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Fredericks v. Elde-Kirschmann Ford: The Vehicle to Enforcing Tribal Court Civil Judgements

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FREDERICKS V. EIDE-KIRSCHMANN FORD: THE VEHICLE TO ENFORCING TRIBAL COURT CIVIL JUDGMENTS

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Most practitioners will admit, if not readily acknowledge, that their interest in Indian law is limited.[1] With the twilight debates which echoed off the law school walls long since past, the general practitioner has left the questions of tribal court sovereignty and jurisdiction to the occasional specialist and those of us with a genuine interest. When these subjects do arise it is most likely to concern a comparison of state, federal and tribal criminal jurisdiction because of the increased publicity and interest that such actions tend to receive.[2]

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1. For an excellent overview of Indian law, see FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1982 ed.); W.C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL (2d ed. 1988).

In North Dakota the general practitioner's civil exposure to tribal court may likely be collection matters. *See generally* Jesse C. Trentadue, *Tribal Court Jurisdiction Over Collection Suits By Local Merchants and Lenders: An Obstacle to Credit for Reservation Indians?*, 13 AM. INDIAN L. REV. 1 (1987-88). Non-Indian creditors asserting an action against an Indian debtor may be required to bring their action in tribal court. *Id.* at 31.

> When the debtor is a tribal member and the debt arose on the reservation, a collection suit cannot be brought in state court. Likewise, if the collateral is personal property located on the reservation, state courts are without the authority to compel its return. . . . If land is pledged as security for the debt, and this is Indian-owned and lying within a reservation's boundaries, North Dakota courts have no jurisdiction over the property.

Id. at 28 n.175 (citations omitted).

2. Congress has been provided with the complete control over regulating Indian affairs through the Commerce Clause of the United States Constitution. U.S. CONST. art. I, § 8, cl. 3. Control over criminal jurisdiction has been codified in the Indian Country Crimes Act and the Indian Major Crimes Act. *See* 18 U.S.C. § 1152 (1988); 18 U.S.C. § 1153 (1988). The Indian Country Crimes Act establishes federal jurisdiction over interracial crimes occurring in Indian Country. 18 U.S.C. § 1152 (1988). The Assimilative Crimes Act allows federal authorities to use state criminal law to prosecute crimes occurring in Indian country where there are no applicable federal laws. *See* 18 U.S.C. § 13 (1988). Federal jurisdiction over thirteen major crimes is established by the Indian Major Crimes Act. 18 U.S.C. § 1153 (1988). For a brief overview of federal criminal jurisdiction, see Frank Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329, 332-33 (1989).

Tribal courts have criminal jurisdiction over Indian defendants where federal jurisdiction has not been mandated by the Indian Country Crimes Act or the Major Crimes Act. *Id.* at 333. Tribal court jurisdiction extends only over members of the tribe. United States v. Wheeler, 435 U.S. 313, 322-23 (1978). Tribal courts are precluded from exercising any criminal jurisdiction over non-Indians. Oliphant v. Suquamish Indian Tribes, 435 U.S. 191 (1978). Tribal courts are further precluded from exercising criminal jurisdiction over non-member Indians. Duro v. Reina, 495 U.S. 676 (1990).

The extent of state jurisdiction over criminal acts occurring on the reservation is well defined. States only have criminal jurisdiction over offenses involving Indians if such jurisdiction has been expressly granted to the state by the federal government. *E.g.*, Solem v. Bartlett, 465 U.S. 463, 465 n.2 (1984). Without a delegation of jurisdiction by the Indian

Occasionally, a decision will be rendered in an Indian law case which should be noted by the bar as a whole.[3] Generally, these "noteworthy" cases involve criminal jurisdiction[4] and it is only rarely that such a case addresses questions of civil law.[5] The North Dakota Supreme Court's recent decision in *Fredericks v. Eide-Kirschmann Ford*[6] is one such noteworthy decision in the area of civil jurisdiction.[7]

This article will attempt to provide a broad overview of the *Fredericks* opinion. First, this article will provide a brief discussion of the origins and parameters of tribal civil jurisdiction. Second, the legal concept of comity and its application to tribal court jurisdiction will be addressed. Third, the *Fredericks* decision itself will be analyzed.

I. JURISDICTIONAL OVERVIEW[8]

A. CASE LAW

The foundation of modern tribal jurisdiction can be traced to

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tribe to the state, state jurisdiction over criminal offenses is limited to victimless crimes by non-Indians and crimes involving only non-Indian perpetrators and victims. *Id.*

3. Although most practitioners do not spend a great deal of time or energy analyzing each Indian law decision which is written, this is not to imply that some Indian law cases are not important; but rather, as with any area of the law, some decisions have a greater scope of impact than other decisions. Considering that there are five Indian reservations located completely or partially within the State of North Dakota, it is likely that the average general practitioner in North Dakota has a greater interest in and understanding of Indian law than practitioners from other states. Trentadue, *supra* note 1, at 12 (citing U.S. Bureau of the Census, Supplementary Report, American Indian Areas and Alaska Native Villages: 1980 Census of Population 24 (1984)). The following Indian reservations are located entirely or partially within North Dakota: Fort Berthold, Fort Totten, Standing Rock, Turtle Mountain and Sisseton-Wahpeton. *Id.*

4. *See, e.g., Duro*, 495 U.S. at 676 (finding that tribal courts have no criminal jurisdiction over non-member Indians); *Oliphant*, 435 U.S. at 191 (stating that tribal courts do not have criminal jurisdiction over non-Indians); Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974) (noting that tribal criminal jurisdiction over members of the tribe extends to offenses committed off the reservation if the offense effects tribal rights or powers).

