Fighting for a Federal Forum

in Indian Sovereignty Cases: A Primer*

By Kaighn Smith Jr.

Every Indian lawyer knows that principles of tribal sovereignty should be fought out in federal court not in state court. Although Indian affairs are uniquely federal concerns, a host of obstacles stands in the way of assuring the adjudication of tribal rights in a federal forum. The Supreme Court's penchant for states' rights does not help. The road to a secure federal forum for advocates of tribal sovereignty is now littered with land mines. This article introduces some of the issues in an area of the law that has become exceedingly complex. To keep Indian sovereignty cases in the federal courts, where they belong, tribal attorneys must be ready to spot the issues early on.[1]

For purposes of this discussion, consider any number of situations in which a state court may be poised to adjudicate an important issue of tribal sovereignty:

- Whether a tribally owned business has sovereign immunity from a lawsuit;
- Whether a tribal employment decision is discriminatory or otherwise unlawful;
- Whether non-Indians may enter reservation offices to obtain tribal records;
- Whether a tribal election is fair; and
- Whether state officers may regulate certain aspects of Indian gaming enterprises.

In each of these cases, extreme tensions are involved.

**The law addressed in this article is fluid and complex. This article is not intended as legal advice and should not be relied upon as such.*

The substantive issue presented is controlled by federal Indian common law, by tribal law, or by a federal statute or treaty. Federal law governs the initial question of whether a state court even has jurisdiction to proceed to the merits of the case. Yet, in each, the state may well have an interest in adjudicating the matter because the outcome could determine the scope of state authority over tribes or tribal businesses within the state.

The danger of a state court proceeding with such cases can be likened to the proverbial fox minding the chicken coop. "One of the basic premises underlying the constitutional allocation of Indian affairs to the federal government was that the states could not be relied upon to deal fairly with the Indians." Canby, *American Indian Law* (West 1998) at 128. "Because of the local ill feeling," the Supreme Court said in 1886, "the people of the States where [the Indian tribes] are found are often their deadliest enemies." *United States v. Kagama*, 118 U.S. 375, 384 (1886). There is "a good deal of force," the Court said more recently, to the view that "[s]tate courts may be inhospitable to Indian rights." *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 566-67 (1983).

Does this mean that the law affords tribes access to federal court in cases that raise the kinds of issues just enumerated? Not at all. The body of law loosely referred to as "federal courts" can present formidable obstacles. A review of the "federal courts" annotations in the *Federal Digest* is an immersion in a complex, interconnected set of statutes and judge-made rules that, in the present era of states' rights, operates to obstruct parties from gaining access to the federal courts. In addressing the role of state courts, this body of law has, at its base, an implicit trust in the state courts, grounded in the Constitution. "Under our system of dual sovereignty," Justice Scalia recently reiterated in an Indian law decision,

> we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States. The Framers assumed that this would be the case. Indeed, Article III of the Constitution, which leaves to Congress the decision whether to create lower federal courts at all, presumes that state courts could enforce federal law.

Nevada v. Hicks, 121 S.Ct. 2304, 2314 (2001) (citations and quotations omitted).

There are counterweights, however, that cannot be overlooked. First, Congress *has* created lower federal courts and conferred jurisdiction upon them to meet specific federal concerns. The most obvious example is the "diversity jurisdiction" of the federal district courts, 28 U.S.C. § 1332, established by Congress to protect citizens of foreign states from the local biases of state courts. In Indian affairs, Congress similarly protected Indian tribes from state biases under a special jurisdictional statute, 28 U.S.C. § 1362 (discussed below), understanding that tribal rights may not fare well in state forums. Second, the duty of a federal court to exercise the jurisdiction conferred upon it by Congress without abdicating to a state court is mandated by the separation of powers:

> There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court [to consider federal claims] can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts.

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 415 (1964). Federal district courts have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." *New Orleans Public Service Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 358 (1989).

