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United States Court of Appeals  
Tenth Circuit

July 24, 2006

Elisabeth A. Shumaker  
Clerk of Court

UNITED STATES COURT OF APPEALS  
TENTH CIRCUIT

BOB BURRELL and SUSAN BURRELL,  
Plaintiffs-Appellants,

v. No. 03-2223

LEONARD ARMIJO, Governor of Santa Ana Pueblo and Acting Chief of Santa Ar  
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO  
(D.C. No. CIV 02-542 WJ/DJS)

Chris Lucero, Jr., Albuquerque, New Mexico, for plaintiffs-appellants.

Richard W. Hughes (Caren I. Friedman, with him on the brief), Rothstein, Dc  
Hughes, Dahlstrom & Schoenburg, LLP, Santa Fe, New Mexico, for defendants-  
appellees.

Before BRISCOE, McWILLIAMS, and McCONNELL, Circuit Judges.

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BRISCOE, Circuit Judge.

Bob and Susan Burrell ("the Burrells") filed this action against the Pueblo ("the Pueblo"), a federally recognized Indian tribe; Leonard Armijo, the Pueblo; Lawrence Montoya, Lieutenant Governor of the Pueblo; Nathan Tso Tribal Administrator of the Pueblo; and Jerry Kinsman, Farm Administrator of the Pueblo, for violations of their civil rights pursuant to 42 U.S.C. 1981, as well as claims for breach of a federal farm lease and "respondeat superior." The district court initially stayed the case so that the Burrells could exhaust tribal remedies. After the Santa Ana Pueblo Tribal Court ruled that the Pueblo and tribal officials were entitled to sovereign immunity, the district court ruled that its decision was entitled to preclusive effect and dismissed the Burrells' appeal. Exercising jurisdiction pursuant to 28 U.S.C. 1291, the district court should not have given preclusive effect or otherwise recognized the tribal court's ruling, and therefore reverse and remand the case for further proceedings consistent with this opinion.

#### I. FACTUAL BACKGROUND(1)

In May 1980, the Burrells entered into a ten-year farming lease with the Pueblo for approximately 172 acres of the Pueblo's land.(2) According to the Burrells:

(1)

The following facts are taken from the Burrells' complaint. We assume these facts for purposes of this appeal.

(2)

At oral argument, counsel for the Pueblo stated that although the Unit lease was necessary. Furthermore, counsel noted that the Pueblo could not terminate the lease, but was required to contact the United States Department to initiate such proceedings.

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informed that if they conducted a successful farming operation, the lease was renewed for as long as they lived. As a result, the Burrells obtained farm Farmer's Home Administration ("FHA") and invested their personal assets in purchase equipment and other materials necessary to run a farm. In February Tribal Council of the Pueblo (the "tribal council") extended the lease until 2000 so that the Burrells could refinance their FHA loans.

The Burrells integrated themselves into the ways of the Pueblo and, in words, were "sometimes" treated "more than fair" by Pueblo officials. They assert, however, that over the years Pueblo officials subjected them to various discrimination. See App. at 12-13. For example, the Burrells claim that they prohibited them from driving their farm equipment along paved roads, prevented from using more than a couple of horseback riders to move their cattle, and permit construction of concrete ditches in their fields while allowing these privileges.

The Burrells allege that the discrimination against them worsened in 1997 when acting Chief of Police Leonard Armijo became Governor of the Pueblo. In 1997, Governor Armijo allegedly ordered them to quit bailing hay at night, while tribal members were permitted to do so. Moreover, the Burrells maintain that

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Pueblo officials, including Lieutenant Governor Lawrence Montoya, Tribal Administrator Nathan Tsosie, and Farm Administrator Jerry Kinsman, refused to interfere with Governor Armijo's order and worked with him to drive them off their farm.

In July 1997, Lieutenant Governor Montoya inquired as to what amount the Burrells would accept from the Pueblo to buy out the farm lease. The Burrells offered \$500,000. On July 24, the Burrells contend that the tribal council voted to renew the lease for \$500,000 and that a tribal member informed them that the vote was

same month, the Burrells allege that Farm Administrator Kinsman ordered tri crews to take over their farm.

