FILE NO. ADM 09-8009

STATE OF MINNESOTA
IN THE SUPREME COURT

IN RE PETITION TO AMEND RULE 10 OF THE
MINNESOTA GENERAL RULES OF PRACTICE
FOR THE DISTRICT COURTS

PETITION OF THE MINNESOTA TRIBAL COURT/STATE COURT FORUM

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PETITION OF THE MINNESOTA TRIBAL COURT/STATE COURT FORUM

To: The Honorable Justices of the Supreme Court of the State of Minnesota:

Petitioner Minnesota Tribal Court/State Court Forum (the Forum) respectfully petitions this Court to adopt the attached amendments to Rule 10 of the Minnesota General Rules of Practice for the District Courts (the MGRP). *See* Appendix A. In support of this petition, the Forum would demonstrate to this Court the following:

INTRODUCTION

1. The Forum originated in 1997. Judge Robert A. Blaeser & Andrea L. Martin, *Engendering Tribal Court/State Court Cooperation*, 63 Bench & Bar No. 11 (2006). It "comprises a state court committee and a tribal court committee," *id.*, and its membership includes judges from each of the tribal judiciaries within Minnesota's borders, judges from the Minnesota judiciary, and lawyers.

2. The Minnesota Judicial Council recognizes the Forum and acknowledges its essential role in enhancing the relationship between the Minnesota judiciary and each of the tribal judiciaries within Minnesota's borders.

3. This Court has the exclusive and inherent power and duty to administer justice and to adopt and, as necessary, amend rules of practice and procedure before Minnesota courts. This power is expressly recognized by the Minnesota Legislature. Minn. Stat. §§ 480.05-.0595 (2014).

4. This Court adopted the MGRP to establish procedures for the practice of law and administration of justice in Minnesota. This Court has amended the MGRP from time to time for good cause shown.

5. The Forum petitions this Court to adopt the proposed amendments to Rule 10 as set forth in Appendix A.

BACKGROUND ON TRIBAL COURT JURISDICTION

Tribal Sovereignty

6. The United States and Minnesota have long recognized that Indian tribes are sovereign political entities. *Worcester v. Georgia*, 31 U.S. 515, 519 (1832) ("The Indian nations had always been considered as distinct, independent political communities . . . ."); *see also Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 288 (Minn. 1996); Exec. Order No. 03-05, 27 Minn. Reg. 1581 (Apr. 21, 2003) (affirming the government-to-government relationship between the State of Minnesota and the Indian tribes located within Minnesota's borders). They are neither states, *Gavle*, 555 N.W.2d at 289, nor foreign nations, *Cherokee Nation v. Georgia*, 30 U.S. 1, 16-17 (1831). Rather, they are "domestic dependent nations," subject to the "plenary control of Congress." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014). And yet they remain "separate sovereigns pre-exiting the Constitution." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–56 (1978); *see Tibbetts v. Leech Lake Reservation Bus. Comm.*, 397 N.W.2d 883, 886 (Minn. 1986).

7. Because of their status, Indian tribes possess a unique kind of sovereignty, which extends to "their members and their territories." *State v. Stone*, 572 N.W.2d 725, 728 (Minn. 1997). It is "a kind of sovereignty superior to that of states but inferior to that of the federal government." *Gavle*, 555 N.W.2d at 289. And while Congress may expand or contract it, *see Bay*

Mills, 134 S. Ct. at 2030 (providing that tribal sovereignty is "subject . . . to congressional action"); *Nevada v. Hicks*, 533 U.S. 353, 358–59 (2001) (recognizing that Congress can delegate power to tribes), the United States Supreme Court has drawn a general contour for tribal sovereignty: "what is necessary to protect tribal self-government or to control internal relations." *Montana v. United States*, 450 U.S. 544, 564 (1981).

8. Today, "[m]ost Indian nations operate their own court systems." *Cohen's Handbook of Federal Indian Law* § 4.01[2][d], at 218 (Nell Jessup Newton ed., 2012) (hereinafter *Cohen's Handbook*). These court systems "play a vital role in tribal self-government." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14–15 (1987); *accord Gavle*, 555 N.W.2d at 292.

Tribal Court Jurisdiction

9. Tribal courts possess expansive jurisdiction within Indian country and even some jurisdiction outside of Indian country. *Cohen's Handbook* § 4.01[2][d], at 219–20. Such jurisdiction, however, has limits.

