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**Re: Supplemental Filings for Petition of Minnesota Tribal Court/State Court Forum to Amend Rule 10**

We represent the Shakopee Mdewakanton Sioux Community, the Lower Sioux Indian Community, the Upper Sioux Community, and the Prairie Island Indian Community. On March 31, 2017, the Minnesota Supreme Court Advisory Committee on General Rules of Practice held a public hearing related to the Petition to Amend Rule 10 filed by the Minnesota Tribal Court/State Court Forum. The Advisory Committee then asked for supplemental written materials related to the following questions.

- 1.) Is the proposed change substantive or procedural?
- 2.) Do tribal court civil monetary judgments immediately become liens when filed in Minnesota?
- 3.) How would the proposed change address law enforcement officers not honoring lawful tribal court orders?
- 4.) To what extent would there be reciprocal recognition for state court orders in tribal courts?
- 5.) What model does the current proposal follow and what has been the experience in those jurisdictions?
- 6.) How can a tribal court ordering a civil commitment do so without making the commitment facility a party to the proceedings?
- 7.) How are tribal court judges selected?
- 8.) What meets the burden to “demonstrate” one of the veto items?
- 9.) Are tribal court records public?

We respectfully submit this joint response to questions 1, 4, 5, 7, 8, and 9. It is our understanding that the petitioners in this matter will file responses to all the supplemental topics as well.

**Question 1. Is the proposed change substantive or procedural?**

The proposed change to Rule 10 is procedural in nature. As a procedural rule, the current proposal does not dictate substantive law to state courts.

**Question 4. To what extent would there be reciprocal recognition for state court orders in tribal courts?**

The development of a tribal judicial system is the ultimate expression of inherent tribal sovereignty. Tribes have inherent authority to create laws and be governed by them. In fact, the ability of a tribe to enact, enforce, and interpret its own laws and be governed by them is one of the most recognized powers of any sovereign. *See e.g. Williams v. Lee*, 358 U.S. 217 (1959). This inherent authority does not depend on a grant of authority from the federal government. *U.S. v. Wheeler*, 435 U.S. 313, 328(1978) (“Tribal authority is inherent in the tribes’ retained sovereignty; it does not arise by delegation from the federal government.”) Such authority exists because of the sovereignty that existed prior to “the arrival of non-Natives on this continent.” *Native Village of Venetie I.R.A. Council v. State of Alaska*, 944 F.2d 548, 556 (9<sup>th</sup> Cir.1991). “The practical result of [tribal inherent sovereignty] is that an Indian tribe need not wait for an affirmative grant of authority from Congress ...[s]overeign authority is presumed until Congress affirmatively acts to take such authority away.” *Id.* at 556. (*citing Wheeler*, 435 U.S. at 323). The U.S. Supreme Court has recognized that “tribal courts are best qualified to interpret and apply tribal law.” *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987).

Due to the inherent sovereign authority of Indian tribes to make their own laws and be governed by them, the reciprocal recognition of state court orders by tribal courts will differ from tribe to tribe.

The General Council of the Shakopee Mdewakanton Sioux Community (“SMSC”) exercised its inherent sovereignty in 1988 to enact General Council Ordinance No. 02-13-88-01 (the “Tribal Court Ordinance”). The Tribal Court Ordinance created the SMSC Tribal Court and delegated authority to the court in certain areas. Pursuant to the authority included in the Tribal Court Ordinance, the SMSC Tribal Court adopted comprehensive Tribal Court Rules of Civil Procedure (“Tribal Court R. Civ. Pro.”). Rule 34 of the Tribal Court R. Civ. Pro. governs the recognition of foreign judgments. Under Rule 34, a party seeking enforcement of a foreign judgment must file a petition with the Tribal Court. Each person whom the petitioner seeks to enforce the judgment against must be served and given an opportunity to respond. Then the SMSC Tribal Court reviews the petition, the attached materials, and any of the pleadings to determine if jurisdiction of the foreign court was proper and if there was regularity in the proceedings of the foreign court. If no substantial question appears with respect to the jurisdiction and regularity of proceedings, the Tribal Court will enter an order enforcing the foreign judgment.

The Upper Sioux Community (“USC”) established the Tribal Court of the Upper Sioux Community in 1993, pursuant to USC Resolution 39-93. The USC Tribal Court was established to adjudicate disputes of a civil nature which arise on or affect the Upper Sioux Community and its members. The USC Tribal Court has established procedures and processes for the docketing and enforcement of foreign judgments. In accordance with Title 4, Chapter VII, Section 1 of the Upper Sioux Community Judicial Code, the Upper Sioux Community will honor a final order, judgment, or decree from other courts provided the other court or jurisdiction honors court orders, judgments, and decrees from the Upper Sioux Community Tribal Court.