5. While criminal jurisdiction is largely governed by federal statutes, civil jurisdiction is not, and therefore, the contours of civil jurisdiction are less clear. Pommersheim, *supra* note 2, at 334.

6. 462 N.W.2d 164 (N.D. 1990).

7. Fredericks v. Eide-Kirschmann Ford, 462 N.W.2d 164 (N.D. 1990). There are a number of other recent North Dakota Supreme Court decisions which should also be noted. A sampling of other recent North Dakota Supreme Court opinions would include the following: State v. Hook, 476 N.W.2d 565 (N.D. 1991) (stating that a federal statute gave North Dakota State "criminal jurisdiction over the non-major offenses commited by or against Indians on the Devils Lake Indian Reservation"); Davis v. Director, N.D. Dep't of Transp., 467 N.W.2d 420 (N.D. 1991) (finding that state highways within reservation are part of the reservation and as such are not subject to state jurisdiction); Three Affiliated Tribes v. Wold Engineering, 392 N.W.2d 87 (N.D. 1986) (acceptance of state jurisdiction over claims arising in Indian country following remand from the United States Supreme Court).

8. *See* COHEN, *supra* note 1, at 122-50; Sandra Hansen, *Survey of Civil Jurisdiction in Indian Country 1990*, 16 AM. INDIAN L. REV. 319 (1991). In addition to providing an excellent overview of civil jurisdiction, Sandra Hansen provides an insightful look at the

three United States Supreme Court cases which were decided in the mid-1800's.[9] These three opinions were the initial test of how the United States Supreme Court was going to balance tribal interest in self-government and the perceived necessity of limiting external tribal power.[10]

The principles enunciated in the "original" case law can be divided into two broad categories: 1) the establishment of a dominant federal government role and 2) the protection of tribal self-government. Included within the first broad category, establishing a dominant federal government role, is the principle that federal statutes regulating the tribes and treaties with the tribes prevail over state laws.[11] Also included in this broad category is the requirement that the tribes recognize the supremacy and exclusive dominance of the United States.[12]

The second broad category of principles enunciated in the "original" case law is the establishment of the federal government's commitment to protecting the self-government of the tribes.[13] This category included the recognition of the right to self-govern all land reserved to the tribes, subject to federal

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origins of Indian "judicial" traditions. *Id.* at 319-20. It is also interesting to note that there are great differences between what many Indians consider self-government and the concept of self-government established by federal policy. *See, e.g.*, Michael M. Pacheco, *Finality In Indian Tribunal Decisions: Respecting Our Brothers' Vision*, 16 AM. INDIAN L. REV. 119 (1991). Excellent discussions of the enforcement of judgments across reservation boundaries can be found in Fred L. Ragsdale, *Problems in the Application of Full Faith and Credit for Indian Tribes*, 7 N.M. L. REV. 133 (1977); William V. Vetter, *Of Tribal Courts and "Territories": Is Faith and Credit Required?*, 23 CAL. W. L. REV. 219 (1987).

9. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823). The principles outlined in these three cases have been consistently followed. Felix S. Cohen, *Indian Rights and the Federal Courts*, 24 MINN. L. REV. 145, 149 (1940).

10. *See generally* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (formal recognition of tribal sovereignty). The recognition of tribal sovereignty has gradually eroded since the United States Supreme Court opinion in *Worcester*. *See* Pacheco, *supra* note 8, at 124-26.

11. *Worcester*, 31 U.S. at 561 (initial determination that the federal government would have dominant authority over Indian tribes). The United States Supreme Court "has never held a federal Indian statute or treaty to be an invasion of state authority, and on several occasions it has reversed contrary holdings of lower courts." Hansen, *supra* note 8, at 321 n.17 (citing United States v. Sandoval, 231 U.S. 28 (1913) as an example).

12. Treaties with the Indian Tribes often included a provision which required the tribes to acknowledge the United States as the exclusive provider of protection. *See* Hansen, *supra* note 8, at 321-22 (citing *Worcester*, 31 U.S. at 551-52). Subsequent treaties included specific language which acknowledged the tribes "dependence on the government of the United States" and acknowledging the "supremacy" of the United States. *Id.* at 322 n.19.

