State-Tribal Relations Comn

62nd Montana Legislature

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Full Faith and Credit Issue before the State-Tribal Relations Committee

August 24, 2012
Dear STR Committee members,

On April 5th STR committee members tasked our legal counsel Dan Whyte to draft legislative wording that would extend full faith and credit for tribal court judgments. As you will recall, Mr. Whyte prepared LC-7001 for you.

On July 20th the committee asked staff to invite, to our next and final meeting, presenters who can help us learn more about the issue of full faith and credit for tribal court orders. Arguably we might have gotten the cart ahead of the horse in that our information-gathering on the subject is coming after the bill concept was prepared. LC-7001 is available for the STR committee to make a motion on but you now have the opportunity to first hear from individuals with substantial experience with the full faith and credit.

Please be apprised that if you come to conclude that "real substantive" changes would be required for LC-7001, then this could require legal research that we as a committee do not have time for. If that is the case, then any individual member who wanted to pursue a full faith and credit type of bill in the upcoming Session could do so as an individual sponsor.

Varied approaches nationwide:

Around the country there have been varied ways to approach getting state and tribal court judgments more harmonized. These have included:

1. **Legislation** – statutory changes that affect how state courts deal with *all* tribes within the state.

2. **Executive** – compacts or understandings with *individual* tribes within the state.

3. **Judicial** – adoption of rules for a state's courts regarding the recognition and enforcement of tribal court judgments.

4. **Federal rules** – by which states must abide, calling for extension of full faith and credit (that is, recognition and enforcement) of tribal court judgments (such as those pertaining to the Indian Child Welfare Act, the Indian Civil Rights Act, and perhaps others)

5. **Consultations** – between tribal and state court judges, attorneys, and others that improve mutual relationships and understanding of each other's jurisprudence, and also design more uniform due process procedures, more standardized formats of reporting, etc.

And within the approaches above there are variations:

1. Extension of full faith and credit on an *issue-by-issue basis*: For example, as noted below, Montana has formally extended full faith and credit of tribal court judgments only in the limited area of child custody.

2. Extension of full faith and credit as long as the given tribal jurisdiction's due process *meets certain specified standards*.

3. Extension of full faith and credit as long as it *is reciprocated* by the given tribal jurisdiction.

Here is a snapshot of what is currently happening in other states:

- Wisconsin, Wyoming, Oklahoma, North Dakota, Iowa, Washington, Michigan, New Mexico, New York and Minnesota are states collaborating with tribes with the help of rather broad full faith and credit policies. Maine, Nebraska, Idaho and South Dakota have also taken some steps.

- Most used legislation to implement their policies. Exceptions include New Mexico, Minnesota, Michigan and Washington; these states' practices were developed or directed by the judiciary.

- New Mexico, Minnesota and Michigan supreme courts adopted rules requiring their state courts to give full faith and credit to tribal court orders. The Minnesota rule also allows discretionary recognition under the principles of comity under certain conditions. Michigan Court Rule 2.615, adopted in 1996, says a tribal court judgment is recognized as long as the tribe or tribal court has enacted a reciprocal ordinance.

- Legislatively, the Wisconsin policy is broad ...There is a reciprocity requirement. As there is no provision in statue for the resolution of jurisdictional disputes, the judiciary itself determines jurisdiction based on several factors. These include involvement of tribal laws, tribal culture, tribal territory and tribal membership. The statute says "the judicial records, orders and judgments of an Indian court in Wisconsin ... shall have the same full faith and credit in the courts of this state as do the ... records, orders and judgments of any other governmental entity... (Wis. Stat. Ann. §806.245)". In practice, it seems to be used mostly for debt issues like wage garnishments.

- Wyoming's law also requires tribes to reciprocate by extending full faith and credit to the states. Some tribal nations are reluctant to take this step.

- Similarly, in Oklahoma, 12 Okl. St. Ann. §728 allows tribal court judgments to be recognized "where tribal courts agree to grant reciprocity of judgments of the courts of the State of Oklahoma in such tribal courts."

- Along this line, North Dakota's N.D. CENT. CODE § 27-01-09 says, "Recognition and enforcement of tribal court judgments, decrees, and orders under this section is conditioned upon recognition and enforcement of state court judgments, decrees, and orders by the tribal court of the [Tribal and tribal law enforcement agencies under the same limitations provided by this section for recognition and enforcement of tribal court judgments, decrees, and orders by state courts.")

- In Iowa, the state's only federally recognized tribe, (the Sac & Fox Tribe of the Mississippi), enjoys full faith and credit as long as tribal court decisions do not conflict with the state's civil laws. If they do, appeals are sent to federal court. Tribal courts handle criminal matters but federal law is the ultimate authority here if the crime in question is deemed to be major or related to domestic violence.

- New York has so far extended full faith and credit only to specific tribal nations, the Oneida, Seneca and St. Regis Mohawk, under the rationale that these tribes all have well-established judicial systems.

- Other states have full faith and credit agreements on an issue by issue basis. The Indian Child Welfare Act, for example, requires all states to work with tribes in that particular manner. Protection orders are another critical issue area.

Montana's current stance viz-a-viz full faith and credit:

The vast majority of civil and criminal cases originating in an Indian court and coming to a state court are handled through *comity* – a practice of reviewing a judgment from another jurisdiction not for the facts of a case but rather for the process through which it went and the format in which it emerged. (As you may recall, the objection voiced to our committee by one speaker at our meeting in Fort Peck was that *comity* sometimes amounted a retrying of a case.)

However, as noted above, Montana does formally/statutorily extend full faith and credit to tribal judgments in one area: that governing family law (Title 40) specifically dealing with uniform child custody jurisdiction and enforcement (Chapter 7). The relevant statutory wording reads as follows

40-7-135. Application to Indian tribes. (1) ...

(2) A court of this state shall treat a tribe as if it were a state of the United States for the purpose of applying 40-7-101, 40-7-103, 40-7-105 through 40-7-110, 40-7-112, 40-7-119, 40-7-125, 40-7-134 through 40-7-140, and part 2 of this chapter.

(3) A child custody determination made by a tribe under factual circumstances *in substantial conformity with the jurisdictional standards* of this chapter must be recognized and enforced under part 3 of this chapter.