The Tribal Court of the Lower Sioux Indian Community enforces and grants full faith and credit to final judgments for money damages from other jurisdictions pursuant to Section 1.08 of the Lower Sioux Community Judicial Code. A petition to enforce a foreign judgment is filed with the Tribal Court and must be properly served on the interested parties. Each respondent is given twenty days from the date of service within which to respond. If no substantial question appears with respect to the jurisdiction of the foreign court and the regularity of the proceedings, the Tribal Court shall enter an order enforcing the foreign money judgment.

The Prairie Island Indian Community established the Prairie Island Mdewakanton Dakota Tribal Court (“Prairie Island Tribal Court”) in 1992. Composition of the Prairie Island Tribal Court and the governing rules are set forth in a comprehensive Judicial Code. The Prairie Island Tribal Court enforces and grants full faith and credit to judgments from other jurisdictions. Judicial Code, Title 1, Section VIII governs the process.

**Question 5. What model does the current proposal follow and what has been the experience in those jurisdictions?**

The jurisdictions that have adopted statutory law or judicial rules related to the enforcement of tribal court orders can be broken down into three categories. The first category includes states that are highly deferential to tribal court orders. The jurisdictions in this category, such as Idaho, New Mexico, and Oklahoma, accord tribal court judgments full faith and credit. Tribal court orders receive the same treatment as judgments and orders from sister states. Kevin Washburn, *A Different Kind of Symmetry*, 34 New Mexico Law Review 263 (2004). The second category includes states that apply rules of comity to tribal court orders and judgments. Most of the states that enforce tribal court judgments fall within this category. The third category includes states that have adopted recognition regimes that are disrespectful to tribal court orders.

South Dakota, for instance, created a strong presumption against the recognition of tribal court orders. A party seeking recognition of a tribal court judgment must prove by clear and convincing evidence that: the tribal court had jurisdiction; the judgment was not fraudulently obtained; the process used assured due process; the order complied with the regulations of the jurisdiction in which it was obtained; and the judgment does not contravene the public policy of the State of South Dakota. A tribal court order may receive recognition in South Dakota only after these requirements have been established by clear and convincing evidence. S.D. Codified Laws §1-1-25(a)-(e).

The model that the current proposal follows is most like the states that apply rules of comity to tribal court orders. At least nine states apply comity to tribal court orders and judgments in a similar fashion to the current proposal. A similar rule adopted in Michigan has greatly increased the efficiency by which foreign child support and garnishment orders receive recognition in tribal and state courts. *See* Indigenous Law and Policy Center Comment. The State of Arizona applies a similar analysis to the current proposal if an objection is filed to the recognition of the tribal court judgment, order, or decree. The Arizona analysis has resulted in a process that ensures that the necessary factors for recognition are met, such as proper jurisdiction and due process, while remaining respectful of tribal judicial institutions.

**Question 7. How are tribal court judges selected?**

Due to the inherent sovereign authority of Indian tribes to make their own laws and be governed by them, the selection of tribal court judges will differ from tribe to tribe. The selection of tribal court judges for the Shakopee Mdewakanton Sioux Community (“SMSC”) is governed by General Council Ordinance No. 02-13-88-01 (the “Tribal Court Ordinance”). The Tribal Court Ordinance initially created a three-judge court but was subsequently amended to

authorize the appointment of up to three pro tem judges. Tribal Court Judges must be licensed attorneys.

Initial appointments to the SMSC Tribal Court were made in the Tribal Court Ordinance itself. To avoid the exertion of political influence over the Tribal Court, the SMSC General Council created lifetime tenure for the court's judges. Two of the judges that were appointed by the Tribal Court Ordinance still serve on the Tribal Court. The third judge was appointed to the Tribal Court in 2007. Section IV of the Tribal Court Ordinance governs subsequent appointments to the Tribal Court. To serve on the Tribal Court, an individual must be nominated by the Chairman of the Business Council and confirmed by the General Council. The General Council is the legislative body of the SMSC and consists of all adult voting members of the Community. Once appointed, a Tribal Court judge may only be removed by a two-thirds (2/3) vote of the General Council.

USC Tribal Court judges must possess following qualifications: A Juris Doctorate Degree in law and experience in federal Indian law, and be 25 years or older. A USC Tribal Court judge must support and defend the Constitution of the United States, the Constitution of the Upper Sioux Community, and the laws of the Upper Sioux Community.