13. *See generally Worcester*, 31 U.S. at 515. In *Worcester*, the United States Supreme Court first recognized tribal sovereignty by recognizing the sovereignty of the Cherokees. *Id.* The Supreme Court subsequently recognized that Indian sovereignty does not stem from the United States Constitution nor is it a product of federal regulation. *See* Talton v. Mayes, 163 U.S. 376, 384-85 (1896). *See also* United States v. Wheeler, 435 U.S. 313, 322-23 (1978).

authority.[14] Additionally, the United States Supreme Court articulated a policy of construing treaties and statutes in favor of retaining and protecting tribal self-government.[15]

B. STATUTES

The most important federal statute concerning civil jurisdiction is Public Law 83-280.[16] Initially, Public Law 280 provided that six states were required to assume some form of civil jurisdiction.[17] All other states were given the option of accepting civil jurisdiction.[18] Public Law 280 was modified in 1968 to require the consent of a majority of a tribe's enrolled members prior to any assertion of state civil jurisdiction over the tribe.[19]

North Dakota initially opted to assert jurisdiction over actions between members of the tribes and non-members occurring on tribal land.[20] However, in 1963, the North Dakota Legislature

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14. *See generally Worcester,* 31 U.S. at 560-61 (tribal right to complete use of their lands). "[T]he reservation to tribes of federally protected territory is intended for the Indians' economic self-support as well as their continued self-government." Hansen, *supra* note 8, at 323.

15. *See* Allison M. Dussias, Note, *Tribal Court Jurisdiction Over Civil Disputes Involving Non-Indians: An Assessment of National Farmers Union Insurance Cos. v. Crow Tribe of Indians and a Proposal for Reform,* 20 J. L. REFORM 217, 224 n.62 (1986); COHEN, *supra* note 1, at 222 ("that treaties be liberally construed to favor Indians, that ambiguous expressions in treaties must be resolved in favor of the Indians, and that treaties should be construed as the Indians would have understood them."). The United States has assumed a fiduciary relationship with the Indian tribes and any exercise of authority by the United States must be rationally related to its obligation to guarantee the security and integrity of the tribes as independent sovereignties. *Id.* at 223-24.

16. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (1988), 25 U.S.C. §§ 1321-1326 (1988), 28 U.S.C. § 1360 (1988)). There are a number of excellent articles discussing Public Law 280, one of which is Hansen, *supra* note 8, at 335-41 (citing Carole E. Goldberg, *Public Law 280: Limits of State Jurisdiction Over Reservation Indians,* 22 UCLA L. REV. 535 (1975)).

17. Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin were initially granted civil and criminal jurisdiction. *See* Trentadue, *supra* note 1, at 6 (citing 18 U.S.C. § 1162 (1982) (criminal jurisdiction); 28 U.S.C. § 1360 (1982) (civil jurisdiction)). Alaska was not initially required to assume jurisdiction but pursuant to Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545 (codified at 18 U.S.C. § 1162(a) (1988), 28 U.S.C. § 1360(a) (1988)), mandatory jurisdiction was assumed by Alaska. Hansen, *supra* note 8, at 340-41.

18. *See* 18 U.S.C. § 1162 (1983) (assumption of criminal jurisdiction); 28 U.S.C. § 1360 (1982) (assumption of civil jurisdiction). Ten states affirmatively accepted jurisdiction over Indian country. Hansen, *supra* note 8, at 340. These ten states were Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah and Washington. *Id.* at n.124. (providing an excellent overview of the extent of jurisdiction assumed by each state and the individual state codification of the assumption of jurisdiction). *See also* N.D. CENT. CODE ch. 27-19 (1991).

19. Act of April 11, 1968, Pub. L. No. 90-284, § 402, 82 Stat. 79 (codified at 25 U.S.C. § 1322 (1988)); Act of April 11, 1968, Pub. L. No. 90-284, § 406, 82 Stat. 80 (codified at 25 U.S.C. § 1326 (1988)).

20. *See* Vermillion v. Spotted Elk, 85 N.W.2d 432 (N.D. 1957). *Vermillion* involved a personal injury action arising between two Indians on the Standing Rock Indian Reservation. *Id.* at 433. The District Court for Burleigh County certified a question of law asking "whether or not the district had jurisdiction to determine a civil cause of action arising in tort between enrolled Indians residing within the boundaries of an Indian Reservation where the cause of action arose within said reservation." *Id.* Relying on case

enacted chapter 27-19 of the North Dakota Century Code, which provided that the consent of the tribe was required prior to the assertion of state jurisdiction.[21] The 1963 enactment of a state statutory requirement of consent to jurisdiction, coupled with the similar changes to Public Law 280 in 1968, persuaded the North Dakota Supreme Court that North Dakota could no longer assert jurisdiction over claims arising on tribal lands.[22] Subsequently, the United States Supreme Court held that North Dakota cannot disclaim jurisdiction over such civil action.[23] Therefore, North

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law from states with identical provisions of the Enabling Act under which North Dakota was admitted to the Union, i.e. Montana, New Mexico and Oklahoma, the North Dakota Supreme Court held that North Dakota Courts would have such jurisdiction. *Id.* at 437-38. The North Dakota Supreme Court's holding was based upon a determination that Indians were residents of North Dakota and as such the courts of this state were open to them for prosecution of civil claims pursuant to Article I, Section 22 of the North Dakota Constitution. *Id.* The compact created by section 4 of the Enabling Act and the disclaimer in section 203 of the North Dakota Constitution only prevented North Dakota Courts from exercising civil jurisdiction over questions involving the title to land. *Id.*

21. *See* N.D. CENT. CODE ch. 27-19. *See infra* note 22, discussing the validity of section 27-19-05 of the North Dakota Century Code.