Back to the problem at hand: retaining a federal forum for cases presenting substantial questions of Indian sovereignty. Clearly, there may well be a doctrinal tug-of-war at play. Federal courts' jurisprudence is oriented to the protection of comity relations between state and federal authority, and it largely overlooks the unique problems of Indian tribes in the face of state power. The sections below identify some of the more significant statutory and judge-made rules obstructing federal court access in Indian sovereignty cases and some of the tools tribal lawyers may have to overcome them.

The First Filed Rule, the All Writs Act, and the Well-Pleaded Complaint Rule

As soon as a controversy pitting state authority against tribal sovereignty develops and appears bound for litigation, counsel must consider ways to move it into federal court, assuming tribal court is not an option. If a tribe first files in federal court before its adversary commences a proceeding in a state court, it should have important advantages to stave off competing state court adjudication. These advantages are most significant in reference to arguments the adversary may later raise to prevent federal court disposition — for example, the prohibitions of the anti-injunction act, abstention doctrines, res judicata, or the full faith and credit statute. Several initial challenges (and potential responses) can emerge when the case is first filed in federal court.

Under the so-called "first filed rule," the court that first takes jurisdiction over a controversy should proceed unfettered to disposition. *See Rickey Land & Co. v. Miller & Lux*, 218 U.S. 258, 262 (1910). Without direct interference in one court by another, however, this rule is unenforceable; it operates only as a rule of comity. *See Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311, 320 (1st Cir. 1992). While it is "the usual practice" for "the court that first had jurisdiction to resolve the issues and the other court to defer," *TPM Hollings Inc. v. Intra-Gold Industries Inc.*, 91 F.3d 1,

4 (1st Cir. 1996), state courts may be anxious to decide a controversy involving the state's authority over Indian affairs and therefore ignore this "usual practice." If that occurs, two cases presenting the same controversy will proceed in separate courts in a genuine race to judgment. In that situation, if the state court begins to win the race, new obstacles to dispositive federal court adjudication may emerge, including arguments favoring abstention or full faith and credit to the proceedings and decisions of the state court.

Because the very consequence of such a race could threaten a tribe's right to proceed to disposition in its first filed federal case, if a state court refuses a requested stay in favor of disposition by a federal court, an extraordinary remedy — a federal court injunction to stop the state court plaintiff from proceeding — may be in order. Pursuant to the All Writs Act, federal courts may issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The argument for the use of such a writ where a state court refuses to stay a case involving questions of tribal sovereignty governed by federal law would track the following logic: Congress intended the All Writs Act to allow a federal court to prevent conduct that, left unchecked, would have the practical effect of diminishing the federal court's power to fully and adequately address matters within its jurisdiction or to bring such matters to an uninterrupted conclusion. *See Public Utilities Commission v. United Fuel Gas Co.*, 317 U.S. 456 (1943). Under the premise that parties (especially Indian tribes) have a right to federal court adjudication of cases properly commenced in federal court in the first instance, it follows that the All Writs Act should be available to secure that right if it becomes threatened by a competing race to dispositive adjudication in a state court.[2]

Regardless of the apparent force of a tribe's federal claim in a first filed federal action, however, the "well-pleaded complaint rule" could present unanticipated problems. Under that rule, a party cannot bring a federal court action, which is, by its nature, a federal defense to a state law claim. In such cases, the plaintiff's "well-pleaded" complaint fails to set forth a claim "arising under" federal law for the purposes of federal court jurisdiction, at least pursuant to federal question jurisdiction under 28 U.S.C. § 1331. (As discussed below, the law remains unsettled with respect to the application of the rule to 28 U.S.C. § 1362.) The well-pleaded complaint rule has gained extra force under a view, grounded in principles of comity, that a federal court plaintiff should not be able to mount a "pre-emptive strike" against an anticipated state court action by filing a federal court action that, by its nature, is a declaratory judgment to vindicate a federal defense to the state claim. *See Public Service Commission v. Wycoff Co.*, 344 U.S. 237, 248 (1952).