The Lower Sioux Tribal Court is comprised of three judges, all of whom must be lawyers experienced in the practice of Tribal and federal Indian law and licensed to practice in the highest court of any state. Judges at Lower Sioux may be selected by contract or appointment but may only be removed upon a two-thirds (2/3) referendum vote of all eligible voting members of the Tribe.

The Prairie Island Tribal Court is comprised of both trial level judges and court of appeals justices. Bases for judge or justice removal are very limited pursuant to Judicial Code

Title 1, Ch. III(10), and removal requires a two-thirds (2/3) vote of the Tribal Council following notice and opportunity to be heard.

**Question 8. What meets the burden to demonstrate one of the veto items?**

Some tribal adversaries have stated that the current proposal places an undue burden on litigants against whom the recognition of tribal court judgments is sought. They argue that litigants should not be forced to challenge the validity of tribal court judgments and instead the burden should be placed on the individual seeking recognition to prove that the tribal court order is valid. This argument advocates for a presumption against the validity of tribal court orders that is disrespectful to tribal judicial institutions. Likewise, this argument portrays the jurisdictional deliberations and due process protections of tribal courts as perfunctory. This position completely ignores the realities of contemporary tribal court practice.

Most cases before tribal courts involve tribal members who reside within Indian country. Tribal court jurisdiction in these cases is easily established. Conversely, cases involving non-members or non-residents require tribal courts to review jurisdictional elements and due process concerns with extreme care. In fact, the jurisdictional elements of a case and the due process protections afforded by tribal law are often heavily litigated. A non-member that is hailed into tribal court will typically take two preliminary actions. First, the non-member will challenge the jurisdiction of the tribal court by filing a limited appearance to contest jurisdiction. Secondly, the non-member will attack the validity of the court by arguing that the tribal judiciary cannot afford the necessary elements of due process to a litigant because of their status as a non-member. Tribal court judges are well versed in these arguments but still consider them with care. The reality of contemporary tribal court proceedings is that in most cases, jurisdictional challenges and due process considerations have received inordinate amounts of attention from

the court. These matters have been decided well in advance of foreign enforcement being sought. For this reason, placing the burden on the individual seeking recognition to prove that the tribal court order is valid is unnecessary.

The current proposal allows the exhaustion doctrine announced in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians* to function correctly. 471 U.S. 845 (1985). Tribal exhaustion not only requires that the tribal court decides whether it has jurisdiction in the first instance but it also requires that the tribal court consider if the due process protections included in tribal law are sufficient vis-a-vis non-member litigants. Requiring an individual seeking enforcement to establish the validity of a tribal court order would frustrate the tribal exhaustion doctrine. Essentially, an adverse party would be allowed to challenge tribal court jurisdiction or due process protections in the first instance in state court, thus turning tribal exhaustion on its head.

Finally, the burden for demonstrating one of the “veto” items would be a matter of federal and state substantive law. The doctrines of comity, adjudicatory jurisdiction, and due process have been legislated and litigated at the federal and state levels for decades. As a procedural rule, the current proposal does not dictate substantive law to state courts when analyzing a petition to seek recognition of a tribal court order, decree, or judgment.

**Question 9. Are tribal court records public?**

Due to the inherent sovereign authority of Indian tribes to make their own laws and be governed by them, the availability of tribal court records to the public will differ from tribe to tribe. The Shakopee Mdewakanton Sioux Community Tribal Court has developed a reporter system, a digest of its opinions, and a citator. The Tribal Court has published six volumes of trial court opinions and two volumes of appellate court opinions. Copies of the reporters, the

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digest, and the citator have been placed in the libraries of the three Minnesota law schools; in the law library of the U.S. Court of Appeals for the Eighth Circuit and the U.S. District Court for the District of Minnesota; and the law libraries of Scott, Dakota, Hennepin, and Ramsey Counties. Copies of the reporter and digest system can also be purchased by the public from the SMSC Clerk of Court.

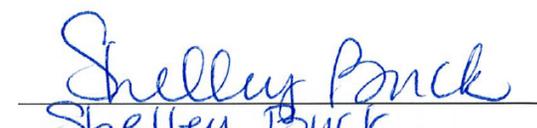
The Prairie Island Tribal Court civil records are publicly available upon request, except for records from certain types of confidential domestic relations and child protection proceedings.

Thank you for providing us with this opportunity to supplement the Rule 10 filings as well as your careful consideration of the Petition to Amend Rule 10.

  
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