The Burrells assert that Governor Armijo, Lieutenant Governor Montoya, Administrator Tsosie, and Farm Administrator Kinsman (hereinafter "the indi officials") refused to comply with the tribal council's resolution to buy c for \$500,000. Instead, they proceeded to negotiate for less money. The Bu that the individual tribal officials lacked the authority to refuse to put council's resolution.

On August 15, 1997, the individual tribal officials allegedly hired ot the Burrells' hay crop and then distributed part of the crop to Pueblo memk Burrells claim that this conduct amounted to larceny. On August 25, the Bu removed their two mobile homes and all of their farm equipment from the lea few days later, the individual tribal officials and their attorney met with offered them the following package: \$218,000 to pay off their FHA loan; th

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health insurance; a home lot off of the Pueblo for the mobile homes; and to Burrell as farm manager for the Pueblo. The Burrells contend that the indi officials withdrew the offer on September 23, but that the tribal council v the offer on September 25. In October 1997, the Burrells, through their at demanded all tribal council records dealing with their farm lease to "see i possibility of avoiding litigation." By January 1998, the tribal council b resolution rescinding the September 1997 offer to the Burrells.

It is the Burrells' position that the individual tribal officials inte off their farm, stole their crops, terminated their lease, and discriminate account of their race (non-Indian). Aplt. Br. at 13.

## II. PROCEDURAL HISTORY

### A. Administrative Proceedings Before the Bureau of Indian Affairs, United Department of Interior

The Burrells' complaint asserts that beginning in 1997, the Pueblo off informed the Bureau of Indian Affairs ("BIA") that they abandoned their far

their lease, and defaulted on their FHA loan and water rights assessments.

A tribal council resolution dated October 1, 1998, stated that the Burrells abandoned their lease in the summer of 1997 and requested that the BIA institute proceedings to terminate the farm lease. *Id.* at 41. A letter dated February 1998 from the Superintendent of the Southern Pueblos Agency, BIA, United States Department of Interior, notified the Burrells that the farm lease was cancelled. *Id.* at

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Superintendent cited the Burrells' failure to keep their performance bond and the tribal council's October 1998 resolution, and delinquent operations and maintenance charges as reasons for the decision. The Superintendent also noted the Burrells' failure to respond to the office's prior requests for information. *Id.*

The Burrells appealed that decision to the Albuquerque Area Office, BIA, United States Department of Interior. On May 26, 1999, the Area Director affirmed the Superintendent's decision to cancel the lease. *Id.* at 45. In particular, the Area Director observed that the Burrells sent a letter dated June 22, 1998, to the Superintendent complaining that discrimination from Pueblo officials amounted to a constructive termination and breach of the lease. *Id.* at 48. That June 1998 letter stated in part: "[The Burrells] did not voluntarily abandon their lease, but instead were driven off their lands which they worked peacefully for 17 years, all because of the prejudice of a few tribal officials. The imposition of a performance bond under these circumstances is not proper." *Id.* at 53. Additionally, the Area Director noted that the Burrells did not dispute the violations cited by the Superintendent, but their attorney advised the office that it faced federal litigation if it continued to enforce the Burrells' contractual and constitutional rights. *Id.* at 48. The Area Director concluded that the Burrells' claims failed to excuse their multiple breaches of the lease. *Id.* at 49.

The Burrells appealed the Area Director's decision to the Interior Board of Land Appeals ("IBIA"), United States Department of Interior. The IBIA affirmed

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the Area Director's decision on May 17, 2000. *Id.* at 52. The IBIA held that the BIA had a trust duty toward the Burrells, rejecting the Burrells' argument that the

should be excused because of the BIA's failure to investigate their allegations against the Pueblo. *Id.* at 55. Specifically, the IBIA determined that the Burrells' re-iterations of their allegations of discrimination to the BIA long after they were in violation of the lease. Therefore, the IBIA concluded that the BIA's failure to investigate those allegations was not the cause of the Burrells' lease violations. *Id.*

The Burrells did not seek federal court review of the IBIA's decision.