10. Tribes retain the authority to prosecute members for crimes committed in Indian country, a power "justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent." *Duro v. Reina*, 495 U.S. 676, 694 (1990).[1] They also retain the authority to prosecute nonmember Indians under the same circumstances. *United States v. Lara*, 541 U.S. 193, 200 (2004).

11. Under federal common law, tribes generally do not possess inherent prosecutorial authority over non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978). This

[1] The federal government has jurisdiction over certain crimes committed on Indian lands. *See* Indian Country Crimes Act, 18 U.S.C. § 1152 (2012); Assimilative Crimes Act, 18 U.S.C. § 13 (2012). And under Public Law 280, the State of Minnesota has concurrent criminal jurisdiction over some crimes arising in Indian country, except on the Red Lake Reservation and Bois Forte Reservation.

is not, however, an absolute rule. *See* Violence Against Women Reauthorization Act of 2013 (VAWA), 25 U.S.C.A. § 1304 (West 2016) (affirming tribal authority to exercise "special domestic violence criminal jurisdiction over all persons" under certain circumstances). Moreover, Congress may delegate federal prosecutorial authority to tribes. *See Oliphant*, 435 U.S. at 212.

12. With respect to civil jurisdiction, tribes retain inherent sovereignty over their members and their territory. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). This includes the "power of regulating their internal and social relations." *United States v. Kagama*, 118 U.S. 375, 381–82 (1886). Thus, tribes may exercise civil adjudicatory jurisdiction over the conduct of their members and the conduct of nonmembers that enter onto tribally owned lands.

13. Generally, tribes do not retain inherent sovereign power to exercise civil jurisdiction over nonmember conduct on non-tribal fee land within Indian country, except when (1) "nonmembers . . . enter consensual relationships with [tribes] or [their] members, through commercial dealings, contracts, leases, or other arrangements" or (2) the nonmember "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana v. United States*, 450 U.S. 544, 563–66 (1981); *see also Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) (extending *Montana* doctrine to adjudication of civil disputes).

14. Congress, however, is free to clarify the confines of tribal inherent power to exercise civil jurisdiction, to limit that power, or to delegate additional federal power. Indeed, Congress has reaffirmed that tribes retain concurrent jurisdiction with the federal government over specified civil matters. *See Cohen's Handbook* § 4.03[1], at 245 (citing examples).

Due Process in Tribal Courts

15. Tribes are not parties to the United States Constitution. Matthew L.M. Fletcher, *Federal Indian Law* 262 (2016). But many tribes have enacted their own civil rights protections, some largely copied from the United States Constitution, some largely copied from the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301 *et seq.* (2012), and some derived from tribal conceptions of fundamental rights of citizens. *Cohen's Handbook* § 14.04[2], at 979–80.

16. Further, ICRA requires tribes to abide by most of the provisions of the Bill of Rights. For example, ICRA ensures that individuals are protected from unreasonable searches and seizures, self-incrimination, takings without just compensation, excessive bail, and cruel and unusual punishment. *Id.* § 1302(a). There are additional protections for defendants who face a term of imprisonment of more than one year. *Id.* § 1302(c). For example, tribes must provide the right to counsel "at least equal to that guaranteed by the United States Constitution." *Id.* § 1302(c)(1).

17. Recent scholarship indicates that tribes often apply state or federal law when addressing the rights of defendants in tribal court. For example, a 2008 study of 120 opinions issued by 22 tribal courts found that tribal courts relied on federal or state law in 95% of cases applying ICRA. Matthew L.M. Fletcher, *Tribal Courts, the Indian Civil Rights Act, & Customary Law: Preliminary Data* 6 (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103474. In the 5% of cases that the tribal courts did not apply state or federal law, either (1) both parties were tribal members involved in a domestic dispute or (2) the tribal court concluded that its interpretation of the law was more protective of individual rights than state- or federal-court interpretation. *Id.*

18. Many tribal courts, whether relying on ICRA, federal or state jurisprudence, or tribal tradition, custom, or common law are more protective of individual rights than state or federal courts. For example, in criminal matters, the Bois Forte Tribal Court will appoint defense counsel without consideration of a defendant's financial ability to hire private counsel. And neither the Bois Forte Tribal Court nor the Shakopee Tribal Court terminate parental rights, ever.

