

The National Agricultural  
Law Center



*A research project from The National Center for Agricultural Law Research and Information of the University of Arkansas • NatAgLaw@uark.edu • (479) 575-7646 • www.NationalAgLawCenter.org*

---

## **An Agricultural Law Research Article**

# **The Enforcement of Money Judgments Across Indian Reservation Boundaries: A Primer for Lawyers Serving the Agriculture Community**

by

Robert Laurence

**The National Agricultural Law Center**  
University of Arkansas School of Law  
1 University of Arkansas  
Fayetteville, AR 72701

May 2002

**The Enforcement of Money Judgments Across Indian Reservation Boundaries: A Primer for Lawyers Serving the Agriculture Community**

Robert Laurence\*

**I. Introduction**

Avoiding all allusions to “cowboys and Indians,” it is nevertheless true that in the rural areas of the American West many conflicts arise that must be settled in either tribal or state court.<sup>1</sup> It is also true that, as with judgments everywhere, some are not paid voluntarily and the judgment creditor must use coercive enforcement to collect the debt. When the judgment is enforceable against property that lies within the jurisdiction that issued the judgment, then that jurisdiction’s body of enforcement law must be used. But when enforcement must be sought in another jurisdiction, complicated problems of cross-boundary comity and respect arise.<sup>2</sup> When one of the jurisdictions is a tribal court and one is a state court, the issues become complex and involve an intricate mix of tribal, state and federal law. The purpose of this article is to introduce those unfamiliar with the field of American Indian law to this mix and to the various and conflicting approaches that courts and commentators have taken to the problem, with special attention given to problems that might affect the farming community.

We may begin, then, with a preliminary matter. In order for any judgment from any court – tribal, state, federal or foreign (to be enforceable anywhere) – the court rendering the judgment must

---

\*. Robert A. Leflar Distinguished Professor of Law, University of Arkansas.

1. It is not literally the case that the problems addressed herein arise only in the states of the American West; more of the fifty states have federally-recognized Indian Country within their borders than do not. And, of course, it is always possible that a judgment that arose in tribal court will be presented for enforcement in a state that is not contiguous with the reservation where the judgment arose. Finally, a judgment may arise in Indian country and be granted recognition in the surrounding state’s court, which, given the requirement of full faith and credit between the states, may require other states to recognize what was originally a tribal court judgment. See Richard E. Ransom, *et al.*, *Recognizing and Enforcing State and Tribal Judgments: A Roundtable Discussion of Law, Policy and Practice*, 18 AM. IND. L. REV. 239 (1993). Nevertheless, the problems addressed herein are much more likely to arise within the states of the Eighth, Ninth and Tenth Federal Circuits than in the others.

2. There is no general federal enforcement of judgment law, and judgments obtained in federal court are enforced under state law, see Fed. R. Civ. P. 69(a). In this article I will be primarily discussing state and tribal courts, although as we shall see, federal law is continually implicated in litigation in those courts. For a more thorough discussion of the role of the federal courts, see Robert Laurence, *The Role, If Any, for the Federal Courts in the Cross-Boundary Enforcement of Federal, State and Tribal Money Judgments*, 35 U.TULSA L.J.1 (1999).

have proper subject matter jurisdiction to hear the case.<sup>3</sup> Thus, when causes of action arise in and around Indian country, the first question for both state and tribal courts is whether proper subject matter jurisdiction exists. In both cases that question is dominated by federal law.

The federalization of subject matter jurisdiction in state and tribal courts came about through two separate lines of cases. In *Williams v. Lee*,<sup>4</sup> the Supreme Court held that the state courts of Arizona were without the power to adjudicate a suit by a non-Indian creditor against an Indian debtor over a debt transaction that arose on-reservation.<sup>5</sup> The Court established the so-called “infringement test,” arguably the most famous Indian-law pronouncement of the Court in the twentieth century: “the question has always been whether the state action infringed on the rights of reservation Indians to make their own laws and be ruled by them.”<sup>6</sup> The extension of the *Williams* infringement test to exercises of state power other than state adjudicatory power is complex and the results somewhat at odds with one another, but the core holding of *Williams*, that state courts are without power to adjudicate on-reservation transactions, still holds.

With respect to tribal court jurisdiction, the key cases are *Strate v. A-1 Contractors, Inc.*<sup>7</sup> and *Nevada v. Hicks*.<sup>8</sup> These cases applied the so-called *Montana* exceptions, from the case of *Montana v. United States*,<sup>9</sup> governing tribal regulatory jurisdiction, to tribal adjudicatory jurisdiction. *Montana* stands for the proposition that a tribe may not generally apply its civil power to non-Indians, except that:

[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. [Citing cases, including *Williams v. Lee*.] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.<sup>10</sup>

The line drawn by these *Montana* exceptions as it is most likely to apply to tribes and their neighbors is between contracts and torts. Litigation concerning on-reservation contracts would seem

---

3. Robert A. Leflar, *et al.*, AMERICAN CONFLICTS LAW (4th ed. 1986) at 236.

4. 358 U.S. 217 (1959).

5. *Id.* at 222.

6. *Id.* at 220.

7. 520 U.S. 438 (1997).

8. 533 U.S. 353 (2001).

9. 450 U.S. 544 (1981).

10. *Id.* at 565-66.

most clearly to fall within the tribe's adjudicatory jurisdiction under the phrase "commercial dealing."<sup>11</sup> In the agricultural community, these dealings could include the hiring of farm labor, the sale or leasing of farm equipment, the provision of seed, fertilizer or other farm supplies, the leasing of agricultural land, the sale or encumbrance of farm products, and the provision of veterinarian services. When disputes arise regarding on-reservation transactions such as these, proper subject matter jurisdiction may well exist in tribal court under *Montana*. On the other hand, under *Strate*, the tribal court may not have jurisdiction over tort actions, even where the alleged tort was committed on-reservation.<sup>12</sup> *Strate* itself concerned a traffic accident between two non-members on a state highway easement within the reservation and is thus potentially limited to that narrow set of circumstances.<sup>13</sup> The Ninth Circuit, however, extended *Strate* to a case where the plaintiff was a member, though the accident still occurred on a highway easement.<sup>14</sup> It is difficult to understand why such a tort does not have, in *Montana*'s words, a "direct effect on . . . the health or welfare of the tribe." The fact that the Ninth Circuit held against tribal court jurisdiction shows how narrowly the second *Montana* exception is being read.