22. Gourneau v. Smith, 207 N.W.2d 256 (N.D. 1973). The *Gourneau* decision reaffirmed previous North Dakota rulings that the *Vermillion* decision was no longer applicable as a result of the enactment of chapter 27-19 of the North Dakota Century Code. *Id.* at 258.

The initial North Dakota case recognizing that Indian consent was required prior to state assumption of civil jurisdiction over Indian lands was *In re* Whiteshield, 124 N.W.2d 694 (N.D. 1963), in which the court held that section 27-19-01 of the North Dakota Century Code acted as a complete disclaimer of state jurisdiction over civil causes of action arising on Indian Lands unless the tribe had accepted jurisdiction in the manner provided by the statute. *Id.* at 698.

The court in *Gourneau* did not reject the analysis articulated in the *Vermillion* decision, but noted that although Indians are residents of the state, "Federal law prohibits State courts from assuming jurisdiction of civil actions involving Indians . . ." and which arise on Indian Land unless the tribe has previously consented to the exercise of state civil jurisdiction. *Gourneau*, 207 N.W.2d at 259.

The North Dakota Supreme Court has held that federal law rendered section 27-19-05 of the North Dakota Century Code invalid as a method for obtaining state jurisdiction over Indian country. Nelson v. Dubois, 232 N.W.2d 54 (N.D. 1975). "[S]tate jurisdiction over Indian Country may be obtained only by state and tribal compliance with Public Law 90-284, §§ 402 and 406." *Id.* at 57. *See also* Rolette County v. Eltobgi, 221 N.W.2d 645, 647 (N.D. 1974) (section 27-19-05 is "probably" ineffective).

23. Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C., 476 U.S. 877, 893 (1986). The North Dakota Supreme Court initially held that the courts of North Dakota did not have jurisdiction to hear an action brought by the Three Affiliated Tribes. Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C., 321 N.W.2d 510 (N.D. 1982). The United States Supreme Court, upon reviewing the initial North Dakota decision, vacated the North Dakota judgment and remanded the case for reconsideration. Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138 (1984). Upon reconsideration, the North Dakota Supreme Court held that the action could be brought in state court if the tribe complied with the provisions of section 27-19-05 of the North Dakota Century Code but also held that section 27-19-05 eliminated any residual jurisdiction. Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C., 364 N.W.2d 98 (N.D. 1985), *rev'd* 476 U.S. 877 (1986). Again the case was brought before the United States Supreme Court. *Three Affiliated Tribes*, 476 U.S. at 877. This time the United States Supreme Court unequivocally held that North Dakota could not disclaim jurisdiction over such suits, and reversed and remanded the case back to the North Dakota Supreme Court for further proceeding consistent with its opinion. *Id.* at 887, 892. The North Dakota Supreme Court then

Dakota initially asserted jurisdiction, then denied jurisdiction, and now has been precluded from denying jurisdiction.

C. SUMMARY

For the purposes of this discussion, the extent of state jurisdiction over claims arising in Indian country may seem to be of little importance. In considering the effect that the enforcement of tribal court decisions by North Dakota courts will have, it is more important to define the limits of tribal jurisdiction. However, it is important for the reader to understand the development of state involvement in jurisdictional issues. The North Dakota Supreme Court's decisions indicate a desire to "protect" the citizens of the state while remaining within federally mandated rules. When reviewing the North Dakota Supreme Court's application of state jurisdiction over claims arising in Indian country, I question whether the court will apply comity without concern for the identity of the promulgating forum or whether the court will choose to proceed with a "helping hand" for the tribal courts. The *Fredericks* decision seems to indicate that the North Dakota Supreme Court may apply a heightened scrutiny in the application of comity to tribal judgments.[24]

Conversely, the United States Supreme Court has repeatedly recognized that Indian tribes may assert sovereignty over their enrolled members and their property.[25] The Court has also consistently construed federal statutes, treaties and executive orders to protect the self-government rights of the tribe.[26] Essentially, tribal courts retain sovereignty over all matters which have not been withdrawn by federal treaty or statute.[27] It is within this framework that tribal courts may assert jurisdiction and establish courts for the resolution of civil claims.

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recognized the second opinion of the United States Supreme Court in Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C., 392 N.W.2d 87 (N.D. 1986).

Interestingly, Justice Vogel anticipated the implementation of "residual jurisdiction" in a 1975 North Dakota decision. *See Nelson*, 232 N.W.2d at 59-61 (Vogel, J., dissenting).

24. *See infra* notes 84-86 and accompanying text.

25. *See* Worcester v. Georgia, 31 U.S. 515 (1932). States generally do not have any legislative or judicial authority in Indian country. White Mountain Apache Tribe v. Backer, 448 U.S. 136 (1980). State authority only extends to reservations where there is specific regulation. *See* Pommersheim, *supra* note 2, at 334 n.47. *See also* Dussias, *supra* note 15, at 221-224.