The Development of Tribal Courts

19. Although tribal courts have existed since at least the nineteenth century, *see United States ex rel. Mackey v. Coxe*, 59 U.S. 100, 103 (1855), tribes within Minnesota's borders first developed modern courts in the late 20th century. Hon. Korey Wahwassuck, *The New Face of Justice: Joint Tribe-State Jurisdiction*, 47 Washburn L.J. 733, 742–43 (2008).

20. In many ways, tribal judicial systems parallel those of state and federal courts. For example, most tribes have both a trial and appellate court. *Cohen's Handbook* § 4.04[3][c], at 267. They typically operate with familiar divisions, such as criminal, probate, juvenile, and civil courts. *Id.* They often employ judges and justices that have been screened by either their executive branches or tribal councils. *Id.* They abide by and interpret written statutes and case law.[2] And many either rely on or seek guidance from the jurisprudence of other tribal courts or state or federal courts. Fletcher, *supra* at 262.

21. Moreover, like state and federal judiciaries, which are increasingly incorporating alternative-dispute-resolution mechanisms, tribal courts often employ less-adversarial mechanisms for dispute resolution, based on tradition and customs. *Cohen's Handbook* § 4.04[3][c], at 268.

[2] For a database of tribal codes and statutes, see Tribal Court Clearinghouse, *Tribal Laws/Codes*, Tribal Court Clearinghouse, http://www.tribal-institute.org/lists/codes.htm (last visited July 11, 2016).

22. Today, 11 federally recognized Indian tribes and bands are located within what is now the borders of Minnesota. Cumulatively, these tribes operate 13 courts with varying jurisdiction. Judge Robert A. Blaeser & Andrea L. Martin, *Engendering Tribal Court/State Court Cooperation*, 63 Bench & Bar No. 11 (2006).

The Procedural History of Rule 10

23. By 2002, the Forum had become increasingly aware that state district courts were adopting disparate approaches when asked to recognize and enforce tribal court orders and judgments. To ensure consistent treatment of these orders and judgment, the Forum petitioned this Court to adopt what it denominated a full-faith-and-credit rule for tribal court judgments and orders. *See* Appendix B.

24. The proposed rule also required district courts to follow any federal and state laws that govern recognition and enforcement of certain types of tribal court judgments and orders.

25. Both the Minnesota State Bar Association Board of Governors and the Conference of Chief Judges (the predecessor to the Minnesota Judicial Council) voted unanimously to endorse the proposed rule. The proposed rule was, however, opposed or criticized by certain organizations, including the Minnesota State Bar Association Committee on Court Rules and Administration, the Minnesota Sheriff's Association, and the Minnesota County Attorneys Association.

26. This Court requested a recommendation from the Supreme Court Advisory Committee on General Rules of Practice (the Committee). After extensive consideration, the Committee concluded "that it [wa]s not appropriate to address the question of the authority of such tribal court decisions by means of a rule *at this time*." (Emphasis added.) But the Committee emphasized that its conclusion was "not clear-cut, nor was it readily reached."

27. Although the Committee recognized the need for a rule to guide district courts faced with the question of whether to recognize and enforce tribal court judgments and orders, the Committee believed that the adoption of such a rule "should be approached cautiously." The Committee's caution in 2003 was largely based on its belief that a full-faith-and-credit rule was substantive, not procedural, and that the Court would be overstepping its constitutional authority by adopting such a rule. The Committee also expressed concern that testimony in the 2003 hearings referenced "troublesome proceedings in tribal courts." Ultimately, the Committee recognized that it could not come to a conclusion "about the quality of justice in tribal courts generally or in any particular proceedings" based on anecdotes presented at the hearings. Consequently, the committee recommended that the Court adopt a procedural rule of comity.

28. In December 2003, following a hearing on the matter, this Court adopted the rule of comity recommended by the Committee. That rule remains the current version of Rule 10 of the MGRP.

The Evolution of Tribal Courts Since 2003

29. Since this Court adopted Rule 10, the Forum has continued to meet and work toward a stronger relationship between the Minnesota and tribal judiciaries. The Forum has become an institution, and its efforts have been supported by the Minnesota Judicial Council, which incorporates within its strategic plan a priority to foster greater cooperation between the judiciaries within Minnesota's borders.