Lying neatly between the first and second *Montana* exceptions is a products liability case, for example, when a dangerous chemical is sold off-reservation for use on-reservation, the chemical is spilled, and several tribal members are seriously injured. Or when a negligently engineered combine is sold to a tribal member and it malfunctions, injuring the driver. A law suit pursuing a breach of contract theory in scenarios such as these would seem properly brought in tribal court under the first *Montana* exception, but, under *Strate* and *Marchington*, subject matter jurisdiction over a tort cause of action might not exist unless those two cases are limited to state or federal highway easements.

Suppose tribal court subject matter jurisdiction exists in cases such as these, and judgment is for the plaintiff, but the defendant-seller is judgment-proof on-reservation. Cross-boundary enforcement of the tribal court judgment then becomes the next legal issue, and it is this issue that is discussed below.

---

11. In *Nevada v. Hicks*, 533 U.S. 353 (2001), the Court intimated that this language was meant to refer only to *private* consensual agreements, not to consensual agreements between a tribe and state government. Whatever the implications of *Hicks* as a whole, see Alex Tallchief Skibine, *Making Sense out of Nevada v. Hicks: A Reinterpretation*, 14 ST. THOMAS L. REV. 347 (2001), for the Supreme Court to use the common law to discourage cooperation between the two governments most directly involved in the day-to-day administration of judgment on and near Indian reservations was most unwise. It could be said, of course, that it was the *tribe* itself that was discouraging state-tribal cooperation by first agreeing to the issuance of the search warrant, and then accepting the validity of litigation in tribal court against those enforcing it. However, this is merely one of the on-the-ground dynamics of such cooperation. Should the state feel that its cooperation with the tribe is contingent upon its immunity from suit before the tribal courts, it could say that at the time of the initial appearance before the tribal court judge. Should the tribal judge think that such a condition to cooperation is unacceptable, then he or she could refuse to ratify the issuance of the search warrant, which would then remove the applicability of the first *Montana* exception. In either case, it makes little sense to hold, as did the Court, that such government-to-government agreements have no relevance to the question of tribal court jurisdiction.

12. *Strate*, 520 U.S. at 459.

13. See Phillip Allen White, Comment, *The Tribal Exhaustion Doctrine: "Just Stay on the Good Roads, and You've Got Nothing to Worry About,"* 22 AM. IND. L. REV. 65 (1997). The quoted words in the title of that Comment are attributed to Justice Scalia as his reaction to the *Strate* holding, see *id.* at 65, n.\*.

14. *Wilson v. Marchington*, 42 F.3d 1178 (9<sup>th</sup> Cir. 1994).

When the underlying transactions hypothesized above occur off-reservation, there would be no *Williams v. Lee* impediment to state court jurisdiction. The plaintiff would likely be a tribal member who could enforce his or her judgment through the state court process. But suppose the chemical was sold on credit off-reservation, and the legal problem was not the dangerousness of the product but the failure of the buyer to pay. Or suppose that a crop was grown on-reservation using an improperly applied herbicide which was then sold off-reservation, sickening consumers. Under *Williams v. Lee*, there would seem to be no impediment to state court jurisdiction, but the defendant-debtor might well be judgment-proof off-reservation, and the state court judgment would have to be enforced on-reservation, thereby raising the issues discussed below.

Hence, the preliminary matter when cross-boundary enforcement of judgment is sought is, as always, the proper subject matter jurisdiction of the court rendering the judgment. When the boundary at issue is a reservation boundary, this question is difficult, the analysis can be convoluted, and the answer problematic. Recognizing that these issues are likely to be presented in many cross-boundary cases, we may now assume them away. Suppose, for the remainder of this article, that proper jurisdiction exists in the initial court, be it state or tribal, and that judgment is for the plaintiff, who, for our general purposes, will be a tribal member litigating in tribal court or a non-member litigating in state court. The difficulties, as we shall see, have just begun.

## **II. The Preliminary Matter of the Enforcement of Judgments When Boundaries Are Not Crossed.**

### **A. The Basic Principles of Non-Indian Enforcement of Judgment Law.**

Sometimes when a plaintiff wins a judgment, the defendant does not voluntarily pay, for which state law provides a wide variety of remedies to the frustrated plaintiff. The most commonly used of these remedies are: (1) execution process, in which a county sheriff or other government official coercively seizes the property of the defendant and sells it; (2) garnishment, in which the court entertains a new law suit against a third party who owes money to the defendant and who is ordered to pay the debt to the plaintiff; (3) wage withholding, a variation of garnishment, in which the same is accomplished by statute, without a law suit; (4) fraudulent transfer avoidance, in which the court undoes real or fictitious transfers in order to allow the execution process to proceed against property held by third parties, and (5) creditor's bill, or otherwise-named equitable proceedings, in which the court of equity takes jurisdiction over the person of the non-paying defendant and all of his, her or its property.<sup>15</sup>

Still restricting our attention to the general principles of non-Indian law, there are three major limitations placed by state and federal law on the use of these remedies by unpaid plaintiffs. First, judgments expire and every state has a statute of limitations on the enforcement of judgment, though the length of time in these statutes varies. So, too, are there varying tolling situations in the states. Some states provide a different, often shorter, period for the enforcement of out-of-state judgments.<sup>16</sup> The enforceability of equitable decrees is similarly limited by the doctrine of laches.

