyoming Legislature and the WTFF&CA. Yet the Legislature should be commended for taking a significant step toward recognizing the Shoshone and Arapaho tribal governments as viable sovereign entities. The last twenty years of U.S. Supreme Court jurisprudence involving tribal sovereignty have been devastating to Native Americans. The U.S. Supreme Court has discounted precedent established by Chief Justice John Marshall by reversing the presumption favoring tribal jurisdiction within reservation boundaries. But the U.S. Congress is the branch of government that defines Indian policy, not the Supreme Court which makes the Court's position even more untenable. Congress strongly advocates advancing tribal rights to self-government and Indian self-determination. Unfortunately for Indian tribes, the renegade Supreme Court has ignored these unambiguous congressional policies in many cases. The Wyoming Legislature should follow the congressional policy of advancing Shoshone and Arapaho Tribes' rights to self-government by amending the WTFF&CA as recommended.

DARBY L. HOGGATT