26. *E.g.*, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174-75 (1973) (precluding the implementation of state taxes on reservation). *See also* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206-07 (1978).

27. *See* Dussias, *supra* note 15, at 220.

II. COMITY

Comity has been characterized as the voluntary recognition and enforcement of foreign laws in which the rights of individuals are determined.[28] Comity is "a willingness to grant a privilege not as a matter of right but out of deference and good will."[29]

There are four basic procedural requirements which must be satisfied to recognize and enforce a foreign judgment under the concept of comity.[30] These four requirements can be described as follows:

> 1) The foreign court must have jurisdiction over the cause of action;
> 2) the foreign judgment must not be obtained fraudulently;
> 3) the foreign court must allow all parties to adequately protect themselves by providing each with an opportunity to offer evidence; and
> 4) the foreign court must provide an impartial hearing which satisfies fundamental due process requirements.[31]

If foreign judgments meet all four of the above requirements, they will be enforced by a court of this state.

At this point it is important to distinguish between comity and the enforcement of judgments through the Full Faith and Credit Clause of the United States Constitution.[32] A foreign judgment issued by an Indian tribunal or a foreign country is not included within chapter 28-20.1 of the North Dakota Century Code which governs the enforcement of foreign judgements through the principles of full faith and credit.[33] "Foreign judgments" as defined under chapter 28-20.1 refers only to judgments of other states or

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28. Hilton v. Guyot, 159 U.S. 113 (1895); Lohnes v. Cloud, 254 N.W.2d 430, 433 (N.D. 1977); Mexican v. Circle Bear, 370 N.W.2d 737, 740 (S.D. 1985). *See generally* Frederic Brandfon, *Tradition and Judicial Review in the American Indian Tribal Court System*, 38 UCLA L. REV. 991, 1003 (1991).

29. *Lohnes*, 254 N.W.2d at 433.

30. *See generally Hilton*, 159 U.S. at 205-06. The North Dakota Supreme Court has summarized the elements of the "Hilton" test as outlined in the text. *See* Malaterre v. Malaterre, 293 N.W.2d 139 (N.D. 1980); Medical Arts Bldg. Ltd. v. Eralp, 290 N.W.2d 241 (N.D. 1980).

31. *Eralp*, 290 N.W.2d at 245 (citing Nicol v. Tanner, 256 N.W.2d 796, 802 (Minn. 1976).

32. *See* U.S. CONST. art. IV § 1. Article IV, section 1 of the United States Constitution is known as the Full Faith and Credit Clause of the Constitution and reads: "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." *Id.*

33. *Eralp*, 290 N.W.2d at 246.

the United States.[34] Thus, the North Dakota Supreme Court has recognized that the principle of comity is the only method of evaluating foreign country judgments and that there are no other provisions of law which would pertain to judgments of foreign countries.[35]

Although the North Dakota Supreme Court has applied the doctrine of comity to the evaluation of tribal judgments, the court has been reluctant to extend its recognition of the tribes sovereignty to the status of a foreign country.[36] Instead, the North Dakota Supreme Court has characterized the tribes as "quasi-sovereign entities,"[37] with tribal sovereignty existing only to the extent that such sovereignty has not been withdrawn by federal treaties or statutes.[38] Therefore, it is ironic that the North Dakota Supreme Court has elected to apply comity, an analytical tool used in the recognition of foreign judgments in suits between citizens of several nations, to enforce tribal judgments which it recognizes as only "quasi-sovereign entities."[39] It appears that this "quasi-sovereign" status has left North Dakota courts with an option to pick and choose when to apply principles relating to a sovereign entity and when to apply rules relating to a non-sovereign entity.

North Dakota is not alone in its application of comity to tribal court judgments. South Dakota, Arizona and Montana courts have also applied the principles of comity to tribal judgments.[40]

III. ANALYSIS OF *FREDERICKS V. EIDE-KIRSCHMANN FORD*

On May 14, 1983, Shawn D. Fredericks ("Shawn") purchased

34. *Id.* (citing Lohnes v. Cloud, 254 N.W.2d 430 (N.D. 1977)). Section 28-20.1-01 of the North Dakota Century Code defines "foreign judgment" as "any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this state." N.D. CENT. CODE § 28-20.1-01 (1991).

35. *Eralp*, 290 N.W.2d at 246. In *Eralp*, the North Dakota Supreme Court noted: "We are not aware of any other provision of law which pertains to foreign judgments or to judgments of foreign countries, and, for that matter, none has been called to our attention." *Id.*

36. *See* Fredericks v. Eide-Kirschmann Ford, 462 N.W.2d 164, 167 (N.D. 1990). The court in *Fredericks* drew a distinction between a "foreign nation" and an "Indian nation." *Id.* This distinction was based primarily on the court's recognition that tribal sovereignty may be limited by the federal government. *Id.*

37. *Lohnes*, 254 N.W.2d at 433.

38. *Fredericks*, 462 N.W.2d at 167 (citing Iowa Mut. Ins. Co. v. La Plante, 480 U.S. 9, 14 (1987)).