---

15. See generally, Elizabeth Warren & Jay Lawrence Westbrook, *THE LAW OF DEBTORS AND CREDITORS* (4<sup>th</sup> ed. 2001) at 45-158.

16. See *Watkins v. Conway*, 385 U.S. 188 (1966).

The second limitation on state enforcement of judgments is federal bankruptcy law. The automatic stay of 11 U.S.C. Sec. 362(a) is one of the broadest injunctions known in the law, and, among many other things, it temporarily prohibits the enforcement of judgments rendered prior to the bankruptcy<sup>17</sup> and usually permanently discharges them.<sup>18</sup>

Third, in every state, and to a limited extent under federal law as well, certain property is exempt from judgment and may not be seized for the benefit of the plaintiff. There is a wide variation in the exemption laws of the states; only one state has enacted the Uniform Exemptions Act and, among the other states there are examples both of extreme generosity and extreme niggardliness. The federal exemptions are very narrow, mostly protecting federal entitlements such as social security,<sup>19</sup> or protecting some small amounts of property from federal tax enforcement.<sup>20</sup> Federal law also protects wages from garnishment, generally to the extent of 75 percent of take-home pay.<sup>21</sup> State laws are permitted to be more protective of debtors, and some are.<sup>22</sup> Less generous state laws are pre-empted by federal law.<sup>23</sup>

Off-reservation, state law dominates the enforcement of judgment process, and there is no general federal enforcement of judgment law. Judgments rendered by a federal court are enforceable under Federal Rule of Civil Procedure 69(a), which incorporates the substantive law of the state in which the court sits. Enforcement will be by federal marshals, but state law will apply.<sup>24</sup> Under accepted principles of off-reservation law, enforcement procedures are creatures of statute, and traditionally there are no exemptions at common law.<sup>25</sup>

#### B. On-reservation Enforcement of Tribal Court Judgments under Tribal Law.

The previous section's discussion of off-reservation enforcement of judgment serves as a counter-point to the law as it exists on the reservation. In the first instance, tribal law will apply, and it is important to determine, for any particular tribe, what enforcement procedures it has enacted and what property it has made exempt from process. It should be noted, too, that while state statutory and constitutional law traditionally govern this area off-reservation, any given tribe might determine to address these issues under its common or customary law. There is nothing inherently offensive about

---

17. See generally, David G. Epstein, *et al.*, BANKRUPTCY (1993) at 59-170.

18. See 11 U.S.C. Sec. 727(a) (liquidation); Sec. 1141(d)(1) (corporate reorganization); Sec. 1228(a) (farmer reorganization); Sec. 1328(a) (consumer reorganization).

19. 42 U.S.C. Sec. 407.

20. 26 U.S.C. Sec. 6334(a).

21. 15 U.S.C. Secs. 1671-77.

22. 15 U.S.C. Sec. 1675.

23. *Id.* See generally, Warren & Westbrook, *supra* note 15 at 104-26.

24. Fed .R.Civ .P. 69(a).

25. See David G. Epstein, *et al.*, BANKRUPTCY (1993) at 593.

the notion of common law exemptions; in fact, many of us who practice primarily under state law wish the courts would be more aggressive in protecting the property of some debtors.<sup>26</sup>

Some tribes, in the interests of uniformity, might adopt as its own, either explicitly or by implication, the surrounding state's enforcement of judgment law, including exemption law. In such an instance, off-reservation court constructions of state law would be persuasive authority in tribal court, but tribal appellate court constructions of that law would be of greater weight. Because there is no federal enforcement of judgment law, a tribe that defers to federal law is, in effect, deferring to state law under Rule 69(a) of the Federal Rules of Civil Procedure. Other than such incorporations of foreign law, the existence, or not, of certain off-reservation state processes and exemptions should have no substantial impact on tribal choices in this area of the law.

Furthermore, it is to be re-emphasized that off-reservation law contains a variety of enforcement of judgment laws, including statutes of limitation and exemptions. Exemption law particularly is considered by off-reservation law-makers to be a matter of intimate local concern. Any tribal variations from off-reservation practice should be viewed in the context of this remarkable non-uniformity of state law, and off-reservation courts should be reluctant to second-guess a tribe's choice in these matters.

Even though there is no *general* federal enforcement of judgment law, federal law does have three principal impacts on tribal enforcement of judgment law. First, federal restraints on alienation exist on much on-reservation real property and some on-reservation personal property. Such trust property will be exempt as a matter of federal law from any execution process pursuant to a federal, state or tribal court judgment.<sup>27</sup>

Second, the Indian Civil Rights Act<sup>28</sup> will restrict the tribe's choice of remedies in ways similar to ways the U.S. Constitution restricts the states in their choice of remedies. Those constitutional restrictions, however, are relatively few, given that the non-paying defendant has presumably already had a presumably fair day in court.<sup>29</sup> Nevertheless, off-reservation courts have applied the Constitution to post-judgment enforcement process under state law in meaningful ways,<sup>30</sup> and the same should be true of the I.C.R.A. A mere difference between the tribe's choice regarding enforcement process, exemption law or the length of the statute of limitations, on the one hand, and

---

26. A student sits this semester in my Debtor-Creditor Relations class in a motorized wheelchair, valued, he tells me, at about the price of a nice car. Under the federal bankruptcy statute, such a device would be exempt, 11 U.S.C. Sec. 522(d)(9), but under Arkansas state statutory law it would not be. Public policy abounds in support of the notion that such a person's creditors should not be able to take the chair out from under him, but traditionally state courts have been reluctant to protect property left unprotected by the legislature. In Arkansas we have a state constitutional provision that limits the legislature's ability to protect items such as wheelchairs, see Ark. Const., art. 9, Secs.1 and 2, and *In re Holt*, 894 F.2d 1005 (8<sup>th</sup> Cir. 1990), but that is a problem, thankfully, of only local concern.