#### B. Federal Court and Tribal Court Proceedings

On April 14, 1998, the Burrells filed an action in the United States District Court for the District of New Mexico, *Burrell v. Armijo, et al.*, CIV 98-0438 JC/W, asserting civil rights claims under 42 U.S.C. §§ 1981, 1983, and 1985, as well as a claim based on "respondeat superior," against the Pueblo and the individual tribal officials. *App.* at 21, 226-45. The district court dismissed that action without prejudice on the grounds of the Burrells' failure to exhaust tribal court remedies, following the Supreme Court's decisions in *National Farmers Union Insurance Companies v. Crow Tribe*, 471 U.S. 82 (1985) and *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987). *Id.* at 246-52. In particular, the district court rejected the Burrells' contention that the exhaustion rule did not apply because the tribal court lacked jurisdiction over their lease and civil rights claims. *Id.* at 250. The district court found that the Burrells' complaint could not be construed to claim a remedy under the provisions of

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the lease, and that the Burrells failed to "cite any express jurisdictional provisions that would prevent tribal courts from hearing their civil rights claims." *Id.* The Burrells appealed that decision.

On October 29, 1998, the Burrells re-filed their lawsuit in the Santa Fe Tribal Court (hereinafter "tribal court").<sup>(3)</sup> In that action, the Pueblo and the tribal officials filed a motion to dismiss on the grounds of tribal sovereign immunity to state a claim. Meanwhile, the Burrells filed several motions, including a motion to compel discovery, a motion for an evidentiary hearing, and a motion for a temporary restraining order and/or a preliminary injunction to prevent tribal officials and other tribal members who provided assistance to the Burrells. Tribal Judge Floyce

held two evidentiary hearings on all pending matters on February 29, 2000, 21, 2000. App. at 23. By May 2002, Judge Kezele had not issued any decisions on pending motions.

On May 14, 2002, the Burrells filed the present action in the United States District Court for the District of New Mexico.<sup>(4)</sup> The complaint alleged that exhaustion of the process of law by failing to make any rulings on the pending motions for almost two years. App. at 22-23. The complaint also asserted that Judge Kezele's conduct "exhibited extreme bias in favor of the Pueblo of Santa Ana and [the] tribal court," and that he paid his salary. Id.

The Pueblo and the individual tribal officials subsequently filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and (b)(6). In this motion, the Burrells' complaint should be dismissed for failure to state a claim and for failure to exhaust tribal court remedies, and that the action against the Pueblo was barred by sovereign immunity. App. at 29, 57. The district court granted the motion on the basis of exhaustion of remedies ground. Id. at 158-65. The district court stated that a delay in tribal court proceedings might be sufficient to invoke an exception to the exhaustion requirement, but given the appointment of a new tribal judge to the case, the district court concluded that the tribal court remained an available remedy for the Burrells to exhaust their remedies. Id. at 163-64. Thus, the district court granted the motion for six months to provide the tribal court an opportunity to address the Burrells' claims. Id. at 164. The district court declined to address tribal sovereign immunity because the issue of exhaustion had been resolved. Id.

Within that six month period, Tribal Court Judge Angela Luhan issued a

(3)

The tribal court complaint is essentially the same complaint filed in the first federal action. The tribal court complaint contained civil rights claims under 28 U.S.C. 1981, 1983, and 1985, and claims for breach of lease, respondeat superior negligence, and violations of property rights and "tribal laws and traditions." App. at 73.