39. *Id.*

40. Wippert v. Blackfeet Tribe, 654 P.2d 512, 515 (Mont. 1982); *In re* Marriage of Limpy, 636 P.2d 266, 267 (Mont. 1981); State v. District Court, 609 P.2d 290, 292 (Mont. 1980); *In re* Marriage of Red Fox, 542 P.2d 918, 921 (Or. Ct. App. 1975); Mexican v. Circle Bear, 370 N.W.2d 737, 741 (S.D. 1985); One Feather v. O.S.T. Public Safety Comm'n, 482 N.W.2d 48, 49 (S.D. 1992).

a pickup from Eide-Kirschmann Ford ("Eide").[41] The pickup was purchased for $14,856 with a down payment of $3,721.35 and the remaining $11,134.75 balance, with interest, was payable in four annual installments.[42] The sales contract was co-signed by John Fredericks, Jr. ("John").[43] Both Shawn and John live on the Fort Berthold Reservation and are enrolled members of the Three Affiliated Tribes.[44]

Upon Shawn's failure to make the initial annual financing payment, Eide initiated an action in tribal court to recover the outstanding balance and repossess and sell the vehicle to satisfy the debt.[45] Eide also filed a motion seeking immediate seizure of the pickup.[46] Prior to any ruling on Eide's motion to repossess, Eide seized the pickup while it was parked off the reservation.[47] Eide then sent a letter to the clerk of the tribal court to confirm its intention to continue with the tribal court proceedings even though it had already seized the pickup.[48] Subsequently, the tribal court issued a show cause order to Shawn, justifying why Eide would not be entitled to repossess the pickup.[49]

A hearing was held on December 21, 1984, at which time Eide moved to amend its complaint to include John as a defendant with Shawn.[50] On January 18, 1985, the tribal court issued a memorandum opinion in which it concluded that Eide's repossession of the pickup violated the tribal repossession statute.[51]

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41. *Fredericks*, 462 N.W.2d at 165.

42. *Id.*

43. *Id.* John Fredericks signed the contract as a "second buyer." *Id.*

44. *Id.*

45. *Id.* The action was initiated by a summons and complaint dated September 12, 1984. *Id.*

46. *Fredericks*, 462 N.W.2d at 165.

47. *Id.* Eide repossessed the pickup while it was in Bismarck, North Dakota, through self-help procedures. *Id.*

48. *Id.* The letter was dated October 9, 1984. *Id.*

49. *Id.* The order to show cause was issued on October 23, 1984, and was directed to Shawn to show cause as to why Eide should not be allowed immediate possession of the pickup. *Id.*

50. *Id.* A subsequent amended summons and complaint was filed with the tribal court on January 9, 1985. *Id.* On January 10, 1985, Eide filed a pretrial brief repeating its request for possession and sale of the pickup, and further requesting that it be allowed to execute on any remaining balance after the proceeds of the sale had been applied to the judgment. *Id.*

51. *Fredericks*, 462 N.W.2d at 165. The tribal court decided to allow the parties to file post-trial briefs on the issue of damages. *Id.* at 165-66. In its post-trial brief, Eide asserted that it had not violated the tribal repossession statute. *Id.* at 166. The pertinent part of the tribal repossession statute reads:

> "The personal property of any Indian shall not be taken from within the exterior boundaries of the Fort Berthold Reservation under procedures of repossession, except in strict compliance with the following prescribed procedures:
> "(1) Written consent to repossess such property from within the exterior boundaries of the Reservation shall be secured by the creditor from the Indian

On April 25, 1985, the tribal court issued an order directing Eide to return the vehicle to Shawn.[52] Eide was also required to account for the lost fair use of the vehicle at a rate of ten dollars per day from the date of the seizure until its return, attorney's fees, costs, and was further required to prepare a new sales contract to be signed by Shawn and not by John.[53]

Eide appealed the tribal court decision to the Intertribal Court of Appeals.[54] Eide then sold the pickup on November 25, 1985.[55] The Intertribal Court of Appeals warned Eide to file a brief, but because Eide indicated that it no longer wished to pursue the appeal, the Intertribal Court of Appeals dismissed the appeal, directed Eide to return the pickup as ordered by the tribal court and remanded the case back to the tribal court for further proceedings consistent with the tribal court's April 25, 1985, judgment.[56]

Shawn moved to amend the trial court's order on February 11, 1986, seeking attorney's fees and damages from Eide's sale of the pickup.[57] The court issued a show cause order demanding that Eide justify why such relief should not be granted.[58] Eide did not respond to the order and the tribal court issued an amended judgment on December 30, 1986.[59] Eide was subsequently served with notice of entry of judgment and on May 3, 1989, Shawn com-

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purchaser thereof at the time the repossession at issue is sought. Such written consent shall be retained by the creditor and exhibited to the Fort Berthold Tribal Court upon proper demand.

"(2) In the absence of such written consent, repossession shall be lawfully perfected by the creditor only obtaining an order authorizing and directing such repossession issued by the Fort Berthold Tribal Court in an appropriate legal proceeding."

Id. at 165-66 n.2.

52. *Id.* at 166.