30. Through the Forum, and otherwise, numerous tribal court and state court judges that exercise jurisdiction in close proximity to one another have created good relationships. Occasionally, these judges collaborate in joint courts or observe one another in practice.

Consequently, greater communication and trust has developed among the Minnesota and tribal judiciaries.

31. For example, tribal courts have been instrumental in the development of wellness courts in northern Minnesota. In 2006, the Leech Lake Band of Ojibwe Tribal Court and the Cass County District Court created a joint wellness court—the first joint tribal-state court in the United States. *See* Wahwassuck, *supra* 747–49. The development of the joint wellness court led to similar collaboration between the Leech Lake Band and the Itasca County District Court, as well as increased cooperation between other branches of tribal and state governments. *Id.* at 749.

32. Improved relationships between state and tribal judiciaries is not limited to Minnesota. In 2014, the Michigan Supreme Court established, by administrative order, the Michigan Tribal State Federal Judicial Forum. Mich. Admin. Or. 2014-12 (July 1, 2014). In its order, the court noted its "great interest" in "[f]ostering continuing good relations between our state and tribal courts." *Id.*

33. Moreover, tribal judiciaries have developed considerably since 2003. Today, tribal judiciaries have greater resources, better facilities, and more and better-trained judges. As one practitioner observes: "Tribal judges are law trained. Trials take place at tribal court facilities. Tribes often have bar associations that an attorney must join before practicing before the tribal court. And gaming revenues are supporting many tribal government responsibilities and programs, including tribal courts." Kirke Kickingbird, *Striving for the Independence of Native American Tribal Courts*, 36 Hum. Rts. 16, 19 (2009).

34. Today, tribal courts have access to greater funding, both internally and through federal grants. For example, the Leech Lake Band of Ojibwe is completing construction of a new justice center, which houses its police department, legal department, and tribal court. The budget

for the construction project was $7.1 million, $3.1 million of which was invested by the tribe, and $4 million of which was funded through a federal grant, procured by Judge Korey Wahwassuck. This funding helps ensure that tribal courts are housed in better facilities and that tribal courts can hire exceptional judges and support staff. It also helps to ensure that tribal courts have access to the resources they need to effectively perform their duties, such as research the law, record proceedings, and the like.

35. Today, tribal judiciaries typically operate with significant independence from other branches of tribal governments. *See Cohen's Handbook* § 4.04[3][d], at 268–69 (stating that some tribes are passing constitutional amendments to strengthen the autonomy of tribal courts, while some tribal courts are establishing their independence through common law). For example, the Bois Forte Band of Chippewa passed a resolution precluding the Tribal Council from interfering with the Tribal Court. And tribal judges for the Lower Sioux Indian Community Tribal Council can only be removed with a 2/3 vote of the members; a 4/5 vote is required by members of the Leech Lake Band of Ojibwe.

36. Today, many who once opposed Rule 10 have changed their stance. This shift in support demonstrates the credibility that tribal courts have garnered in the public eye through diligent and fair administration of justice.

37. Finally, at least two other state have adopted a statute or rule to extend greater recognition and enforcement to tribal court orders and judgments. For instance, in 2007, the Iowa Legislature passed the Recognition and Enforcement of Tribal Court Civil Judgments Act. Iowa Code § 626D.1 *et seq.* And in 2015, the New York judiciary adopted a rule of comity for tribal courts. N.Y. Ct. R. § 202.71. This evolution further demonstrates the competence that tribal judiciaries have demonstrated and the respect they have earned.

38. Given the strides tribal courts have made since 2003 and the evolving relationship between tribal and state courts, now is the time for this Court to revisit Rule 10.

The Forum's Current Proposal

39. Although tribal courts and state courts have strengthened working relationships since 2003, state court enforcement of tribal court judgments remains inconsistent. Meanwhile, other states have continued to update their court rules and statutes regarding enforcement of tribal court orders and judgments. After investigating the developments that have occurred since 2003, the Forum has developed a proposal to simplify Rule 10 to ensure greater consistency in its implementation.

