

Enforcement Issues

The subject matter jurisdiction of each tribal court is defined by the tribe which establishes it. The extent to which tribes may exercise personal jurisdiction over individual litigants is defined in a body of federal law. As a general rule tribes may exercise full civil and criminal jurisdiction over Indians within the tribe's reservation or trust lands ("Indian Country")¹. Tribes have no criminal jurisdiction over non-Indians. Tribes may exercise civil jurisdiction over non-Indians generally only where the non-Indians have entered

... into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. 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.²

While tribes are recognized as sovereign, they are not "states" for the purpose of the full faith and credit requirements of Article IV of the U.S. Constitution. There is general consensus (but no United States Supreme Court authority) that tribes are not covered by the federal full faith and credit statute (28 U.S.C. § 1738). In *Wilson v. Marchington*, 127 F.3d 805 (1997) the Ninth Circuit Court of Appeal determined that as a general matter, the recognition of a tribal court order within the United States federal courts was governed by the principles of comity, and not subject to the full faith and credit requirement of the constitution or 28 U.S.C. § 1738.

There are, however, a number of specific federal and state laws that mandate full faith and credit for and between tribal and state courts in specific types of actions:

- Indian Child Welfare Act (25 U.S.C. § 1911(d)) requires full faith and credit for tribal court custody orders concerning Indian children. ICWA also addresses the issue of jurisdiction over child welfare proceedings involving Indian children;
- Violence Against Women Act (18 U.S.C. § 2265) mandates full faith and credit for protection orders;
- Child Support Enforcement Act (28 U.S.C. § 1738 B) mandates full faith and credit for child support orders; and
- Uniform Child Custody Jurisdiction and Enforcement Act (Family Code § 3404) mandates full faith and credit for child custody orders.

¹ See eg. *Fisher v. Dist. Ct.* 424 U.S. 382 (1976) at 389

² *Montana v. United States*, (1981) 450 U.S. 544, 565-566

Where there is no specific statutory mandate for full faith and credit, the general rule is that tribal court orders are entitled to comity. The Ninth Circuit has held that it is appropriate to apply the principles of comity to tribal court judgments as follows:

While *Hilton* and the Restatement (Third) provide sound guidance for assessing legal judgments of other nations, special considerations arising out of existing Indian law merit some modification in the application of comity to tribal judgments. In synthesizing the traditional elements of comity with the special requirements of Indian law, we conclude that, as a general principle, federal courts should recognize and enforce tribal judgments. However, federal courts must neither recognize nor enforce tribal judgments if:

- (1) the tribal court did not have both personal and subject matter jurisdiction; or
- (2) the defendant was not afforded due process of law.

In addition, a federal court may, in its discretion, decline to recognize and enforce a tribal judgment on equitable grounds, including the following circumstances:

- (1) the judgment was obtained by fraud;
- (2) the judgment conflicts with another final judgment that is entitled to recognition;
- (3) the judgment is inconsistent with the parties' contractual choice of forum; or
- (4) recognition of the judgment, or the cause of action upon which it is based, is against the public policy of the United States or the forum state in which recognition of the judgment is sought.³

Despite the mandates of full faith and credit or comity for recognition and enforcement of tribal court orders, in practice, things are not so simple. Jurisdictional issues arising from the status of lands where offenses are committed and the individuals involved can affect both state and tribal court's jurisdiction to issue a particular order. Further each law enforcement and judicial system has its own technical and procedural requirements which can affect enforcement of these orders.

³ *Wilson v. Marchington*, 127 F.3d 805 (1997)