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August 31, 2011

Judicial Council of California
Administrative Office of the Courts
455 Golden Gate Avenue
San Francisco, CA 94102-3688

Re: Proposed Legislation for Recognition & Enforcement of Tribal Court Civil Judgments (Code of Civ. Proc., §§ 1730-1739)
Item Number: Leg 11-03

Dear Honorable Members of the Judicial Council:

The California State Association of Counties (CSAC) submits these comments in response to the recently-issued legislative proposal to place the full faith and credit of the California court system behind tribal court civil judgments. While reform to extend the reach of tribal court judgments may be desirable in some instances, CSAC provides these comments to raise important issues regarding the proposal and to encourage a reexamination of the scope of the proposed legislation under consideration.

Description of CSAC and its Interest in the Tribal Court Judgment Proposal

CSAC is a nonprofit association comprised of the State's 58 counties. The primary purpose of CSAC is to represent county government before the California Legislature, administrative agencies and the federal government. CSAC places a strong emphasis on educating the public about the value and need for county programs and services.

CSAC supports government-to-government relations that recognize the role and unique interests of tribes, states, counties, and other local governments to protect all members of their communities and to provide governmental services and infrastructure beneficial to all—Indian and non-Indian alike. CSAC recognizes and respects the tribal right of self-governance to provide for tribal members and to preserve traditional tribal culture and heritage. In similar fashion, CSAC recognizes and promotes self governance by counties to provide for the health, safety and general welfare of all members of their communities.

CSAC does not take a position on the legislative proposal under consideration, but has identified questions or issues that warrant further consideration. County interactions with community members cut across a wide spectrum of services potentially impacted by this proposal, including the provision of social services to tribal members and enforcement of court orders through the County Sheriffs. Because of the direct impact on county operations, CSAC believes several issues deserve further study and should be clarified or narrowed before this proposal is adopted by the Judicial Council.

Tribal Governments Vary Significantly and Should Not Be Treated as a Monolith

As noted in the background discussion of this proposal, there are 107 federally recognized tribes in California. The relative population of those tribes illustrates their vast differences. According to statistics maintained by the Bureau of Indian Affairs, in 2005 there were 61,644 enrolled tribal members in California.[1] (Bureau of Indian Affairs, Office of Indian Services, *2005 American Indian Population and Labor Force Report*, p. 1.) Only fourteen of the 107 federally recognized tribes have enrollments of 1,000 or more. (*Id.* at p. 13.) The remaining 93 tribes have enrolled membership ranging from 963 to five, with at least four tribes having less than ten enrolled members. (*Id.* at pp. 12-14.)

It goes without saying that such differences in size results in a wide variety of governing structures. Some of California's tribes have very well-established governmental systems, including highly developed judicial structures. Others have no tribal court at all, or are in the very early stages of developing a more formal tribal court. There are no accreditation or approval standards (other than not violating the Indian Civil Rights Act) for the tribal courts that are developed in the state. As such, there are no uniform procedures used by tribal courts, nor do they offer a uniform set of protections to their litigants.

The legislative proposal defines "tribal court" as "*any* court or other tribunal of any federally recognized Indian nation, tribe, pueblo, ban, or Alaska Native village, duly

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[1] There appears to be some confusion in the background discussion of the proposal, which states that "California is home to more people of Indian ancestry than any other state in the nation." Most native people in California are not members of a federally-recognized tribe, and therefore appear to be unaffected by this proposal. At least for purposes of being entitled to enroll in a federally-recognized tribe, California's Native American population is lower than several other states, including Oklahoma (692,421), Arizona (269,778), New Mexico (174,199), Alaska (140,339), South Dakota (115,513) and Montana (66,962). (Bureau of Indian Affairs, Office of Indian Services, *2005 American Indian Population and Labor Force Report*, p. 1.)

established under trial or federal law. . . ." (Proposed § 1732(5)(emphasis added).) The proposal requires certain documentation about the tribal court to be submitted with an application to enforce a judgment, including a copy of the tribal court rules of procedure. However, there is no mechanism within the proposal for a superior court to independently review those procedures. Indeed, there is no requirement that the superior court do anything with those rules other than to receive them. In other words, under the proposal, all tribal court judgments are treated the same regardless of the significant differences in their histories, structures, traditions, ability to meet minimum standards of judicial fairness, or any other criteria. Tribal government should not be treated as a single monolith, but as separate sovereign entities each with their own characteristics.

This aspect of the proposal, which provides for the wholesale adoption of all California tribal court systems, current and future, deserves further study. The 107 federally recognized tribes in California are each separate tribal governments and their court operations should similarly be separately evaluated. As discussed more fully below, there should be some demonstration, whether or not an objection to the application is raised, that minimum standards are met before the Superior Court enters a tribal court judgment. (See *Carijano v. Occidental Petroleum Corp.* (9th Cir. 2010) 626 F.3d 1137, 1153 ["California generally enforces foreign judgments, as long as they are issued by impartial tribunals that have afforded the litigants due process."].)

