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TO: House Judiciary Committee

FROM: Kansas Judicial Council; Judge James A. Patton

DATE: January 24, 2019

RE: Testimony on 2019 HB 2039 - District Court Recognition of Tribal Judgments

The Judicial Council recommends 2019 HB 2039 regarding the extension of full faith and credit to tribal judgments. The bill was requested by the Judicial Council on the recommendation of its Tribal-State Judicial Forum (Forum). The Judicial Council created the Forum in 2016 as a subcommittee of the Council, joining the 12 other states who have established tribal-state judicial forums – Arizona, California, Idaho, Michigan, Minnesota, New Mexico, New York, North Dakota, South Dakota, Utah, Washington, and Wisconsin. These forums work to strengthen the relationship between state courts and tribal courts by fostering mutual respect, encouraging cooperation and collaboration, and facilitating education and training.

Full Faith and Credit

The Full Faith and Credit Clause in Article IV, Section 1 of the U.S. Constitution requires that all states respect the "public acts, records, and judicial proceedings of every other state." The federal full faith and credit statute, 18 U.S.C. § 1738, generally applies the same requirement to courts of U.S. territories, and the U.S. Supreme Court has held that the federal courts must give judgments of the state courts the same full faith and credit that state courts must give to each other's judgments. See *e.g.*, *Cooper v. Newell*, 173 U.S. 555, 567 (1899) and *Kremer v. Chemical Const. Corp.*, 456 U.S. 461 (1982). The U.S. Supreme Court has not held that either the Full Faith and

Credit Clause or 18. U.S.C. 1738 apply to judgments of tribal courts. However, a number of state and federal courts recognize tribal judgments as a matter of comity, and other states have enacted statutes regarding recognition of tribal judgments. Comity is a legal principle under which a court will honor another court's orders out of respect for the other court system. The doctrine of comity is created and applied by courts, but – unlike full faith and credit – is not required by a statute or the Constitution.

Kansas does not have a general statute regarding tribal judgments, although there are a number of Kansas acts under which tribal judgments are recognized. These are areas in which federal law mandates that state courts give full faith and credit to tribal judgments. See, *e.g.*, the Uniform Interstate Family Support Act (K.S.A. 23-36,101 *et seq.*), the Uniform Child Custody Jurisdiction and Enforcement Act (K.S.A. 23-37,101 *et seq.*), and the Uniform Child Abduction Prevention Act (K.S.A. 23-3801 *et seq.*). Federal law also mandates recognition of tribal judgments concerning child custody under the Indian Child Welfare Act and protection orders under the Violence Against Women Act.

Despite no existing Constitutional or statutory requirement to give full faith and credit to tribal judgments in other types of cases, state and tribal courts in Kansas generally do recognize each other's judgments as a matter of comity. However, because this recognition is not mandated, there are circumstances in which a Kansas district court has refused to recognize tribal judgments and, due to tribal codes requiring reciprocity, the tribal court is then unable to recognize judgments from that district court. To rectify this situation, the Council recommends passage of HB 2039, which will require state courts to give full faith and credit to the judgments and orders of tribal courts who reciprocally honor the judgments and orders of Kansas state courts. Codifying the current practice and making it mandatory will provide certainty to litigants that judgments obtained in one court system will be honored and enforced in the other. Whether to honor a tribal judgment will be required by law and not left to a judge's discretion.

While tribal members and businesses will benefit from the certainty that judgments from tribal courts will be given full faith and credit in state courts, there are more state court judgments that need to be enforced on tribal lands than the reverse. Kansas citizens, small businesses, hospitals, and other entities located outside of tribal lands will benefit from a statute that requires recognition of judgments from tribal courts that reciprocate and honor state court judgments. This statute will ensure that garnishment orders, money judgments, and other civil orders obtained in Kansas state courts will be honored by reciprocating tribal courts.

In addition to benefitting Kansas citizens and businesses, the proposed statute will positively impact state and tribal court relations, creating a solid foundation for further collaborations that will improve the administration of justice in Kansas. Bringing more certainty to judgments can also result in better use of judicial resources.