(4)

The Burrells acknowledge that the complaint in this action is basically the same complaint filed in the first federal action and in the tribal court. App. at 22-23. The Burrells state that the two federal proceedings and the tribal court proceedings involve the same parties, the same issues of fact and law, and are actually the same

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Granting Defendant's [sic] Motion to Dismiss on Grounds of Sovereign Immunity

THIS MATTER comes before the Court pursuant to Defendant's [sic] Motion to Dismiss [o]n Grounds of Sovereign Immunity. Having reviewed the entire file in this matter, submissions of the parties, a law, and being otherwise fully advised on the issues, THE COURT FINDS that Santa Ana Tribal Court has Jurisdiction to hear this matter, and Defendant's [sic] motion is well taken and granted, and there is no ne any further hearings in this matter.

IT IS THEREFORE ORDERED that Defendant's [sic] Motion to Dismiss is hereby GRANTED on the grounds that Plaintiff's [sic] claims are barred by the Sovereign Immunity of Defendant, Pueblo of Santa Ana from suit.

Id. Judge Luhan did not issue a ruling on any other motions.(5)

After the Pueblo and the individual tribal officials notified the dist tribal court's decision, the Burrells filed a motion asking the district co tribal court's decision "null and void." App. at 169, 188. The district c motion, refusing to review the Burrells' arguments that the tribal court fa parties to arbitration and that the tribal court's sovereign immunity rulir Supreme Court precedent. Id. at 194-201. The district court stated that i review the tribal court's determination regarding its jurisdiction to adjud Burrells' claims, but that nothing in the Burrells' motion could be constru request. Yet, the district court entertained the Burrells' argument to dec court's decision void based on a lack of due process. Id. at 197. Althoug

(5)

In addition to their prior pending motions before Judge Kezele, the filed several motions before Judge Luhan, including motions to compel disclosure of their complaint, and order arbitration. App. at 220.

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court initially determined that its readjudication of issues previously res court was not supported by Supreme Court precedent, it alternatively reached of the Burrells' due process argument and found that the tribal court's process provided adequate due process. Id. at 198. The district court concluded by requesting the parties to file status briefs addressing, at a minimum, the whether the stay should be lifted; whether the stay should be extended pending exhaustion; and whether the Burrells' claims should be dismissed. Id. at 1

In the status briefs filed, the parties agreed that the Burrells had exhausted their tribal court remedies because it appeared that no appellate review was available. App. at 204, 220-21. The Pueblo and the individual tribal officials also requested in their status briefs that the district court should lift the stay and dismiss the complaint with prejudice under res judicata principles, arguing that the tribal court had adjudicated the Burrells' claims. Id. at 203-14.

The district court subsequently lifted the stay because the parties demonstrated that the Burrells exhausted their tribal court remedies. App. at 398. The court also construed the Pueblo and the individual tribal officials' status brief motion to dismiss raising res judicata as a new ground for dismissal, and granted the Burrells an opportunity to respond. Id. at 400. The Burrells, however, did not file a response.

On August 29, 2003, the district court issued a decision on the unopposed motion to dismiss. App. at 402-406. The district court noted that under 10

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41(b) and Tenth Circuit precedent, a dismissal for lack of jurisdiction (such as sovereign immunity) did not operate as a final adjudication on the merits under res judicata principles. Id. at 404. Nevertheless, the district court stated that under the doctrine of collateral estoppel, a dismissal for lack of jurisdiction precluded "relitigation of jurisdictional issues necessarily decided on the jurisdictional question."

Matosantos Commercial Corp. v. Applebee's Int'l, Inc., 245 F.3d 1203, 1209-10 (10th Cir. 2001); Stewart Sec. Corp. v. Guar. Trust Co., 597 F.2d 240, 241 (10th Cir. 1979).