27. See *generally*, Robert N. Clinton, *et al.*, AMERICAN INDIAN LAW (3d ed. 1991) at 147-52.

28. 25 U.S.C. Secs. 1301-03.

29. See *Endicott Johnson Corp. v. Encyclopedia Press, Inc.*, 266 U.S. 285 (1924).

30. See, e.g., *Finberg v. Sullivan*, 634 F.2d 50 (3d Cir. 1980).

the choice of the surrounding state on the other, should not rise to the level of an I.C.R.A. violation. Any such civil-side I.C.R.A. challenge would, under *Santa Clara Pueblo v. Martinez*,<sup>31</sup> have to come in tribal court.<sup>32</sup>

Third, federal bankruptcy law will affect tribal enforcement of judgment law. The petition in bankruptcy enjoins “any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case,”<sup>33</sup> which would include a tribal court plaintiff’s attempt to enforce a tribal court judgment. Section 362(a)(1) enjoins “the commencement or continuation, including the issuance or employment of process, of a judicial . . . proceeding against the debtor that was or could have been commenced before the commencement of [the bankruptcy] case . . .”<sup>34</sup> This injunction surely applies to the individual tribal court plaintiff, but whether it applies to the tribal court itself raises sovereign immunity questions that are beyond the scope of this article.<sup>35</sup>

### III. Cross-Boundary Enforcement Issues.

#### A. The Basic Principles of Non-Indian Cross-Boundary Enforcement Law.

Whenever a judgment of one jurisdiction is presented to another for coercive enforcement, important matters of sovereignty, jurisdiction and judicial latitude are brought to the fore. This is true whether the judgment is being brought across a state line, a reservation boundary, or an international frontier. Again, to serve as a counterpoint to federal Indian law, it is best to begin the discussion with a brief review of off-reservation law.

By constitutional command, the states of the United States give “full faith and credit” to the final judgments of their sister states.<sup>36</sup> By statute, this command is extended to the courts of “territories and possessions.”<sup>37</sup> The question of whether tribes are territories or possessions will be discussed below.

---

31. 436 U.S. 49 (1978).

32. *Id.*

33. 11 U.S.C. Sec. 362(a)(6).

34. 11 U.S.C. Sec. 362(a)(1).

35. 11 U.S.C. Sec. 106 attempts to abrogate sovereign immunity for all “governmental unit[s],” a term defined very broadly by 11 U.S.C. Sec. 101(27). The definition of a “governmental unit” does not specifically mention Indian tribes, but includes the phrase “other foreign or domestic government.” See *Adams v. Grand Traverse Band of Ottawa and Chippewa Indians Economic Development Authority (In re Adams)*, 133 Bankr. 191 (Bcy. W.D. Mich. 1991) (holding that the court has the power to order removal of a bankruptcy-related matter from tribal court to bankruptcy court, but abstaining from doing so.)

36. U.S. Constitution, Article IV, Sec. 1.

37. 28 U.S.C. Sec. 1738.

If full faith and credit is required to be given, the court of the state where enforcement is sought has only limited discretion to inspect the judgment or to entertain collateral attacks upon it. After assuring itself that the judgment has not been satisfied, nor was it obtained by fraud on the rendering court, the state court may only hear collateral attacks based upon the lack of jurisdiction before the rendering court.<sup>38</sup> Of particular importance, the receiving court may not refuse to enforce the sister-state judgment merely because it offends local public policy.<sup>39</sup>

Furthermore, even a jurisdiction-based collateral attack is available only if jurisdiction was not challenged in the court rendering the judgment. Hence this collateral attack is ordinarily available only if the judgment whose enforcement is sought was a default judgment. If jurisdictional matters were actually contested in the court rendering judgment, then disputes would give rise to appeal, not collateral attack.<sup>40</sup>

Many states have enacted the 1962 version of the Uniform Enforcement of Foreign Judgments Act (UEFJA), which allows a foreign-state judgment that is entitled to full faith and credit to merely be registered in order to be enforced under the law of the receiving state. Local statutes of limitations and exemptions apply to the enforcement process. Alternatively, a judgment plaintiff may forego registration under the UEFJA and bring suit on the out-of-state judgment, thereby obtaining a new judgment from the receiving state. Technically speaking, under the 1962 version of UEFJA no new judgment is ever entered in the receiving state; the statute merely allows the foreign judgment to be enforced as if it were a local judgment.<sup>41</sup>

Only *final* judgments are entitled to full faith and credit. Modifiable equitable decrees, most notably child support orders, are not enforceable under standard full faith and credit principles; specific legislation is required to bind the states to enforce the equitable decrees of sister states.<sup>42</sup>

When a state court is asked to enforce a foreign-nation judgment, as opposed to a sister-state judgment, then comity, not full faith and credit, is the governing principle. Comity involves a looser and more generalized respect by the court receiving the judgment for enforcement toward the court that rendered the judgment. For example, a court using the principles of comity may inquire into the procedural fairness shown by the rendering court, matters that have to be attacked on appeal, not collaterally, under the principles of full faith and credit. So, too, may the receiving court test the incoming judgment against strongly held local public policy and refuse to enforce the judgment because of substantial and important departures from same. Under both full faith and credit and

---

38. Leflar, *supra* note 3, at 221-26.

39. Baker v. General Motors Corp., 522 U.S. 222 (1998).

40. Leflar, *supra* note 3, at 236.

41. *Id.* at 235. Compare the 1948 version of the UEFJA, which created a summary procedure for obtaining an in-state judgment based on an out-of-state one.