In the field of federal Indian law, the best (or worst) example of the rule's operation is *Oklahoma Tax Commission v. Graham*, 489 U.S. 838, 840 (1989) (per curiam). In that case, the Oklahoma Tax Commission sued the Chicksaw Nation in state court to collect state excise taxes related to tribal businesses. Logically, the tribe removed the case to federal court pursuant to 28 U.S.C. §1441(a), claiming that it presented a federal question: whether the tribe had sovereign immunity from the state court action. The Supreme Court held that the case did not "arise under" federal law for the purposes of federal question jurisdiction under § 1331. The tribe's sovereign immunity from suit for the collection of state excise taxes, the Court said, arose as a defense to a state cause of action.

Important exceptions to the rule may prove significant in cases involving matters of tribal self-government in the face of asserted state authority.[3] First, where state action against a tribe is involved, the well-pleaded complaint rule will not stand in the way of a federal court suit brought against a state official to prevent violations of federal law. *See Shaw v. Delta Airlines*, 463 U.S. 85, 96 n.14 (1983). Second, if the threatened coercive action against the tribal party "necessarily depends on resolution of a substantial question of federal law" in controversy between the parties, the rule will not apply. *Franchise Tax Bd. of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 13 (1983). Beyond this, while the law is unsettled, the jurisdictional act specifically designed for Indian tribes to proceed to federal court, 28 U.S.C. § 1362, may operate without the constraints of the well-pleaded complaint rule.

Section 1362 provides as follows:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

Congress enacted this provision for two reasons: (1) to allow Indian tribes to proceed to federal court in those cases in which the United States could, but for some reason was unable to, proceed on their behalf as trustee, *see Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 473-74 (1976); and (2) to ensure that tribes would have access to federal court to adjudicate important matters of tribal self-government, rather than be relegated to state courts for disposition of such matters, *see Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 559 n.10 (1983).

In *Sac and Fox Nation v. Hanson*, 47 F.3d 1061, 1062 (10th Cir. 1995), the Tenth Circuit affirmed an injunction granted to a tribe in an action brought under § 1362 to enjoin a state court plaintiff and judge from proceeding with a state case because it was barred by the tribe's sovereign immunity from suit. That case cannot be squared with the Supreme Court's decision in *Graham* unless the well-pleaded complaint rule is inapposite in cases brought pursuant to 28 U.S.C. § 1362.[4] In contrast, in *Penobscot Nation v. Georgia-Pacific Corp.*, 106 F.Supp.2d 81 (D. Me. 2000); 116 F.Supp.2d 201 (denying reconsideration), *affirmed on other grounds*, 254 F.3d 217 (1st Cir.

2001), the district court applied the well-pleaded complaint rule to dismiss an action brought by two tribes under § 1362 to enjoin corporations from proceeding against them under a state "public access" law. (The tribes claimed that Congress had confirmed their inherent right to control such access matters without state interference pursuant to a land claims settlement act.) The district court's dismissal of that case under the well-pleaded complaint rule is difficult to square with Congress' intent, under § 1362, to supply Indian tribes with a federal forum, in preference to state court, for adjudication of their federal rights of self-government.

The Anti-Injunction Act and Abstention Doctrines

The Anti-Injunction Act, 28 U.S.C. § 2283, provides as follows:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Some circuit courts have held that this act does not apply when a plaintiff invokes a federal court's injunctive power before a state court action commences.[5] Others, however, have held that it does.[6] The Supreme Court has said, in dicta, that "[t]his statute and its predecessors do not preclude injunctions against the institution of state court proceedings, but only stays of suits *already instituted*." *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965) (emphasis added). Clearly, a tribe faced with a significant controversy concerning state authority over its affairs or territory and an adversary poised to proceed in state court will want to be in federal court first to avoid any uncertainties about the prohibition of the Anti-Injunction Act.