40. The attached proposed amendments to Rule 10 were approved by the Forum at its July 15, 2016 meeting. Appendix A.

PROPOSED AMENDMENTS TO RULE 10.01 AND RATIONALE

List of Federal and State Laws

41. Currently, Rule 10.01(a) provides that district courts must adhere to federal and state law that mandates recognition and enforcement of certain tribal court judgments and orders. Advisory Committee comments to Rule 10.01 then list numerous other federal and state laws that govern the recognition and enforcement of tribal court judgments and orders. But as this Court has "often cautioned, committee comments are included with rules adopted by this court for convenience and do not reflect court approval of those comments." *Nguyen v. State Farm Mut. Auto. Ins. Co.*, 558 N.W.2d 487, 489 n.4 (Minn. 1997).

42. The Forum chose the proposed reconfiguration of current Rule 10.01 due to cases in which district courts have subjected tribal court judgments and orders that fall within current

Rule 10.01 to the rule of comity under current Rule 10.02. These errors have resulted in needless delays in enforcement of tribal court judgments and orders.

43. Providing a more comprehensive list of federal and state laws that govern recognition and enforcement of tribal court judgments and orders will help district court judges know which statutes they must follow. Accordingly, proposed Rule 10.01 includes such a list of federal and state laws that govern the recognition and enforcement of tribal court judgments and orders, such as the Violence Against Women Act.

Omission of VAWA Presumption Discussion

44. Rule 10.01(b) goes on to provide that district courts must follow the procedures set forth by federal and state law, with respect to recognition and enforcement of tribal court orders and judgments. It also "fills in a gap in state law," providing that orders and judgments that fall within the scope of 18 U.S.C. § 2265 and that are "facially" valid shall be "presumptively enforceable" and honored by district courts and law enforcement. *See* Minn. Gen. R. Prac. 10 cmt. notes.

45. The Forum proposes that Rule 10.01(b)(1) be incorporated into proposed Rule 10.01, which would now instruct district courts to adhere to federal and state law that either requires or "provides rules and procedures" for recognition and enforcement of tribal court orders and judgments.

46. The Forum also proposes omitting Rule 10.01(b)(2). Since this Court adopted Rule 10, the Minnesota Legislature appears to have filled the gap referenced by the Committee. *See* Minn. Stat. § 518B.01, subd. 19a (2014) (discussing when an order is presumed valid). Furthermore, proposed Rule 10.01 would solely instruct district courts to follow existing federal

and state law. The Forum believes that incorporating language that "fills in a gap in state law" would be inconsistent with the purposes of Rule 10.01.

PROPOSED AMENDMENTS TO RULE 10.02 AND RATIONALE

47. Currently, Rule 10.02 provides that where recognition and enforcement of a tribal court judgment or order is not governed by federal or state law, a district court *may* consider any of numerous and *non-exclusive* factors in deciding whether to recognize and enforce the judgment or order. Among those factors for district court consideration are numerous elements of due process, reciprocity, and "any other factors the court deems appropriate in the interests of justice."

48. The Advisory Committee comments indicate that the rationale behind Rule 10.02 is the "inherently flexible" nature of the rule of comity. *See* Minn. Gen. R. Prac. 10 cmt. notes. Accordingly, under Rule 10.02, "[a] court asked to decide whether to recognize a foreign order can consider whatever aspects of the foreign court proceedings it deems relevant." *See id.*

49. As the Committee noted in 2003, Rule 10.02 is "only hortatory in nature." It imposes limited, if any, obligation on district courts to recognize and enforce tribal court orders and judgments not subject to Rule 10.01. Moreover, Rule 10.02's complex and non-exhaustive list of considerations may lead to confusion among district courts about the parameters of their review of tribal court orders and judgments.

50. Proposed Rule 10.02 creates a presumption that comity must be extended to tribal court orders and judgments. It goes on to provide that a party to the judgment or order may overcome the presumption by proving any of the following: (1) "the tribal court lacked personal or subject matter jurisdiction," (2) "the party was not afforded fundamental due process rights," (3) "the tribal court order or judgment was obtained by extrinsic fraud, duress, or coercion," (4) "the tribal court order or judgment contravenes the public policy of this state," or (5) "the tribal

court does not reciprocally provide for recognition and enforcement of orders and judgments of the courts of this state."

51. Proposed Rule 10.02 largely reflect the rule of comity laid down in *Hilton*:

> [W]e are satisfied that where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh . . . .

159 U.S. at 202–03. However, proposed Rule 10.02 imposes an additional basis for objecting to recognition: reciprocity. This Court has declined to impose reciprocity as a prerequisite for recognition and enforcement of other foreign judgments. *See Nicol v. Tanner*, 310 Minn. 68, 78, 256 N.W.2d 796, 801 (1976) ("We . . . hold that reciprocity is not a prerequisite to enforcement of a foreign judgment in Minnesota.").