Applying this law, the district court concluded that the tribal court determined that the Defendants were entitled to sovereign immunity with respect to their claims and that immunity had not been waived." App. at 405. As a result, the court held that the tribal court's decision was entitled to preclusive effect. The court noted, as it did previously in the case, that it possessed the authority to decide whether the tribal court had jurisdiction to decide the Burrells' claims.

then commented:

Plaintiffs have never made an intelligible argument challenging the jurisdiction of the Santa Ana Tribal Court over their various claims. Plaintiffs . . . [previously argued] that the tribal court lacked jurisdiction over the BIA lease because of an alleged arbitration clause within the lease and lacked jurisdiction over all Plaintiffs' claims because tribal court jurisdiction is generally unfair. These arguments do not relate to the jurisdictional authority of the Santa Ana Tribal Court over Plaintiffs' causes of action. Plaintiffs made no further attempt to challenge the jurisdiction of the tribal court. Therefore, this Court has never addressed the jurisdiction of the Santa Ana Tribal Court as it relates to Plaintiffs' claims.

Id. at 405-06.

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### III. STANDARD OF REVIEW

The Burrells' notice of appeal references only the district court's August 2001 order dismissing their claims based on the preclusive effect accorded to the tribal court's sovereign immunity decision. App. at 408; see *Salguero v. City of Clovis*, 1168, 1172 (10th Cir. 2004) (citation omitted) (reviewing the district court's application of the doctrine of collateral estoppel de novo). The Burrells' appellate brief does not limit itself to challenging the district court's collateral estoppel application. The Burrells spend a significant portion of their brief arguing that the district court erred by denying their motion to declare the tribal court's decision "null and void." Their focus, in particular, on the alleged lack of due process afforded to them in the district court proceedings. We believe that the issues involved in the denial of the Burrells' motion—whether, and under what circumstances, a federal court may refuse to recognize or enforce a tribal judgment—are intertwined and arguably inseparable from the issue of whether to give the tribal court's judgment preclusive effect. Therefore,

review de novo the district court's denial of the Burrells' motion to declare the court's decision "null and void." See *Bird v. Glacier Elec. Coop. Inc.*, 251 F.3d 1140-41 (9th Cir. 2001) (applying de novo review to examine whether "alleged process violations precluded the district court's grant of comity . . . to judgment").

#### IV. DISCUSSION

The threshold issue on appeal is whether any grounds exist that would preclude the court from giving preclusive effect or otherwise recognizing the tribal court's decision on its immunity decision. We believe two grounds require consideration in this case: (1) lack of subject matter jurisdiction; and (2) denial of due process, including whether the defendant enjoyed a "full and fair opportunity to litigate" their claims under the doctrine of collateral estoppel. See *Macarthur v. San Juan County*, 309 F.3d 1216, 1225 (9th Cir. 2002) (stating that this court is "unwilling to enforce judgments of tribal courts beyond their authority"); *Wilson v. Marchington*, 127 F.3d 805, 807 (9th Cir. 2000) (with approval in *Macarthur*) (holding that federal courts shall neither recognize nor enforce tribal judgments if "(1) the tribal court did not have both personal and subject matter jurisdiction; or (2) the defendant was not afforded due process of law." See *City of Shawnee*, 13 F.3d 345, 348 n.2 (10th Cir. 1993) (noting that "collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case") (quoting *City of Shawnee*, omitted).

##### A. Tribal Court Jurisdiction

"Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. 498 (1978) (internal citations omitted); see *Montana v. United States*, 450 U.S. 548 (1981) (determining that Indian tribes possess inherent authority to exercise jurisdiction over "nonmembers who enter consensual relationships with the tribe or its members, through . . . contracts, leases, or other arrangements" and "over

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members, through . . . contracts, leases, or other arrangements" and "over

non-Indians on fee lands within its reservation when that conduct threatens direct effect on the political integrity, the economic security, or the health of the tribe"); *Enlow v. Moore*, 134 F.3d 993, 996 (10th Cir. 1998) (stating that jurisdiction over non-Indians on reservation lands "presumptively lies in the tribe unless affirmatively limited by a specific treaty provision or federal statute omitted).