42. *Id.* at 247. Regarding child support orders, such specialized legislation generally exists, see 28 U.S.C. Sec.1738A. This section reaches orders from states, the District of Columbia, the Commonwealth of Puerto Rico, and "territor[ies] or possession[s] of the United States," and hence its application to orders from Indian tribes is problematic.

comity, lack of jurisdiction in the rendering court and fraud by the plaintiff upon the rendering court are defenses to enforcement.<sup>43</sup>

There are two forms of comity, retaliatory and non-retaliatory. Under retaliatory comity, in addition to the usual considerations of proper jurisdiction, absence of fraud, consistency with local public policy, and fair proceedings in the foreign court, there is the additional question of whether the rendering jurisdiction enforces the receiving court's judgments when the roles are reversed. In non-retaliatory comity, the reciprocal reception given by the rendering court to the receiving court's judgments is irrelevant.

Commentators tend to prefer the non-retaliatory form of comity. The United States Supreme Court has held that the retaliatory form is the law in federal courts,<sup>44</sup> but some lower federal courts have found ways to limit that case and to avoid its application.<sup>45</sup> The Supreme Court's choice to use retaliatory comity in federal courts does not apply to the states, which are free to develop their own versions of comity under their common or statutory law. Among state courts, the jurisdictions are split between the two forms of comity. The Uniform Foreign Money-Judgments Recognition Act (UFM-JRA), adopted by about half the states, contains the non-retaliatory form, but a few states have added retaliation as a non-uniform variation to the UFM-JRA.<sup>46</sup>

#### B. The Enforcement of Judgments Across Indian Reservation Boundaries.

As of now, no consistent rule exists among the jurisdictions addressing the question. As will be shown below, there is both case law and statutory authority for each of the three rules of recognition mentioned above (full faith and credit, retaliatory comity and non-retaliatory comity). Furthermore, the scholarly commentary is extensive, contradictory, and inconclusive.<sup>47</sup>

The first question is whether the federal full faith and credit statute, 28 U.S.C. Sec. 1738, applies to tribal courts as the rendering court, the receiving court, both or neither. If Sec. 1738 applies to tribal courts in both instances, then they must give full faith and credit to incoming judgments, and their judgments must receive it. Otherwise not, except under the specialized statutes that apply full faith and credit to narrow subject matter areas, such as support orders and non-divorce-related custody decrees.

Section 1738 does not mention Indian tribes or tribal courts, nor does its legislative history. Nevertheless, some courts have held that the section applies to tribal court judgments, usually by

---

43. *Id.* at 236-41.

44. *Hilton v. Guyot*, 159 U.S. 113 (1895).

45. *See, e.g., Direction der Disconto-Gesellschaft v. United States Steel Corp.*, 300 F. 741 (S.D.N.Y. 1924), *aff'd* 267 U.S. 22 (1925).

46. *See Leflar, supra* note 3 at 252.

47. *See Ransom, supra* note 1.

finding tribes to be “territories or possessions” of the United States.<sup>48</sup> Supreme Court authority is rather abstruse: Section 1738 has been said in dicta to apply to tribal courts,<sup>49</sup> and the Court has held that a now-repealed, very narrow but somewhat similar statute required that full faith and credit be given to a decree of a Cherokee orphans court.<sup>50</sup>

If these cases are wrong or distinguishable, then, in the absence of full faith and credit, one of the forms of comity discussed above will obtain under federal law, state law, tribal law, or all three. The sections that follow review the law from the opposite sides of the state-reservation boundary.

### C. The Enforcement of Tribal Court Judgments in State Court.

State courts are divided on the question of whether they are bound, under Sec.1738, to give full faith and credit to tribal court judgments. For example, the Supreme Courts of New Mexico and Idaho have found that that section applies, so they must recognize final judgments of the Navajo and Shoshone-Bannock tribal courts, respectively.<sup>51</sup> On the other hand, the Supreme Courts of South Dakota and the Court of Appeals of Arizona declined to follow the dictates of Sec.1738.<sup>52</sup>

The application of such an important doctrine as full faith and credit to Indian tribes should not be done in the absence of careful congressional consideration, which is not demonstrated by the silence of 28 U.S.C. Sec. 1738. The dicta of *Martinez* should not be followed and the holding of *Mackey* should not be extended without specific statutory language applying full faith and credit principles across Indian reservation boundaries. Examples can be found of both retaliatory comity and non-retaliatory comity applied by state courts toward tribal court judgments.<sup>53</sup>

A few states have legislated with respect to the treatment of tribal court judgments in their state courts, choosing different forms of comity.<sup>54</sup> No federal court case has ever stricken a state enforcement statute on supremacy grounds as being inconsistent with some federal rule. The Ninth

---

48. See, e.g., *Halwood v. Cowboy Auto Sales, Inc.*, 946 P.2d 1088 (N.M. 1997).

49. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 66-67 n.21 (1978)

50. *United States ex rel. Mackey v. Coxe*, 59 U.S. (18 How.) 100 (1885).

51. *Halwood v. Cowboy Auto Sales, Inc.*, 946 P.2d 1088 (N.M. 1997); *Sheppard v. Sheppard*, 655 P.2d 895 (Idaho 1982). I have intentionally stated the holdings of these cases narrowly in the text. While the logic of these opinions would suggest that their holdings are not limited to the specific tribe involved, it is unclear whether on policy grounds either Supreme Court was willing to require full faith and credit be given to judgments from all tribal courts nationwide. In particular, it is unclear whether either or both courts would apply full faith and credit to the judgments of tribal courts from outside their states.

52. *Mexican v. Circle Bear*, 370 N.W.2d 737 (S.D. 1985); *Brown v. Babbitt Ford, Inc.*, 571 P.2d 689 (Ariz. App. 1977). See also *Begay v. Miller*, 222 P.2d 624 (Ariz. 1950)(holding that the Full Faith and Credit Clause of the Constitution does not apply to the Navajo Tribe).