53. *Id.* Costs included telephone calls in the amount of $838.00. *Id.*

54. *Id.*

55. *Id.*

56. *Fredericks*, 462 N.W.2d at 166. Eide was ordered to file appellant brief by September 30, 1985. *Id.* In a second order by the Intertribal Court of Appeals, it was recognized that Eide had "failed to file the Appellant's Brief pursuant to Rule 4(c)," and the Intertribal Court of Appeals further noted that on October 15, 1985 counsel for Eide had indicated that Eide no longer wished to pursue the appeal. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* The tribal court issued the following amended judgment:

menced an action in the district court.[60] Both parties moved for summary judgment.[61] Eide was granted summary judgment and Shawn's motion for summary judgment to enforce the tribal court judgment was denied.[62] Shawn appealed the decision to the North Dakota Supreme Court.[63]

The North Dakota Supreme Court began its opinion by examining the general principles of comity.[64] Relying on the United States Supreme Court decision of *Hilton v. Guyot*,[65] the court outlined several factors to be considered in determining whether the tribal court decision should be recognized by the courts of this state.[66]

After implicitly concluding that the general factors warranted enforcement of the tribal court judgment, the court turned its attention to defining the difference between judgments of "foreign nations," judgments which are recognized to be enforceable through the use of the comity doctrine, and judgments of "Indian nations."[67] In concluding that Indian judgments could be enforced in a manner similar to foreign judgments, the court stated that "[w]e consider an 'Indian nation' as equivalent to a 'foreign nation' to encourage reciprocal action by the Indian tribes in this state and ultimately, to better relations between the tribes and the State of North Dakota."[68]

The court then addressed Eide's challenges to the enforcement of the tribal court judgment.[69] Eide's first challenge was to the tribal court's subject matter jurisdiction.[70] The court dis-

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"1. Court Order of April 25, 1985:
"A. Mileage $ 288.00
"B. Attorney Fees $ 500.00
"C. Phone Calls $ 50.00
"D. $10 per day loss of use from October of 1984 to April of 1986 $ 5450.00
"2. Loss of Down Payment $ 3721.00
"3. Exemplary (punitive) Damages resulting in [sic] sale of vehicle in direct violation of Court's Order of April 25, 1985 $15000.00
"TOTAL OF ALL DAMAGES $25009.00
"Interest per Tribal Code 10% from date of April 25, 1985"

Id. (quoting from the tribal court amended judgment).

60. *Id.*
61. *Fredericks*, 462 N.W.2d at 166.
62. *Id.*
63. *Id.*
64. *Id.* at 167.
65. 159 U.S. 113 (1895).
66. *Fredericks*, 462 N.W.2d at 167 (citing *Hilton*, 159 U.S. at 205-06).
67. *Id.* The Court discussed the requirements of comity and then began evaluating Eide's assertions and challenges to the implementation of comity. *Id.* at 167-71.
68. *Id.* at 168.
69. *Id.* at 167-71.
70. *Id.* at 168.

missed this argument on the basis that jurisdiction of a foreign court is presumed,[71] Eide consented to tribal court jurisdiction,[72] and the tribal constitution provided for jurisdiction.[73]

Eide's second challenge was that the tribal court erred in its implementation of the tribal repossession statute.[74] The court dismissed this challenge by noting that Eide's remedy was with the Intertribal Court of Appeals and that Eide should have thoroughly pursued a remedy in that forum.[75]

Eide then challenged the tribal court judgment on the grounds that the North Dakota Legislature had not yet indicated a level of confidence in the tribal courts sufficient to warrant enforcement of a tribal judgment.[76] Eide argued that because section 27-01-09 of the North Dakota Century Code requires a tribal judge to be a graduate of an accredited law school and hold a license to practice in at least one state prior to enforcement of a tribal "family law" judgment, the judgment in the case at hand should not be enforced.[77] The court found section 27-01-09 to be

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71. *Fredericks*, 462 N.W.2d at 168 (citing *Hilton*, 159 U.S. at 166-67).

72. *Id.* Eide consented to tribal court jurisdiction by initiating the action in tribal court. *Id.* Eide continued to assent to tribal jurisdiction by pressing its claim for a money judgment after it had seized the pickup. *Id.*

73. *Id.* "We note that Constitution and By-Laws of the Three Affiliated Tribes, Ch. 1, Subch. 3, § 2(a) provides:

> 'a. Jurisdiction. The Tribal Court . . . shall have exclusive original jurisdiction over:
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> * * * * *
>
> (2) All civil actions where the cause of action arose within the territorial jurisdiction of the courts, or in [sic] the property to be affected lies within the territorial jurisdiction of the courts; and, those cases where the parties have consented to tribal court jurisdiction in writing, by conduct, or by contract.' "

Id.

74. *Id.* at 168-69.

75. *Id.* Quoting from Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16-17 (1987), the Court recognized that Eide's failure to allow the tribal court system a full opportunity to review the judgment precluded Eide from challenging the trial court's implementation of the tribal statute in North Dakota state courts. *Id.* at 169. Eide had in effect deprived the tribal court system an opportunity to rectify any errors. *Id.*

76. *Fredericks*, 462 N.W.2d at 169.