Tribes may have tools to avoid the Anti-Injunction Act, regardless of whether they have filed first in federal court. If the controversy involves threatened coercive action in state court by a state actor, 42 U.S.C. § 1983 may provide a cause of action in federal court against the state court proceeding without any constraint of the Anti-Injunction Act. *Mitchum v. Foster*, 407 U.S. 225 (1972). And, as in the case of the well-pleaded complaint rule, there are good arguments that the act should not apply to actions brought by Indian tribes pursuant to 28 U.S.C. § 1362. *See Bowen v. Doyle*, 880 F. Supp. 99, 130 n. 39 (W.D.N.Y. 1995), *aff'd* 200 F.3d 525 (2nd Cir. 2000). The importance of § 1362 in this regard is worthy of further elaboration.

Arguments that the Anti-Injunction Act has no application to cases commenced by tribes pursuant to § 1362 stem from the Supreme Court's decision in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 472-73 (1976) and the fact that Congress enacted § 1362 to allow tribes to bring the same types of claims in federal court that the United States, as trustee, could bring on their behalf. In *Moe*, the Court held that the Tax Injunction Act, 28 U.S.C. § 1341, which, like the Anti-Injunction Act, promotes comity concerns between the state and federal governments, did not prevent an Indian tribe from bringing an action to enjoin the imposition of state taxes upon the tribe pursuant to § 1362. The Court reasoned that the Tax Injunction Act would not prevent the United States from bringing such an injunctive action on behalf of Indian tribes. Thus, the tribe could proceed without the constraints of the Tax Injunction Act.

In *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), the Supreme Court drew the line for equating Indian tribes' rights of action under § 1362 with the ability of the United States to proceed as trustee for tribes. The *Blatchford* majority held that, while the United States could sue a state in federal court without the constraints of the Eleventh Amendment, Congress could not authorize Indian tribes to do so pursuant to § 1362. The Court distinguished between the *comity* concerns reflected in the Tax Injunction Act, which, under *Moe*, must yield to the protections afforded by § 1362, and the *constitutional* barrier of the Eleventh Amendment, which, it said, could not. That distinction is crucial, for it suggests that Congress' desire, under 28 U.S.C. § 1362, to give Indian tribes access to federal court to protect their interests (especially those threatened by assertions of state authority) trumps federal-state comity concerns.

The Anti-Injunction Act, like the Tax Injunction Act, reflects federal-state comity concerns without accounting for tribal interests. Like the Tax Injunction Act, it does not apply to actions brought by the United States, *see Leiter Minerals v. United States*, 352 U.S. 220 (1957), and it would not apply in preventing the United States from proceeding in federal court, as trustee for an Indian tribe, to enjoin a state court proceeding that is threatening tribal interests.[7] Thus, the reasoning of *Moe* should, by extension, allow tribes to use 28 U.S.C. § 1362 to enjoin parties from proceeding against them in state court in violation of federal law without the constraints of the Anti-Injunction Act.

Finally, by its terms, the Anti-Injunction Act does not apply where the injunction is "necessary in aid of [the federal court's] jurisdiction, or to protect or effectuate its judgments." Thus, several courts have permitted tribes to bring federal court actions to enjoin state court proceedings under this exception where the threshold issue is whether, as a matter of federal law, the state court has subject matter jurisdiction to proceed.[8] "Two principles underlie these courts' holdings: the well-established rules protecting Indian tribes' interests in their sovereignty and property, and the primacy of federal authority in Indian affairs." *See Bowen v. Doyle*, 880 F. Supp. at 130.

Abstention doctrines address what should occur when cases are running concurrently in the state and federal courts prior to a final judgment in either case. They present a host of judge-made rules, also grounded in principles of federal-state comity and turning on balancing equations, which may obstruct the road to federal court adjudication of cases presenting issues of Indian sovereignty. These doctrines are complex and multifaceted. As

in the case of the Anti-Injunction Act, however, tribes, if mindful of the doctrines and their limitations, may have good arguments to overcome them. A full discussion of these arguments is well beyond the scope of this article. What follows, therefore, is a summary of some basic considerations.