The Supreme Court, citing the promotion of tribal self-government and tribal court jurisdiction (as opposed to a jurisdictional prerequisite), has required litigants to exhaust their tribal court remedies before a district court may evaluate the existence of federal court jurisdiction. *Iowa Mut.*, 480 U.S. at 15-16; see *Texaco, Inc. v. Zaleski*, 1378 F.2d 1378 (10th Cir. 1993) (noting that "[w]hen the activity at issue arises on reservation lands, [exhaustion] policies almost always dictate that the parties exhaust their tribal court remedies before resorting to a federal forum"); *Smith v. Moffett*, 947 F.2d 442, 444 (10th Cir. 1991) (stating that application of the exhaustion requirement does not depend on the existence of a pending action in a tribal court). This exhaustion policy requires a litigant to exhaust tribal court the first opportunity to examine its own jurisdiction, but is subject to several exceptions: (1) "where an assertion of tribal jurisdiction is motivated by harassment or is conducted in bad faith," *Nat'l Farmers*, 471 U.S. at 857 n.21 (citation omitted); (2) "where the [tribal court] action is patently violating tribal jurisdictional prohibitions," *id.*; (3) "where exhaustion would be futile because

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of an adequate opportunity to challenge the [tribal] court's jurisdiction," *id.* . . . it is plain that no federal grant provides for tribal governance of non-Indian land covered by [the main rule established in *Montana v. United States*], *Montana v. United States*, 450 U.S. 491, 498 n.14 (1981); or (5) it is otherwise clear that the tribal court lacks jurisdiction so that the exhaustion requirement "would serve no purpose other than delay," *Nevada v. Hicks*, 533 U.S. 353, 369 (2001) (internal citation omitted). Allegations of local bias and tribal court incompetence, however, are not sufficient to excuse the exhaustion requirement. *Iowa Mut.*, 480 U.S. at 19.

After exhaustion is completed, litigants may seek federal court review

court's ruling that it had jurisdiction. Iowa Mut., 480 U.S. at 19; Nat'l at 853. But "[u]nless the district court finds the tribal court lacked jurisdiction, it must enforce the tribal court's judgment without reconsidering issues decided by the tribal court." AT&T Corp. v. Intellectual Prop. Bd. of the Cherokee Tribe, 295 F.3d 899, 905 (9th Cir. 2002) (citing Iowa Mut., 480 U.S. at 19).

The Burrells never accepted the district court's invitation to challenge the court's jurisdiction. On appeal, the Burrells still fail to construct a claim challenging the tribal court's jurisdiction over their claims. The only arguments in the Burrells' filings before the district court or on appeal that could be construed as an objection to the tribal court's jurisdictional authority is their claim that

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the BIA lease required arbitration of their damage claims before the Secretary of the Interior.

With regard to their contention that the BIA lease required arbitration of their damage claims, the Burrells argue that language in the BIA lease and its regulation, 25 C.F.R. 131, together with 25 U.S.C. 229, operate as a waiver of the Pueblo's sovereign immunity and require arbitration of their damage claims by the Secretary of the Interior. App't. Br. at 23-25, 30. In support, the Burrells cite the Supreme Court's decision in *C & L Enterprises, Incorporated v. Citizen Bank Potawatomi Indian Tribe*, 532 U.S. 411, 414 (2001), which held that an Indian tribe's agreement to arbitrate disputes and to enforce arbitral awards in state court waived the tribe's sovereign immunity in a state court action to enforce an arbitral award. We conclude that the Burrells fail to demonstrate that an agreement to arbitrate existed or that federal law required arbitration in this instance.

First, the Burrells claim that the BIA lease contains a provision requiring arbitration before the Secretary of the Interior pursuant to "the old" 25 C.F.R. 131. While the lease references that regulation, App. at 123, the portions of the lease that we observe that the Pueblo and the individual tribal officials pointed out to us are that 25 C.F.R. 131 has been repealed, that 25 C.F.R. 162 now deals with leases, and that 25 C.F.R. 162 does not contain a provision requiring arbitration. Even in the Burrells' first federal action, the district court rejected their claim that 25 C.F.R. 131 was a jurisdictional prohibition to tribal court

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Second, the Burrells cite paragraph seven of the lease, entitled "Rese which states:

It is understood and agreed that the lessor reserves the right to make gas leases, grant rights of way and other legal grants, on the premise covered by this lease and that in event such a lease or grant is made, lessee hereunder shall be entitled to damages for the actual loss sust him on account of said lease or grant, and to nothing more. It is fu understood that in the event of a dispute between the lessee hereunder the lessee or permittee under any oil and gas lease, right-of-way, or grant, as to the amount of such actual damages the matter will be refe to the Secretary who shall be the sole and final judge as to the amour the said damages.