52. Nine states have adopted similar rules of comity—whether by rule or common law—for tribal court orders and judgment.

53. In Alaska, a district court is obliged to recognize and enforce tribal court judgments unless (1) "the tribal court lacked personal or subject matter jurisdiction" or (2) "any litigant is denied due process." *See John v. Baker*, 982 P.2d 738, 763 (Alaska 1999).

54. In Arizona, "[a] tribal judgment, unless objected to . . . , shall be recognized and enforced by the [state courts] to the same extent and shall have the same effect as any judgment, order, or decree of a [state court]." Ariz. R. P. Recognition Tribal Ct. Civ. Judgment 5(a). If a party objects to recognition and enforcement of a tribal court judgment, it "shall not be recognized and enforced if the objecting party demonstrates to the court at least one of the following:" (1) "[t]he tribal court did not have personal or subject matter jurisdiction" or (2) "[t]he defendant was

not afforded due process." Ariz. R. P. Recognition Tribal Ct. Civ. Judgment 5(c). Additionally, a state court "may, in its discretion, recognize and enforce or decline to recognize and enforce a tribal judgment on equitable grounds, including:" (1) "[t]he tribal judgment was obtained by extrinsic fraud" or (2) "[t]he tribal judgment conflicts with another final judgment that is entitled to recognition." Ariz. R. P. Recognition Tribal Ct. Civ. Judgment 5(d).

55. In Michigan, as previously discussed, a tribal court judgment, decree, order warrant, subpoena, record, or other judicial act is presumed valid and enforceable if a tribal court "enacts an ordinance, court rule, or other binding measure that obligates the tribal court to enforce the judgments, decrees, orders, warrants, subpoenas, records, and other judicial acts" of the state courts and transmits the ordinance, court rule, or other binding measure to the state court administrator. Mich. Ct. R. 2.615(B), (C). However, a party may overcome that presumption. To do so, they must demonstrate:

> (1) the tribal court lacked personal or subject-matter jurisdiction, or
> (2) the judgment, decree, order, warrant, subpoena, record, or other judicial act of the tribal court
>
> > (a) was obtained by fraud, duress, or coercion,
> > (b) was obtained without fair notice or a fair hearing,
> > (c) is repugnant to the public policy of the State of Michigan, or
> > (d) is not final under the laws and procedures of the tribal court.

Mich. Ct. R. 2.615(C).

56. In New Jersey, when considering whether to enforce a tribal court order or judgment, courts "must determine whether the [tribal] court had jurisdiction over the subject matter and the person against whom judgment was rendered" and whether enforcement of the order or judgment is "against the public policy of New Jersey." *Mashantucket Pequot Gaming Enter. v. Malhorta*, 740 A.2d 703, 705–06 (N.J. 1999).

57. In New York, a party can initiate a special proceeding in supreme court of an appropriate county for recognition of an order, decree, or judgment of "a court duly established under tribal or federal law by any Indian tribe, band or nation recognized by the State of New York or by the United States." N.Y. Ct. R. § 202.71. "If the court finds that the judgment, decree or order is entitled to recognition under principles of the common law of comity, it shall direct entry of the tribal judgment, decree or order as a judgment, decree or order of the Supreme Court of the State of New York." *Id.*

58. In North Dakota, "judicial orders and judgments of tribal courts within the state of North Dakota, unless objected to, are recognized." N.D. R. Ct. 7.2(b). And if a party objects to recognition of the order or judgment, the court "must be satisfied, upon application and proof by the objecting part," that the following are true:

> (1) The tribal court had personal and subject matter jurisdiction;
> (2) The order or judgment was obtained without fraud, duress, or coercion;
> (3) The order or judgment was obtained through a process that afforded fair notice and a fair hearing;
> (4) The order or judgment does not contravene the public policy of the state of North Dakota; and
> (5) The order or judgment is final under the laws and procedures of the rendering court."

Id.