First, federal courts cannot abstain in favor of a state court proceeding involving the same issues when the state court lacks subject matter jurisdiction. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 809 (1976). A complex situation may arise, however, if the state court, in a proceeding running parallel to a federal action, "wins the race" to a decision about its own jurisdiction (say, for example, by concluding that its jurisdiction is not barred by tribal sovereign immunity from suit). In that situation, which is touched upon below, tribes will need to employ arguments to avoid the res judicata effect of that decision upon their federal court action raising the same question.

Second, while it often appears otherwise, the Supreme Court has, on numerous occasions, emphasized that abstention is an exception to the "strict duty" of federal courts to exercise the jurisdiction conferred upon them by Congress. Only "exceptional circumstances, where denying a federal forum would clearly serve an important countervailing interest," can justify a federal court's abstaining in favor of a state court's disposition. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). So important is this principle that a district court's abdication of a federal forum to a state court proceeding by abstention gives rise to an interlocutory appeal because the harm to the party losing the federal forum is immediate and irreparable; the party is "effectively out of court." *Id.* at 714.

Third, the primary concern of abstention doctrines is "principles of comity and federalism." *Id.* at 723. As discussed above in the context of the Ant-Injunction Act, these concerns may be set aside in favor of paramount federal interests that protect Indian rights, especially in the face of state encroachment. It is, therefore, axiomatic that where important questions of federal law determine the very authority of a state court to proceed with a case affecting tribal interests, abstention in favor of the state court should be rejected.[9] *But see Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983) (McCarran Amendment allocating adjudication of water rights issues to state courts, coupled with abstention principles, overrides mandate of § 1362).

Fourth, the benefits of filing first in the federal court are significant in the context of abstention doctrines and deserve particular attention. One popular variant of abstention, so-called "*Younger* abstention" (named for *Younger v. Harris*, 401 U.S. 37 (1971)), requires (1) the existence of an ongoing state judicial proceeding, (2) the implication of important state interests in that proceeding, and (3) an opportunity within that proceeding to litigate federal issues. *See Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). If a federal action is first filed by a tribe prior to the commencement of a state judicial proceeding, the first *Younger* criterion may be avoided altogether. Simply put, "a person threatened with, but not yet the subject of … violations of his federal rights may seek appropriate injunctive and declaratory relief without any obstacles from the *Younger* doctrine." *Robinson v. Stovall*, 646 F.2d 1087, 1090 (5th Cir. 1981).

More importantly, by filing first in federal court, a tribe may gain the option of avoiding the preclusive effect of a state court decision on a federal question it has set out to have decided by the federal court if a state court reaches it in the meantime. In *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), the Supreme Court held that a federal court plaintiff cannot be deprived of a federal forum for disposition of a federal constitutional question when a district court abstains (under "*Pullman* abstention"[10]) to allow a state court to consider novel state law questions that could dispose of the controversy. "There are fundamental objections," the Supreme Court declared in *England*, "to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims." *Id.* at 415. The litigant can ensure the case's return to the federal court for that determination by informing the state court of an intent to do so. *Id.* at 418-22. This is known as an "*England* reservation." With an *England* reservation, a federal court plaintiff cannot be barred, under principles of collateral estoppel or res judicata, from adjudication of the federal question to be resolved in federal court if the state court decides the question in a *Pullman* abstention setting. *See Instructional Systems Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 820 (3rd Cir. 1994).

The Full Faith and Credit Statute, Res Judicata, Collateral Estoppel, and the Rooker-Feldman *Doctrine*

This last set of rules governs the finality of decisions when there is tension between the state and federal courts. To focus the discussion, consideration will be limited to the preclusive effect (or finality) of state court decisions concerning state jurisdiction over tribes or tribal affairs.

Two related judge-made doctrines govern the finality of decisions: collateral estoppel and res judicata. Collateral estoppel (also known as issue preclusion) bars a party from relitigating an issue identical to one it has previously litigated to final disposition. Res judicata (also known as claim preclusion) precludes litigation of claims that were, or could have been, decided in a prior action. Pursuant to the Full Faith and Credit Statute, 28 U.S.C. § 1738, "judicial proceedings … shall have the same full faith and credit in every court within the United States … as they have by law or usage in the courts of such State … from which they are taken." Under this statute, when federal courts are confronted with a judgment of a state court, they must generally give it the same preclusive ef-

fect that it would be given in the courts of the state from which it emerged. *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). These bases for preclusion are affirmative defenses, which can be waived.