53. See *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997) and cases cited.

54. See, e.g., S.D. Codified Law Sec. 1-1-25(2)(b) (Michie 1992).

Circuit has intimated, in fact, that the Supremacy Clause does not require that the state courts subordinate themselves to some federal common law rule.<sup>55</sup> Several commentators have expressed themselves in disagreement with this intimation.<sup>56</sup>

#### D. The Enforcement of State Court Judgments in Tribal Court.

The discussion of full faith and credit and comity in tribal courts begins with the question of whether state enforcement processes extends to Indian country. If state sheriffs may enforce writs of execution on-reservation pursuant to off-reservation judgments by seizing property non-exempt under state law, then there would be little occasion for the state court plaintiff to use the tribal system to enforce a judgment. While there is case law to the contrary,<sup>57</sup> the principle that state judgments should be enforced via state process off-reservation, but via tribal process on-reservation, is well-founded on the authority of *Williams v. Lee*.<sup>58</sup> “The right of the reservation Indians to make their own laws and be ruled by them”<sup>59</sup> is nowhere stronger than in the right to govern how, in what circumstances, and by whom the coercive enforcement of judgments will be done. A state sheriff would seem to have no more business executing judgment in Indian country than a tribal police officer would have doing the same off-reservation.<sup>60</sup>

In *Nevada v. Hicks*,<sup>61</sup> however, the Supreme Court addressed the question of whether a state game warden could execute a state search warrant on-reservation. The search warrant had been issued with the concurrence of the tribal court,<sup>62</sup> which would seem both to be an entirely appropriate procedure, and to take care of any question of *Williams* infringement. Writing in very sweeping terms and citing in the main cases from the 19<sup>th</sup> Century, the Court wrote: “The State’s interest in execution of process is considerable . . .”<sup>63</sup> Does this statement mean that a creditor with a state court judgment may have the county clerk send the county sheriff out to seize on-reservation property? The law is not yet there for three reasons. In the first place, the Court might yet decide that search warrants pursuant to criminal prosecution are different from civil writs of execution, which would be a sensible distinction. Second, the statement quoted is dicta, for the issue in *Hicks* was whether the tribal court had jurisdiction over the litigation against the state official, not whether state court civil process reaches within the reservation. And third, the Court gave little reason for its decision beyond

---

55. *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997).

56. *See Ransom*, *supra* note 1.

57. *See, e.g., Little Horn State Bank v. Stops*, 555 P.2d 211 (Mont. 1976).

58. 358 U.S. 217 (1959)

59. *Id.* at 220

60. *Cf. Francisco v. State*, 556 P.2d 1 (Ariz. 1976) (holding that a state sheriff has no authority to serve process on-reservation).

61. 533 U.S. 353 (2001).

62. *Id.* at 356.

63. *Id.* at 364.

some out-moded language from old cases, and this: “[E]ven when [state process] relates to Indian-fee lands[,] it no more impairs the tribe’s self-government than federal enforcement of federal law impairs state government.”<sup>64</sup> But, of course, federal enforcement of federal law impairs state government; Rule 69 of the Federal Rules of Civil Procedure is written in apparent homage to this fact. If the Congress should override all state exemptions, states would feel themselves improperly impaired.<sup>65</sup> Congress may or may not have the power to work such an impairment of state law, but it almost certainly has such power with respect to tribal exemption law. But is the Court suggesting that *states* have the power to make such an impairment of tribal law? Surely not; *Williams v. Lee* is entirely to the contrary.

Until the Court reworks the parameters of cross-boundary enforcement of civil law more emphatically than in *Nevada v. Hicks*, the assumption can be made that state execution process does not run on-reservation, and that the proper forum for the on-reservation enforcement of an off-reservation judgment is in tribal court, and the proper forum for the off-reservation enforcement of an on-reservation judgment is in state court.

The situation is somewhat different in Public Law 280 states, where a cause of action governing reservation activity may be litigated and go to judgment in state court. Nevertheless, enforcement process and exemption laws are creatures of statute, not cases, and under the holding of *Bryan v. Itasca County*,<sup>66</sup> it is the tribe’s statutory law that should apply. Thus, even in Public Law 280 states, the better rule is that state court judgments should be presented to tribal courts for recognition, and not merely executed upon by state officers using state enforcement process on-reservation.<sup>67</sup>

Tribal law, too, is divided on the question of whether full faith and credit or comity should be afforded to incoming judgments from state or federal courts. The Court of Appeals of the Cheyenne River Sioux Tribe, for instance, found itself bound by the full faith and credit provisions of the Parental Kidnaping Prevention Act and, in dicta, by the more general full faith and credit provisions of 28 U.S.C. Sec. 1738, although the court found a way to avoid the necessity of enforcing the particular judgment presented to it.<sup>68</sup> It appears likely, however, that more tribal courts are using comity-like principles, retaining for themselves more discretion than full faith and credit would allow.

Comity as used in state and federal courts derives from the Anglo-American common law, but the notion of respect for fellow sovereigns is so basic a proposition that it is likely that some form of it exists under the law of most every tribe and nation. Hence, it is not surprising to find that most bodies of tribal law and custom contain within them some form of cross-boundary respect that embodies comity-like principles. Thus, it should not be necessary that a tribe wishing to adopt a comity regime do so by incorporating all the details of off-reservation comity into tribal law.

---

64. *Id.*

65. See, e.g., Philip Shenon, *Home as Shield from Creditors Is under Fire*, THE NEW YORK TIMES, April 4, 2002, at p. B1, col. 4.

66. 426 U.S. 373 (1976).

67. See generally, Clinton, *supra* note 27 at 594-622.

68. *Eberhard v. Eberhard*, 24 Ind. L. Rep. 6059 (Cheyenne River Sioux 1997).