App. at 124 (emphasis added). This paragraph, however, relates to disputes Burrells and lessees under an oil and gas lease, right-of-way, or other gra between the Burrells and the Pueblo. App. Br. at 17.

Third, the Burrells rely on 25 U.S.C. 229, which states:

If any Indian, belonging to any tribe in amity with the United States, (6)

The record reflects that the Burrells addressed the tribal court's ju adjudicate civil rights claims in their first federal case. Nevertheless, squarely raise the issue in this case. Instead, they have merely suggested court erred in the first case they filed by requiring them to exhaust their In support of that contention, they note that their case involves a federal constitutional torts. Noticeably absent from the Burrells' briefs is citat Court's decision in Nevada v. Hicks, which held that "tribal courts cannot 1983 suits." 533 U.S. at 369. Whether tribal courts possess jurisdiction 1981 and 1985 claims appear to be issues of first impression. But since t have not raised these issues, we will not address them at this time.

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within the Indian country, take or destroy the property of any person lawfully within such country, or shall pass from Indian country into a State or Territory inhabited by citizens of the United States, and the inhabitant of the United States, such citizen or inhabitant, his repre attorney, or agent, may make application to the proper superintendent, agent, or subagent, who, upon being furnished with the necessary documents and proofs, shall, under the direction of the President, mak application to the nation or tribe to which such Indian shall belong, satisfaction; and if such nation or tribe shall neglect or refuse to r satisfaction, in a reasonable time not exceeding twelve months, such superintendent, agent, or subagent shall make return of his doings to Commissioner of Indian Affairs, that such further steps may be taken a shall be proper, in the opinion of the President, to obtain satisfacti injury.

25 U.S.C. 229. This argument was not presented to the district court, ar settled that this court generally does not review matters raised for the fi See, e.g., Tillman ex rel. Estate of Tillman v. Camelot Music, Inc., 408 F.

(10th Cir. 2005). In any event, this statute does not establish that the Burrells waived their sovereign immunity by agreeing to arbitrate disputes over the BIA lease, thereby depriving the tribal court of jurisdiction.

Lastly, the Burrells point out that they wrote to the Area Director of the BIA on June 22, 1998, demanding all their rights under the lease. The Burrells claim that their general demand encompassed a request for mandatory arbitration. This argument incorrectly assumes that the BIA lease contained a right to arbitration. If the Burrells could somehow argue that the Secretary of Interior failed to afford them a right to arbitration, they waived this argument because they never sought federal review of the BIA's decision to terminate the lease.

In sum, while lack of subject matter jurisdiction is a ground for refusal to

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recognize the tribal court's sovereign immunity decision, we agree with the court that the Burrells failed to assert an intelligible or otherwise meritorious issue.

#### B. Collateral Estoppel-Due Process Considerations

The Burrells focus most of their attention on an alleged lack of fairness in the proceedings before the tribal court. The Burrells maintain that the tribal court should allow discovery pertaining to the tribal council's records of its meetings, the tribal form of government, including the separation of powers between the tribal council and its officials, and the cacique that appoints them;(7) the tribal court's code of laws, and the existence of a tribal court system based on principles of stare decisis. (8) The Burrells assert that the Pueblo has a corrupt, totalitarian form of government that lacks a regular code of laws and allows tribal judges to serve entirely at the discretion of tribal officials. The Burrells point out that the first tribal judge failed to make a record for almost four years, and they assert that the second tribal judge acted upon the Burrells' record,(8) ignored their motions, and simply issued a one-page order dismissing their claim on sovereign immunity grounds. Finally, the Burrells argue that they were denied due process. They believe that the district court had a responsibility to review the tribal court's handling of their case because it involves a dispute over a federal lease and

violations of civil rights.