“...[B]oth state and tribal courts are confronted with a very mobile population and an ever growing complex of business, economic and personal relationships that involve tribes, tribal enterprises and Indians and non-Indians who reside or are employed in tribal communities. Properly exercising their jurisdiction, tribal and state courts ought not to have fear their time and resources will be wasted because their judgments will not be recognized and enforced by the courts of the other sovereign. Likewise parties ought not to have to face the prospect of relitigating matters because one sovereign refuses to recognize and enforce the judgment of another.” Tom Tremaine, *Recognition and Enforcement of Tribal Court Orders in State Courts*, American Judges Association, 2013 Annual Education Conference.

The Forum reviewed other state’s laws regarding recognition of tribal judgments to determine the best way to accomplish its objective. The approaches that other states have taken are varied. Some states’ laws resemble the federal common law of comity, which is used to recognize judgments from foreign countries. In Minnesota, for example, there is no mandate to recognize and enforce tribal judgments. Instead, a list of discretionary factors is given for the judge to consider in deciding whether to recognize and enforce a tribal judgment. South Dakota has a similar list of factors, but is even less respectful to tribal courts because invalidity is presumed. The party seeking recognition of a tribal judgment must establish by clear and convincing evidence that the judgment complies with the standards. The law in a number of states has been crafted by judicial decisions and is not statutory. The purest full faith and credit afforded to tribal judgments is found in New Mexico and Idaho, whose courts have held that tribes are “territories” under 28 U.S.C. § 1738, the federal full faith and credit statute.

2018 HB 2039 is similar to the approach taken in Oklahoma and involves a combination of statute and court rule. Section 1 of the bill authorizes the Supreme Court to adopt rules governing the process of granting full faith and credit to tribal judgments, provided that the Court may extend recognition only to judgments of tribal courts that reciprocate and grant full faith to Kansas state court judgments. It leaves to the Supreme Court the task of creating by rule an appropriate system of identifying and keeping a record of tribes that reciprocally give full faith and credit to orders and judgments of Kansas state courts.

Addition to Bill

Although there are tribal judges sitting as members of the Forum, approval of the proposed statute was also sought from the tribes themselves, through their tribal councils. The Forum received feedback from the tribes and made changes to the original proposal. Due to an oversight, one amendment, which was unanimously approved by the Forum, was not included in the final version sent to the Revisor. The Council requests that a new Section 2 be inserted into the bill, reading as follows:

Section 2. Nothing in this Act shall be construed to be a waiver of the sovereign immunity of the State of Kansas or a waiver of the sovereign immunity of a federally recognized Indian Tribe.

States generally have protection under the Eleventh Amendment to the United States Constitution from suits by citizens. However, there is no similar constitutional protection for tribes that is as widely known or understood. This language is intended to clarify that the statutory provision regarding full faith and credit does not constitute a waiver of a tribe's sovereign immunity. The language was requested by the tribes, approved by the Forum, and the Judicial Council has no objection to its inclusion in the bill.

The Council recommends that HB 2039, with the above amendment, be passed. The Council believes this statute will improve the administration of justice in Kansas by providing certainty that judgments and orders issued in state or tribal courts will be reciprocally recognized and enforced. Kansas courts already recognize tribal judgments in significant areas of law, including the custody and support of children and protection of women from abuse. There is no reason not to extend that trust of tribal judicial decisions to other civil matters, such as garnishment orders and money judgments. The statute will promote judicial economy and will benefit all Kansas citizens, Indian and non-Indian alike.

The current members of the Tribal-State Judicial Forum are:

Hon. Theresa L. Barr, Chair; Lawrence, Kansas
Administrative Judge - Prairie Band Potawatomi Nation

Hon. James A. Patton, Vice-Chair; Hiawatha, Kansas
District Judge - Kansas 22nd Judicial District

Hon. Blaine A. Carter; Alma, Kansas
Magistrate Judge - Kansas 2nd Judicial District

Hon. Steven R. Ebberts; Topeka, Kansas
District Judge - Kansas 3rd Judicial District

Hon. Steven Hager; Oklahoma City, Oklahoma
Chief Judge - Kickapoo Tribe in Kansas

Hon. Lisa Otipoby Herbert; Ponca City, Oklahoma
Judge - Iowa Tribe of Kansas & Nebraska

Hon. Peggy Kittel; Lawrence, Kansas
District Judge - Kansas 7th Judicial District

Hon. Nate Young; Tahlequah, Oklahoma
Chief Judge - Delaware Tribe