The question of when and whether federal law pre-empts a tribe's local choice to use some form of comity rather than full faith and credit to address cross-boundary-enforcement issues again raises the question of whether 28 U.S.C. Sec. 1738, as written, applies to Indian tribes as the jurisdiction receiving a judgment for enforcement. As mentioned above, the better rule is that tribal court latitude should not be restricted by an Act of Congress that does not mention Indian tribes and, hence, that Sec. 1738 should not apply to tribes. In those instances mentioned below, when Congress directly addresses the question of the tribes as receiving jurisdictions, then such legislation binds the tribes.

#### E. The Role of the Federal Courts in Cross-boundary Enforcement of Judgments.

Under general principles of off-reservation law, the federal courts play only a very limited role in the cross-boundary enforcement of judgments. There is no general federal enforcement of judgment law and, under Rule 69(a) of the Federal Rules of Civil Procedure, state enforcement law applies. This Rule applies irrespective of whether the federal case was based on diversity jurisdiction or federal-question jurisdiction.

Furthermore, if a judgment arose in state court between citizens of the same state, it may not be enforced via the federal court in a different state; merely because the judgment is worthy of full faith and credit does not create federal jurisdiction over the enforcement action.<sup>69</sup> Hence, federal Indian law aside, the only state court judgments that might be enforced in federal court are those between parties of diverse citizenship. Because Rule 69 requires the application of state enforcement law anyway, most judgment creditors simply use full faith and credit in state court.

When the enforcement is across reservation boundaries, the federal courts might be thought to play a more active role, given the tradition of federal court involvement in Indian law. This turns out not to be the case, as discussed below.

##### 1. The On-Reservation Enforcement of Federal Court Judgments.

In *Annis v. Dewey County Bank*,<sup>70</sup> the federal court in South Dakota found that while a state court might be constrained by *Williams v. Lee* from enforcing a judgment on-reservation, the same constraints should not apply to a federal court enforcing a federal judgment. Furthermore, the court intimated it would not be difficult for many state court judgments to be converted to federal judgments for such enforcement.<sup>71</sup> Given that there is no federal enforcement of judgment law, but only Rule 69's incorporation of state law, *Annis* is ill-considered. *Williams v. Lee* shields a tribe from state law, not merely from state administration of the law. Where the state and tribe make different choices with respect to the exempt status of certain property, it does not serve the purposes of *Williams v. Lee* merely to have the federal marshal, instead of the county sheriff, enforce a state judgment against property exempt under tribal law.

---

69. *Minnesota v. Northern Securities Co.*, 194 U.S. 48 (1904).

70. 335 F.Supp. 133 (D.S.D. 1971).

71. *Id.*

Thus, unless and until Congress passes legislation specifically setting forth the processes for enforcement of federal judgments on Indian reservations, federal judgments, too, must be presented to tribal courts for on-reservation enforcement.

## 2. The On-reservation Enforcement of State Court Judgments Through the Federal Court System.

These cases are indistinguishable from the previous category. It is true that when a state court judgment is presented to a federal court for enforcement, the federal court must give full faith and credit to the state court judgement.<sup>72</sup> However, the remainder of the analysis is as given above: having recognized the state court judgment, the federal court must, under Rule 69, send the federal marshal onto the reservation to apply state enforcement of judgment law, contrary to *Williams v. Lee*. If a federal court is required by *Williams v. Lee* and Rule 69 to present its own judgments to tribal court for enforcement, it must do the same when the original source of the judgment is the state court system.

*Annis*, itself, involved an especially insidious form of the tactic of using federal courts to enforce state court judgments. There, the judgment creditor threatened on-reservation enforcement under state law. The judgment debtor, now plaintiff, sought a federal court injunction against state process. Now in federal court as defendant, the creditor simply counterclaimed on the judgment. The South Dakota federal district court took jurisdiction over the suit, enjoined the direct enforcement under state law but granted relief on the counter-claim, sending the federal marshal out to seize the defendant's cattle under state law.<sup>73</sup>

This tactic should be unavailing. On-reservation enforcement of both state and federal judgments should be made via the tribal court system, just as tribal court judgments should be enforced, off-reservation, through the state or federal court systems.

## 3. The Off-reservation Enforcement of Tribal Court Judgments Through the Federal Court System.

In *Wilson v. Marchington*,<sup>74</sup> a plaintiff with a judgment from the Blackfeet tribal court presented the judgment to the Montana federal district court for off-reservation enforcement, arguing that it was entitled to full faith and credit there. The Ninth Circuit held, instead, that the federal rule for use in federal courts was one of non-retaliatory comity, not full faith and credit. The court rejected the application of both Sec. 1738 and *Hilton v. Guyot*.<sup>75</sup> Contrary to *Wilson* is *In re Larch*,<sup>76</sup> in which the Fourth Circuit held that the Eastern Cherokee Tribe is a "territory" as defined by the Parental Kidnaping

---

72. Full faith and credit is required between state and federal courts by 28 U.S.C. Sec. 1738.

73. 335 F.Supp. at 133.

74. 127 F.3d 805 (9th Cir. 1997).

75. 159 U.S. 113 (1895). In *Bird v. Glacier Electric Cooperative, Inc.*, 255 F.3d 1136 (9th Cir. 2001), the Ninth Circuit followed *Marchington*, and refused to recognize a tribal court judgment rendered following a closing argument that the Ninth Circuit thought offensive.

76. 872 F.2d 66 (4th Cir. 1989).

Prevention Act.<sup>77</sup> As such, the child custody orders of the tribal court were entitled to full faith and credit in state court. *Wilson* would appear to be the better-reasoned case, at least on the full faith and credit issue.<sup>78</sup>

Some commentators would go farther than *Wilson* did and argue that the rule of comity laid down there is not just for the federal courts within the Ninth Circuit but is also the federal rule binding under the Supremacy Clause on the state courts within the Ninth Circuit.<sup>79</sup> While it is true that, under off-reservation law, comity is generally a principle of state law, in the specific field of America Indian law, federal interests and the federal common law so dominate that a federal rule of comity should apply in state courts.