A separate doctrine related to finality, however, is jurisdictional. Under the *Rooker-Feldman* doctrine, named for two Supreme Court decisions, *Rooker v. Fidelity Trust* Co., 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), federal district courts lack authority to review the judgments of state courts because the sole avenue for federal court review of such judgments is by the Supreme Court, pursuant to 28 U.S.C. § 1257. *Rooker-Feldman* preclusion applies not only to claims that were adjudicated by the state court but also to those that are "inextricably intertwined" with a state judgment. *Feldman*, 460 U.S. at 486-87. However, the doctrine does not apply in federal actions that are "separable from and collateral to" the merits of the state court judgment. See *Texaco Inc. v. Penzoil*, 481 U.S. 1, 21 (1987) (Brennan, J. concurring). Thus, for instance, in *Kiowa Indian Tribe v. Hoover*, 150 F.3d 1163 (10th Cir. 1998), the Tenth Circuit held that the Kiowa Indian Tribe could proceed with a federal court action, pursuant to 42 U.S.C. § 1983, to enjoin state court plaintiffs and judges from proceeding to execute a judgment that the tribe claimed was void because of its sovereign immunity. The court held that the tribe's action to prevent the execution of the judgment was sufficiently collateral and separate from the merits of the state court's contract case to avoid application of *Rooker-Feldman*.

Where a tribe has sought adjudication of a federal right to be free from state authority in a federal court and is faced with an intervening decision from a state court, holding that such authority exists, a host of complex questions may emerge with respect to the application of these doctrines. At risk of oversimplification, tribes may draw upon some general counterpoints to overcome the force of these doctrines. Most stem from the unique importance of federal oversight of state authority in the field of Indian affairs.

First, if a tribe has properly invoked the jurisdiction of the federal court prior to the commencement of proceedings in the state court and is involuntarily beset with a state court adjudication of a substantial federal question prior to disposition by the federal court, the tribe will have arguments that (1) *Rooker-Feldman* cannot apply because the tribe did not invoke the jurisdiction of the district court to review any judgment of the state court, and (2) the policies of 28 U.S.C. § 1738 and related judge-made preclusion rules of res judicata or collateral estoppel must give way to the constitutional duty of a federal court to proceed to adjudicate a federal claim when a party has properly invoked the court's subject matter jurisdiction under an act of Congress. Arguments can be made, for instance, that the right of an Indian tribe to proceed to federal court under 28 U.S.C. § 1362 to vindicate rights under a federal law or treaty trumps the comity policies of the Full Faith and Credit statute. Indeed, if a tribe properly invokes the federal court's authority to proceed in the first instance, the mere option to seek discretionary review of a state court disposition in the Supreme Court is an "inadequate substitute" for the tribe's right, by choice, to have its claim decided by a federal court. *See England v. Louisiana State Board of Medical Examiners*, 375 U.S. at 416.

Second, regardless of the timing of a tribe's commencement of an action in federal court relative to the state court's disposition, if the state court fails to address a tribal claim of sovereign immunity or some other claim challenging the state court's subject matter jurisdiction, the tribe will have arguments that the Full Faith and Credit statute and related principles of res judicata should not stand in the way of the federal court's consideration of such claims. Preclusion principles cannot apply to questions of subject matter jurisdiction that have not been "fully and fairly litigated and finally decided" in the earlier proceeding of another court. *Allen v. McCurry*, 449 U.S. 90, 95 (1980). And the Supreme Court has held that a decision rendered against an Indian tribe without consideration of the tribe's sovereign immunity from suit is void and has no res judicata effect in a subsequent action involving the same parties and claim. *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506, 512-15 (1940)