The Legislative Proposal Raises Procedural Issues that Require Further Consideration

Enforcement of judgments in superior court allows a tribe to enforce judgments against non-Indians whose property is located outside of the tribe's jurisdiction, and against tribal members who leave tribal jurisdiction to avoid legal burdens. (Comment, *Full Faith and Credit in Cross Jurisidictional Recognition of Tribal Court Decisions Revisited* (2010) 98 Calif. L.Rev. 1393, 1404.) While CSAC can certainly understand the desire to achieve these goals, it has concerns about certain procedural aspects related to the proposal. These concerns are directly relevant to counties because many superior court judgments spill over into county functions, particularly where enforcement of these judgments falls to the County Sheriff (such as unlawful detainer orders, evictions, foreclosures, judgments for possession of personal property, injunctions, restraining orders and so on). CSAC is cautious of its member counties being placed in an enforcement role in proceedings over which counties have very little knowledge. The concern is compounded when the respondent to the proceeding perceives that the process is less than completely fair and open, and thus may be more likely to resist the Sheriff's attempts to enforce the judgment.

A possible limitation that would reduce some of CSAC's concerns with the proposal would be to limit the proposal to money judgments, as is currently done under the Foreign-Country Money Judgments Recognition Act (Code Civ. Proc, §§ 1713 et seq.). This makes sense for two reasons. First, such a limitation would take the County Sheriff out of the role of enforcing judgments related to restraining orders and property, which can be dangerous for the officers, particularly where the parties may view the process for obtaining a superior court judgment as unfair or bias.

Second, since comity, and not full faith and credit, is the basis for recognition under the proposed legislation, there is no apparent reason for statutory recognition of tribal judgments to be any broader than that afforded to foreign county judgments. Under existing law, judgments from foreign courts granting injunctions are generally not entitled to enforcement. (Restat. 3d of the Foreign Relations Law of the U.S., § 481; *Global Royalties v. Xcentric Ventures* (D.AZ. Oct. 10, 2007, No. 07-956-PHX-FJM) 2007 U.S.Dist.LEXIS 77551.)

Another concern that is not addressed in the background materials is that adding a new category of judgments that require enforcement through the County Sheriff may amount to a state mandate requiring a subvention of funds under section 6 of article XIII B of the California Constitution. There is no information to help counties or the Legislature understand the potential financial impact the proposal could have on law enforcement and the State general fund.

With that in mind, CSAC urges the Judicial Council to give further consideration to the following aspects of the proposal:

Proof of Due Process in the Tribal Court

Under the proposal, a respondent may object to an application on the basis that due process was lacking in the tribal court proceeding. (Proposed § 1735, subd. (b)(4).) If an objection is raised, then the applicant has the burden "of establishing that the tribal court judgment is entitled to recognition under section 1733.1." (Proposed § 1735, subd. (d).) If the applicant meets his or her burden, then the respondent has the burden of establishing a ground for nonrecognition.[2] (*Ibid.*)

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[2] The standard of proof is not specified, though the invitation requests comments on what standard of proof should be required to prove a ground for non-recognition. CSAC would urge the Judicial Council to consider that whatever standard of proof is used, it be applied equally to

CSAC has concerns about this process. First, it requires that a respondent raise an objection about due process rather than requiring an applicant to show as an initial matter that due process was afforded in the tribal court proceeding. (Cf. Code Civ. Proc., § 1715, subd. (c) [the party seeking recognition of the foreign judgment has the burden of establishing the judgment is entitled to recognition even where no objection has been raised].) There are many reasons that a respondent might not raise an objection in these proceedings— lack of resources to hire counsel to assist in responding to the application, pressure from the tribal community not to challenge the tribal court process, confusion over the requirements for satisfying due process. There is, therefore, the very real risk that due process violations will go undetected by the court because the only mechanism for the court to consider the issue is when it is raised as an objection by the respondent. At a minimum, the legislative proposal should not conflict with the protections found under current California law (e.g., Code Civ. Proc., § 1715, subd. (c)).

Second, if an objection is raised under the proposed legislation, the applicant must then show that the judgment is entitled to recognition under proposed section 1733.1. However, proposed section 1733.1 only requires basic information about the matter (names of relevant parties, that the action is not barred by the statute of limitations, etc.). Nothing in section 1733.1 requires a showing of meeting minimum due process requirements. After the applicant proves that the basic elements of section 1733.1 are met, which elements do not relate to the due process provided in the tribal court proceeding, the burden is on respondent to prove a lack of due process. As a result, the sole burden relative to establishing the due process (or lack thereof) of a tribal court order rests with the respondent.

CSAC suggests that the Judicial Council amend this process so that the applicant bears the initial burden of establishing that the tribal court judgment satisfied due process requirements, as defined, whether or not an objection is raised.

Discretion of the Superior Court

Proposed section 1735, subdivision (c), provides the superior court with discretion to either grant or deny an application to enter a tribal court judgment based on four specified equitable grounds: fraud, conflict with another judgment, inconsistency with contractual choice of forum, or violation of fundamental policy of the United States.