#### 4. Federal Restraints on Improper Enforcement Attempts.

All three court systems may be implicated in the complex case where a judgment arises in one court system, enforcement is sought in a second, and the third is used to enjoin enforcement in the second. Typically, it is in federal court that a judgment debtor, now plaintiff, seeks an injunction against the enforcement under state or tribal law. The merits of such controversies aside, two federal abstention doctrines will usually prevent the federal court from hearing the case.

The first abstention doctrine flows from the non-Indian case of *Younger v. Harris*.<sup>80</sup> This case presents substantial barriers to the federal courts in their attempts to enjoin on-going state court process, as cases to which the doctrine applies must be dismissed by the federal court with no injunction issuing. While *Younger* itself involved an attempt to enjoin state criminal process, subsequent cases have extended the doctrine to the civil side, and, as a general matter, it is likely that federal courts will be required to abstain from any attempt to enjoin state court enforcement of a tribal court judgment. An argument has been offered that cases such as these should be allowed as an exception to *Younger v. Harris* abstention, but this argument has not been accepted by the courts.<sup>81</sup>

The second abstention doctrine flows from the Indian law case of *National Farmers Union Ins. Co. v. Crow Tribe of Indians*.<sup>82</sup> This type of abstention is less strong than *Younger* abstention, as it does not require dismissal, but only postponement of the federal case while tribal process is exhausted. Thus, if a creditor with a state court judgment is attempting on-reservation enforcement in tribal court, and the state court defendant seeks to enjoin the same in federal court, the federal court must abstain, under *National Farmers Union*, until all challenges to tribal court process are finally

---

77. 28 U.S.C. Sec. 1738A.

78. In addition to the holding on the cross-boundary enforcement of tribal judgments, *Wilson v. Marchington* unwisely expanded the doctrine of *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), and refused to recognize tribal jurisdiction over a tort suit brought by a plaintiff who was a member of the tribe.

79. See Ransom, *supra* note 1.

80. 401 U.S. 37 (1971).

81. See Robert Laurence, *The Enforcement of Judgments across Indian Reservation Boundaries: Full Faith and Credit, Comity and the Indian Civil Rights Act*, 69 ORE. L. REV. 589, 612-19 (1990).

82. 471 U.S. 845 (1985).

disposed of by the tribal court system. Following that final disposition, a federal court might give collateral review to the tribal process, but only on the grounds that the tribal court was without jurisdiction, under federal law, to enforce the judgment. Such a challenge ought to fail, assuming that the defendant's property lies properly within the tribe's jurisdiction. Other challenges to the tribal court process are Indian Civil Rights Act challenges which, under the doctrine of *Santa Clara Pueblo v. Martinez*, must be brought in tribal, not federal, court.

The combination of *Younger v. Harris*, *National Farmers Union v. Crow Tribe of Indians*, and *Santa Clara Pueblo v. Martinez* is that in this sensitive area of tribal-state relations where federal interests are strong, the federal courts play almost no role at all. The solution to this irony appears to lie in congressional legislation, however, and not in court-created exceptions to these three abstention doctrines.

#### F. Special Statutory Provisions.

Occasionally, for purposes deemed important to the interests of national uniformity and federal Indian policy, Congress enacts a specific full faith and credit provision that explicitly reaches Indian tribes. As of the present writing, those statutes are: 18 U.S.C. Sec. 2265 (The Violence against Women Act); 25 U.S.C. Sec. 1725(g) (The Maine Indian Claims Settlement Act); 25 U.S.C. Sec. 1911(d) (The Indian Child Welfare Act); 25 U.S.C. Sec. 2207 (The Indian Land Consolidation Act); 28 U.S.C. Sec. 1738B (Full Faith and Credit for Child Support Orders Act); 25 U.S.C. Sec. 3106 (The National Indian Forest Resources Management Act); 25 U.S.C. Sec. 3713 (American Indian Agricultural Resource Management Act). The latter two of these statutes would seem to have potential effect on farmers and their lawyers, but they have never been litigated in any meaningful way.

As mentioned above, given the important state and tribal sovereign interests involved, more general federal full faith and credit statutes using terms like "state," "territory," or "possession" should not apply to tribal courts without referring explicitly to tribal courts.<sup>83</sup> The Full Faith and Credit for Child Support Orders Act mentioned above uses the term "Indian Country" instead of "Indian Tribe" to describe the entity which must give, and is entitled to receive, full faith and credit; an unfortunate choice, but one which leaves Congress's intent clear.

#### G. Tribal-State Agreements.

As many tribes and states recognize, matters dealing with the cross-boundary enforcement of judgments are especially susceptible to tribal-state negotiation. Several such negotiations proceed at the time of this writing, and tribal-state agreements, often between judicial branches of the two governments, are becoming the preferred method of handling these problems. Every known precept of federal respect for tribal sovereignty, as well as federalist principles regarding state sovereignty, suggest that these negotiations should be fostered by federal action, not hindered by it. There is no more discouraging aspect of *Nevada v. Hicks*<sup>84</sup> than its suggestion that tribal-state cooperation is irrelevant to, or unnecessary for, the cross-boundary enforcement of judgments.<sup>85</sup>

---

83. See, e.g., 28 U.S.C. Sec. 1738A.

84. 533 U.S. 353 (2001).

85. See generally P.S. Deloria & 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).

*This article was prepared in May 2002.*

*This material is based on work supported by the U.S. Department of Agriculture under Agreement No. 59-8201-9-115. Any opinions, findings, conclusions or recommendations expressed in this article are those of the author and do not necessarily reflect the view of the U.S. Department of Agriculture.*

NCALRI is a federally funded research institution located at the University of Arkansas School of Law  
Web site: [www.NationalAgLawCenter.org](http://www.NationalAgLawCenter.org) • Phone: (479)575-7646 • Email: NatAgLaw@[uark.edu](mailto:NatAgLaw@uark.edu)