Finally, there is a catch-all argument, grounded in the supremacy clause and Congress' constitutional plenary authority over Indian affairs. Where paramount federal policies or interests are at stake and will be undermined by the effect of a state court judgment, federal courts must be free to disregard such a judgment.[11] Controversies about state power over Indian tribes, their territory, or their affairs are uniquely federal concerns under the Constitution, deserving heightened scrutiny by the federal courts.[12] If a tribe is forced to succumb to state authority in violation of a federally protected right to be free from such authority, there will be an irreparable injury to the "dignitary interest" of a sovereign that is comparable to the harm a state would suffer if a federal court ignored its Eleventh Amendment immunity. *See Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163, 1172 (10th Cir. 1998) (citing *Seminole Tribe v. Florida*, 517 U.S. 44 (1996)). Such circumstances, it can be argued, warrant intervention by a federal court without regard for the principles of federal-state comity. **TFL**

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Endnotes

[1]In this article, the term "Indian sovereignty cases" is limited to cases presenting questions concerning the freedom of Indian tribes or tribal entities from the state adju-

dicatory or regulatory authority. Examples of these kinds of cases follow in the text. For simplicity, unless context suggests otherwise, the term "tribe," as used in this article, encompasses Indian tribes, political subdivisions of Indian tribes, including tribal housing authorities, and tribally owned enterprises.

[2]Invoking the All Writs Act to enjoin state court proceedings is an extraordinary undertaking, but it is not without precedent. *See Public Utilities Commission v. United Fuel Gas Co.*, 317 U.S. 456; *In re: Baldwin-United Corp.*, 770 F.2d 328, 335 (2nd Cir. 1985); *In re Joint E. & S. Dist. Asbestos Litigation*, 134 F.R.D. 32, 36-38 (E. & S.D.N.Y. 1990). Certainly, if a party faces irreparable harm to its right to adjudicate a case in the federal courts, where federal court jurisdiction is properly invoked, it should have a remedy. (This is especially so if the federal court action tests the very propriety of the state proceeding. *See Ex Parte Young*, 209 U.S. 123, 165(1907); *Prout v. Starr*, 188 U.S. 537, 542-44 (1902).) A strong analogy is found in cases where parties have invoked the All Writs Act to force federal district courts to take jurisdiction over cases properly brought before them, rather than abdicate to a parallel state case. *See McClellan v. Carland*, 217 U.S. 268 (1910).

[3]The mere fact that an Indian tribe is a party to a case does not mean that the case "arises under" federal law. *See Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708 (9th Cir. 1980), *cert. denied,* 451 U.S. 911. *Accord Iowa Management & Consultants Inc. v. Sac & Fox Tribe*, 207 F.3d 488 (8th Cir. 2000); *TTEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676 (5th Cir. 1999). On the other hand, many cases involve assertions of state authority over tribes that "arise under" federal law simply because federal Indian common law or treaties govern the scope of that asserted authority. *See Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994); *Native Village of Venetie IRA Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991); *see also Forrest County Potawatomi Comm. of Wis. v. Norquist*, 45 F.3d 1079, 1082 (7th Cir. 1995).

[4]While the Tenth Circuit in *Hanson* did not address the well-pleaded complaint rule, the author of the opinion, Judge Tacha, had written the dissenting opinion in *Oklahoma ex. rel. Oklahoma Tax Commission v. Graham*, 846 F.2d 1258, 1261-62 (10th Cir. 1988), which the Supreme Court then adopted in *Oklahoma Tax Commission v. Graham*, 489 U.S. 838 (1989). Surely the Tenth Circuit was aware of the issue. In fact, it had a duty to inquire as to its subject matter jurisdiction. *McGeorge v. Continental Airlines Inc.*, 871 F.2d 952, 953 (10th Cir. 1989).

[5]*See Hyde Park Partners L.P. v. Connolly*, 839 F.2d 837, 842 n. 6 (1st Cir. 1988); *National City Lines Inc. v. LLC Corp.*, 687 F.2d 1122, 1127 (8th Cir. 1982); *Barancik v. Investors Funding Corp. of New York*, 489 F.2d 933, 937 (7th Cir. 1973).