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establishing entitlement to recognition and to evidence of fact constituting grounds for an objection.

It is unclear to CSAC why a superior court is afforded discretion to grant an application where any of these four grounds are present. Rather, if a superior court determines, after examining the facts of a given case and the relevant law, that one of these grounds exists, the application should be denied.

Contacts Between Judicial Officers

Proposed section 1738 permits, with notice to all parties, contact between the state court and tribal court judge who issued the tribal judgment. The section states its purpose is to resolve any issues regarding a tribal court judgment. CSAC has concerns about permitting such contact, as it could certainly raise questions about the fairness of the proceedings in the mind of the parties.

As the Judicial Council well knows, this type of contact between judicial officers is procedurally irregular. CSAC does not believe such contact is part of the procedure for recognizing or enforcing foreign judgments under existing state or federal laws. The invitation for comment suggests that Family Code section 3410 might serve as the model for this contact. However, Family Code section 3410 only applies to family custody proceedings due to the specialized needs of child custody cases, and child custody cases are specifically excluded from the proposal, which removes the policy justification for relaxed standards for communication with the judge. As such, CSAC questions the need for this contact and urges further consideration. It seems that communication between judges should be a rare exception, and only where absolutely necessary because of special circumstances.

The Issue of Reciprocity Deserves Further Discussion

The invitation for comment specifically asks whether the proposed statute should be limited in application to judgments from tribes that have reciprocal provisions for recognition of California court judgments. CSAC believes this issue warrants further discussion.

As mentioned above, CSAC understands the goal of more easily enforcing tribal judgments in state court as a means to access those persons that are avoiding legal burdens by staying outside of tribal jurisdiction. Counties are facing the same issues with tribal members avoiding legal burdens by staying within tribal jurisdiction. Certainly,

garnishment of wages from child support orders is an example of this.[3] When those wages cannot be collected from tribal members to support their children, the children may require financial and other support that the counties are obligated to provide. The hardship caused by those attempting to avoid legal burdens exists on both sides, and to the extent tribal judgments are afforded comity by California courts, the corresponding reciprocal recognition should be required.

Additional Information is Needed on the Scope of the Problem this Legislation is Intended to Address

The precise need for this legislative proposal is not made clear in the background materials provided. There are unquantified statements that the existing process is "lengthy and time consuming," and that some tribal court judges report the current procedures are "inadequate" and "immensely" inefficient and ineffective. Yet there is no indication of the number or type of tribal judgments that are currently brought to superior court for enforcement, the length of time it takes to move through the existing process, the number of tribal judgments that are rejected in superior court because of the inadequacy of the existing system, or any other data that would put the nature of the problem in perspective as compared to the proposed solution.

As noted above, the number of enrolled tribal members in the state is roughly 62,000, which accounts for something less than two-tenths of one percent of California's total population. Given the relatively small population benefiting from this legislative proposal, there should be more effort to identify the scope of the problem the legislation intends to address. In addition, the recently-enacted Tribal Law and Order Act of 2010 (25 U.S.C. §§ 2801 et seq.) includes funding and other federal resources to help develop

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[3] Amendments made in 1996 to the Uniform Interstate Family Support Act (which each State must enact in order to be eligible for certain federal aid grants) specify that reciprocity is not required between States and Indian Tribes, unlike the provision made for foreign nations. The Full Faith and Credit for Child Support Orders Act (FFCCSOA) (28 U.S.C. § 1738B(b)) defines "State" to include "Indian country" for purposes of recognizing child support enforcement orders across jurisdictional boundaries, but the provision only works in practice if a tribe has a judicial system that includes full faith and credit for State child support orders. (See U.S. Dept. for Health and Human Services, Admin. for Children and Families, Office of Child Support Enforcement, *Essentials for Attorneys in Child Support Enforcement* (3d ed.) pp. 180-183.) A recent investigative report highlights this problematic issue in California. (Weiss, *Native American Tribes Shield Parents From Child Support*, California Watch (Aug. 5, 2011) [available at: http://californiawatch.org/health-and-welfare/native-american-tribes-shield-parents-child-support-11872].)

and enhance the effectiveness of tribal courts. Because of the concerns raised here, and the development and changes to tribal courts that may result from the new federal law, it seems that further study of the problem would be appropriate. If the proposal is adopted, it should be significantly narrowed to build a record of the benefits and concerns with enforcing tribal court judgments in superior court before moving forward with such a broad program with unknown impacts on both county government and the courts.

Conclusion

CSAC has absolute respect for the judicial process that a tribe may have developed, but that is not the focus of this legislative proposal. Instead, this proposal is about using the power of the state courts, including the enforcement authority available through county law enforcement, to effectuate tribal court judgments beyond the jurisdiction of the tribe. The reach of this legislation, as proposed, has impacts on counties that should be addressed before moving forward. Further, more work should be done to quantify the need for this legislation.

CSAC appreciates the opportunity to comment on this proposal. Should you have any questions about these comments, please do not hesitate to contact me at (916) 327-7537.

Respectfully Submitted,

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