59. In Oklahoma, a court must recognize and enforce a tribal court judgment if (1) "the tribal court that issued the judgment grants reciprocity to judgments of the courts of the State of Oklahoma," R. Dist. Courts Okla. 30(b), (2) "the court rendering the judgment [had] jurisdiction," *Barrett v. Barrett*, 878 P.2d 1051, 1054 (Okla. 1994) (quotation omitted), and (3) "the judgment was [not] obtained by extrinsic fraud," *id.* (quotation omitted).

60. In Oregon, tribal court decrees are "entitled to the same deference shown decisions of foreign nations as a matter of comity." *In re Matter of Red Fox*, 542 P.2d 918, 921 (Or. Ct.

App. 1975). Thus, district courts are obliged to recognize and enforce tribal court decrees, so long as (1) "the [tribal court] had jurisdiction over both the subject matter and the parties," (2) "the decree was not obtained fraudulently," (3) "the decree was rendered under a system of law reasonably assuring the requisites of an impartial administration of justice—due notice and a hearing," and (4) "the judgment did not contravene the public policy" of the state. *See In re Matter of Red Fox*, 542 P.2d 918, 921 (Or. Ct. App. 1975).

61. In Washington, state courts

> shall recognize, implement and enforce the orders, judgments and decrees of Indian tribal courts in matters in which either the exclusive or concurrent jurisdiction has been granted or reserved to an Indian tribal court of a federally recognized tribe under the Laws of the United States, unless the [state] court finds the tribal court that rendered the order, judgment or decree (1) lacked jurisdiction over a party or the subject matter, (2) denied due process as provided by the Indian Civil Rights Act of 1968, or (3) does not reciprocally provide for recognition and implementation of orders, judgments and decrees of the [state] courts.

Wash. Civ. R. 82.5.

62. The above list of court rules and decisions demonstrates that a number of state judiciaries believe they have the authority to adopt their own procedural rules regarding recognition and enforcement of tribal court orders and judgments. In fact, the Oklahoma Legislature appears to take the same position. In an apparent effort to alleviate any concerns regarding the authority of the Oklahoma's Supreme Court's to adopt a rule of comity or full faith and credit for tribal court orders and judgments, the Oklahoma Legislature enacted legislation recognizing the same. *See* Okla. Stat. tit. 12, § 728 (1992). This enactment did not delegate authority to the state's high court. Rather it simply affirmed the court's own authority:

> A. This act affirms the power of the Supreme Court of the State of Oklahoma to issue standards for extending full faith and credit to the records and judicial proceedings of any court of any federally recognized Indian nation, tribe, band or political subdivision thereof, including courts of Indian offenses.

> B. In issuing any such standard the Supreme Court of the State of Oklahoma may extend such recognition in whole or in part to such type or types of judgments of the tribal courts as it deems appropriate where tribal courts agree to grant reciprocity of judgments of the courts of the State of Oklahoma in such tribal courts.

Id.

63. The Forum is aware of only five state legislatures that have enacted statutes governing general recognition and enforcement of all tribal court orders and judgments. Iowa Code § 626D.1 *et seq.*; N.C. Gen. Stat. § 1E-1; S.D. Stat. § 1-1-25; Wis. Stat. § 806.245; Wyo. Stat. Ann. § 5-1-11.

64. That the judicial branches of the nine states listed in paragraphs 54 through 62 found themselves vested with the power to instituted their own standards for recognition and enforcement of tribal court orders and judgments makes sense, given the material distinctions between full faith and credit and comity. For instance, full faith and credit provides a court with the limited ability to deny enforcement of a foreign judgment or order when it determines that the order or judgment was obtained by fraud or where the issuing court lacked jurisdiction. *Cohen's Handbook* § 7.07[2][a], at 661–62 (citing William M. Richman & William L. Reynolds, Understanding Conflict of Laws §§ 114–15, at 375–86 (3d ed. 2002, 2003 reprint) and Russell J. Weintraub, Commentary on the Conflict of Laws §§ 11.1–11.5, at 696–702 (6th ed. 2010)). Even attacks on jurisdiction cannot be heard unless the matter was not litigated in the foreign court. *Id.* § 7.07[2][a], at 662 (citing *Sherrer v. Sherrer*, 334 U.S. 343 (1951), Richman, *supra* § 115[d][1], at 381, and Weintraub, *supra* § 11.3, at 698–99). Comity, unlike full faith and credit, provides a court with discretion to deny enforcement of a foreign judgment or order because the foreign court failed to provide due process or because the order or judgment violates public policy of the court. *Id.* (citing Richman, *supra* § 115[c], [d], at 378–81 and Weintraub, *supra* § 11.6, at 703). And unlike full faith and credit, comity allows for the imposition of a reciprocity requirement. *See*

Cohen's Handbook § 7.07[2][a], at 663. Proposed Rule 10.02 provides district courts with the expansive discretion found under the doctrine of comity.