[6]*See Royal Insurance Co. of America v. Quinn-L. Capital Corp.*, 3 F.3d 877, 885 (5th Cir. 1993); *Standard Microsystems Corp. v. Texas Instruments*, 916 F.2d 58, 61-62 (2nd Cir. 1990); *Roth v. Bank of the Commonwealth*, 583 F.2d 527, 533 (6th Cir. 1978), *cert. dismissed*, 442 U.S. 925 1979).

[7]The United States has had a trust obligation to protect tribal interests from state encroachment since the founding of the republic. *See, e.g., United States v. Kagama*, 118 U.S. 375, 384 (1886); *Worcester v. Georgia*, 31 U.S. 515, 595; 25 U.S.C. § 3601(2) (congressional trust obligation to protect tribal sovereignty); *HRI Inc. v. E.P.A.*, 198 F.3d 1224, 1245-46 (10th Cir. 2000); *State of Washington Department of Ecology v. U.S.E.P.A.*, 752 F.2d 1465, 1470 (9th Cir. 1985). That trust responsibility is manifested in any number of injunctive actions brought by the United States to protect the tribes' rights in the face of state authority. *See, e.g., United States v. Board of Commissioners of Osage County*, 40 S.Ct. 100, 102 (1919) (enjoining state enforcement of taxes against Indians; emphasizing that "the existence of power in the United States to sue [pursuant to its trust obligation to Indians] … disposes of the proposition that because of remedies afforded [the Indians] under the state law the authority of a court of equity could not be invoked by the United States"); *United States v. County of Humbolt*, 615 F.2d 1260 (9th Cir. 1980) (action by United States to enjoin county from enforcing zoning and building codes against tribe); *Alonzo v. United States*, 249 F.2d 189 (10th Cir. 1957) (enjoining state court proceeding against Indian tribe and its officers concerning rights to Indian property); *United States v. Michigan*, 508 F. Supp. 480 (W.D. Mich. 1980) (action to prevent a state court from holding a tribal member in contempt for violating state fishing regulations); *United States v. Washington*, 459 F. Supp. 1020 (W.D. Wash. 1978) (action to stop state interference in tribal fishing rights), *aff'd* 645 F.2d 749 (9th Cir. 1981).

[8]*Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 541 (9th Cir. 1994); *White Mountain Apache Tribe v. Smith Plumbing Co.*, 856 F.2d 1301, 1304 (9th Cir. 1988); *Tohono O'Odham v. Schwartz*, 837 F. Supp. 1024, 1028 (D. Ariz. 1993); *Bowen v. Doyle*, 880 F. Supp. at 130-31 (summarizing cases).

[9]*See Sycuan Band of Mission Indians v. Roache*, 54 F.3d at 541; *Seneca-Cayuga Tribe v. State Ex. Rel. Thompson*, 874 F.2d 709, 714 (10th Cir. 1989); *Fort Belknap Indian Community v. Mazurek*, 43 F.3d 428, 431-32 (9th Cir. 1994); *Bowen v. Doyle*, 880 F. Supp. at 132; *Tohono O'Odham Nation v. Schwartz*, 837 F. Supp. at 1028-29.

[10]*See Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

[11]S*ee Castorr v. Brundage*, 459 U.S. 928, 929-30 (1982) (per curiam); *Midgett v. United States*, 603 F.2d 835, 845 (Ct. Cl. 1979) ("A judgment or decree of a state court whose effect would restrain the exercise of the sovereign power of the United States by imposing requirements that are contrary to important and established federal policy would not be given effect in a federal court."); *American Mannex Co. v. Rozands*, 462 F.2d 688, 690 (5th Cir.) (Wisdom, J.), *cert denied*, 409 U.S. 1040 (1972).

[12]*See Bowen v. Doyle*, 880 F. Supp. 99 (W.D.N.Y. 1995), *aff'd* 200 F.3d 525 (2nd Cir. 2000).