77. *Id.* Section 27-01-09 of the North Dakota Century Code applies specifically to "family law" judgments and orders rendered by the tribal courts for the Three Affiliated Tribes. Section 27-01-09 states:

> The district courts and county courts shall recognize and cause to be enforced any judgment, decree, or order of the tribal court of the Three Affiliated Tribes of the Fort Berthold Reservation in any case involving the dissolution of marriage, the distribution of property upon divorce, child custody, adoption, and adult abuse protection order, or an adjudication of the delinquency, dependency, or neglect of Indian children if the tribal court had jurisdiction over the subject matter of the judgment, decree, or order. The tribal court judgment, decree, or order must be rendered by a judge who is a graduate of an accredited law school and holds a current valid license to practice law in at least one state. A state court may inquire as to the facts of the case or tribal law only to the extent necessary to determine whether the tribal court had jurisdiction over the subject matter of the judgment, decree, or order and personal

inapplicable and only an example of mandatory recognition which did not bar voluntary recognition as a matter of comity.[78]

Eide's final challenges were directed at the merits of the tribal decision.[79] While the court did address the specific issue of whether punitive damages would have been applicable under North Dakota law for the improper repossession of the pickup, the court declined to address the merits of the action because Eide had failed to show prejudice, fraud or any other reason why comity should not be granted.[80]

The court concluded by stating that Eide had failed to overcome the presumption that the tribal court had jurisdiction.[81] The court also stated the following:

> It appears to us that the tribal court judgment sought to be enforced was "rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them" and that the tribal court's "proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record."[82]

The court then held that the district court had erred in failing to enforce the tribal judgment as a matter of comity and reversed the judgment of the district court, remanding the matter for entry of judgment enforcing the tribal court judgment.[83]

It is foreseeable that a fair number of general practitioners in North Dakota will encounter a situation where they are asked to either enforce or defend against the recognition of a tribal court decision by the courts of the State of North Dakota. Knowledge of

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jurisdiction over the parties to the action. Recognition and enforcement of tribal court judgments, decrees, and orders under this section is conditioned upon recognition and enforcement of state court judgments, decrees, and orders by the tribal court of the Three Affiliated Tribes and tribal law enforcement agencies under the same limitations provided by this section for recognition and enforcement of tribal court judgments, decrees, and orders by state courts.

N.D. CENT. CODE § 27-01-09 (1991).

In *Fredericks*, the court concluded that section 27-01-09 was an example of mandatory recognition, regardless of the doctrine of comity. *Fredericks*, 462 N.W.2d at 169. Section 27-01-09 did not, therefore, preclude recognition under the comity doctrine. *Id.*

78. *Fredericks*, 462 N.W.2d at 169. The court further found that the doctrine of comity does not depend upon the mutual or reciprocal enforcement of judgments of this state by the "foreign" entity. *Id.* (citing Medical Arts Bldg. Ltd. v. Eralp, 290 N.W.2d 241, 246 (N.D. 1980).

79. *Id.* at 169-71.

80. *Id.* at 170 (citing Hilton v. Guyot, 159 U.S. 113, 202-03 (1895)).

81. *Id.*

82. *Id.* at 170-71 (citing *Hilton*, 159 U.S. at 205-06).

83. *Fredericks*, 462 N.W.2d at 171.

the boundaries of both state and tribal jurisdiction is essential to the application of comity. The requirement that the original court have jurisdiction over the action is a primary element of comity.

The decision in *Fredericks* is both enlightening and discouraging. On the one hand, it is encouraging to see state tribunals attempt to look beyond the racial barriers which once would have prevented the enforcement of a tribal decision. However, by applying the doctrine of comity, the North Dakota Supreme Court has resolved the question of whether tribal court judgments should be enforced by determining whether or not the tribal judgment meets traditional Anglo-justice principles. While the *Fredericks* decision can be viewed as a cornerstone for future enforcement of tribal decisions, it is clear that future applications of comity will require the tribes to develop courts which comply with Anglo-justice principles.[84] As Justice Vande Walle stated in his concurring opinion in Fredericks:

> One of the witnesses before the House Judiciary Committee which considered the legislation, in response to a question from a member of the committee, indicated that the other tribes do not have law-trained judges and an appellate procedure which would meet the requirements necessary to grant recognition to the judgments of those tribal courts. If that situation still exists, our opinion today should not be considered a carte blanche invitation to recognition of judgments of those tribal courts by the North Dakota courts.[85]

Has the court taken a step forward or has it actually continued the process of eroding Indian self-government?[86]

84. *See id.* at 171-72 (Vande Walle, J., concurring).

85. *Id.* at 172 (Vande Walle, J., concurring).

86. Many recent articles have been written regarding the continued erosion of Indian self-government. Two excellent articles are Michael M. Pacheco, *Finality In Indian Tribunal Decisions: Respecting Our Brothers' Vision*, 16 AM. INDIAN L. REV. 119 (1991); Robert Laurence, *The Enforcement of Judgments Across Indian Reservation Boundaries: Full Faith and Credit, Comity, and the Indian Civil Rights Act*, 69 OR. L. REV. 589 (1990).