65. And under the doctrine of comity, state and federal courts generally presume that foreign judgments are entitled to recognition and enforcement. *See* Restatement (Third) of Foreign Relations Law § 481; Cedric C. Chao & Christine S. Neuhoff, *Enforcement and Recognition of Foreign Judgments in United States Courts: A Practical Perspective*, 29 Pepp. L. Rev. 147, 149 (2001). The person against whom the judgment is being enforced bears the burden of showing that a foreign judgment is not entitled to recognition or enforcement. Chao and Neuhoff, *supra*. Proposed Rule 10.02 creates a similar presumption that applies to tribal court orders and judgments. It is not outcome determinative. It merely establishes that a party must demonstrate why a tribal court order or judgment should not be recognized and enforced.

66. Under the above framework, proposed Rule 10.02 is not a full-faith-and-credit rule. It is a procedural rule to ensure that district courts consistently apply the doctrine of comity to tribal court orders and judgments.

67. The Forum proposes Rules 10.02, because it will help alleviate the pervasive confusion about the degree and type of discretion afforded to district courts when deciding whether to recognize and enforce a tribal court judgment or order. Confusion regarding the type and degree of discretion afforded district courts under Rule 10.02 festers among district courts and litigants. That confusion leaves open the potential for continued mistreatment of tribal court judgments and orders. Such mistreatment both harms litigants, who are deprived of timely justice, and offends notions of mutual respect among sovereigns, *see Hilton*, 159 U.S. at 163–64 ("'Comity' . . . is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.").

68. Proposed Rule 10.02 will reduce the confusion created by current Rule 10.02 because it includes fewer factors for district courts and litigants to analyze, omitting, among others, current Rule 10.02's catch-all factor. And by reducing the numerous specific due-process factors to a more general factor, proposed Rule 10.02 will not undermine the efforts of the Court and the advisory committee to ensure that Minnesota courts are not limited in their evaluation of whether a party received due process.

69. Proposed Rule 10.02 will consequently provide clearer guidance to district courts and litigants regarding the relevant considerations for determining whether a tribal court judgment or order should be recognized and enforced. The result will be more consistent and appropriate treatment of tribal court judgments and orders by district courts and litigants. Consequently, litigants will have greater certainty in the finality of such judgments and orders. In addition, tribal and state courts will receive the mutual respect they are due.

70. The Forum also chose proposed Rule 10.02 due to the practical need for faster recognition and enforcement of tribal court orders and judgments. Such need is perhaps most clear in the context of conservatorships and civil commitments, where tribal courts, through their judgments or orders, call upon various third-party institutions to provide necessary care to persons under the protection of tribes. Often, these institutions will not cooperate unless presented with state district court orders enforcing tribal court judgments or orders. But district courts can take many days, or even weeks, to issue their orders. For example, the Lower Sioux Tribal Court recently issued an order for placement of a chemically dependent pregnant woman that was continuing to use drugs during the second trimester of her pregnancy. The facility to which the tribal court ordered the woman's placement does not accept tribal court orders, so the tribe petitioned the Redwood County District Court to recognize and enforce the placement

order. Due to unfamiliarity with the tribe's law, a substitute judge presiding in the district court instructed the tribe to file a memorandum and request a hearing on the matter. Consequently, the woman's placement was delayed, allowing for more harm to her and her unborn child.

71. Proposed Rule 10.02 would alleviate the delays in district court recognition and enforcement proceedings by providing a more clear and concise set of guidelines to follow, reducing the analytical burden presented by current Rule 10.02. Consequently, district courts could issue their orders faster and reduce the delays in institutional cooperation with tribal court judgments and orders.

CONCLUSION

Now is the time for this Court to revisit Rule 10. And the Forum believes that its proposal best addresses the concerns presented in Rule 10. For the foregoing reasons, the Forum petitions this Court to adopt the proposed amendments to Rule 10 of the MGRP.

Dated: November 30, 2016 MINNESOTA TRIBAL COURT/STATE COURT FORUM

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