In denying the Burrells' motion to declare the tribal court decision ' the district court observed that the Ninth Circuit, following principles of for recognition of foreign judgments, refuses to enforce tribal court judgment denied a litigant due process. App. at 197 (citing AT&T Corp., 295 F.3d 1136). The district court, however, ruled that a federal court's readjudicate issues resolved in tribal court because of a due process failure to the Supreme Court's decisions in *Iowa Mutual and National Farmers*. Id. the alternative, the district court reached the merits of the Burrells' argument that they were afforded sufficient due process. Id. The district court nonetheless provided the Burrells two days of hearings, and stated that they were of due process merely because the tribal court ruled on sovereign immunity ruling on the Burrells' pending motions. Id.

We disagree with the district court's conclusion that the Burrells could (7)

The cacique appears to be the leader of the Pueblo that is appointed by (8)

The Burrells presume that no transcripts of the two days of hearings were the first tribal judge ignored requests for copies of the tapes from the hearing at 22.

(9) We note that at one point in their brief, the Burrells ask us to overrule the Court's decision in *Santa Clara Pueblo v. Martinez*. The Burrells maintain that subjects United States citizens to "wide ranging violations of their basic rights by tribal officials." In *Martinez*, the Supreme Court limited federal relief under the Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. 1301-1303, to a writ of *corpus*. 436 U.S. at 69-70. Needless to say, we cannot overrule the Supreme

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challenge the tribal court's judgment based on due process considerations.

Court's decisions in *Iowa Mutual and National Farmers* do not address due process; rather, they hold that principles of comity require a federal court to give the first opportunity to determine its own jurisdiction, subject to later review by the court. *Iowa Mut.*, 480 U.S. at 19; *National Farmers*, 471 U.S. at 857. Here, that both principles of comity applicable to the recognition of foreign judgments and collateral estoppel doctrine's requirement that a litigant have a full and fair opportunity to litigate an issue, are relevant to the case at hand.

In *Macarthur v. San Juan County*, we cited the Ninth Circuit's decision in *v. Marchington*, which found two mandatory grounds for refusing to recognize

enforce a tribal court judgment. *Macarthur*, 309 F.3d at 1225. Specifically, the Ninth Circuit held, citing principles of comity, that a federal court should neither enforce a tribal judgment if the tribal court lacked personal or subject matter jurisdiction nor if the defendant was denied due process of law. *Marchington*, 127 F.3d at 1152. The court still finds *Marchington* instructive.

As to the due process ground, the Ninth Circuit determined that due process was not violated because it encompassed

that there has been opportunity for a full and fair trial before an impartial tribunal that conducts the trial upon regular proceedings after proper notice and voluntary appearance of the defendant, and that there is no showing of prejudice in the tribal court or in the system of governing laws. Further, there is no evidence "that the judiciary was dominated by the political branches of the tribal government or by an opposing litigant, or that a party was unable to obtain adequate legal counsel, or secure documents or attendance of witnesses, or to have access to the tribal court records."

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to appeal or review, would support a conclusion that the legal system of the tribe is one whose judgments are not entitled to recognition."

*Id.* at 811 (citing *Hilton v. Guyot*, 159 U.S. 113, 202-03 (1895); Restatement (Second) of Foreign Relations Law of the United States § 482 & cmt. b (1986)); see also *Macarthur*, 309 F.3d at 1152 (applying *Marchington* to hold that a closing argument in tribal court proceedings violated due process). While describing these basic due process tenets, the court also cautioned that comity did not require "a tribe [to] utilize judicial procedures that are those used in the United States Courts" and that federal courts should "be respectful of tribal jurisdiction and respect tribal jurisprudence along with the special customs and practical realities of tribal court systems." *Id.*

Additionally, we observe that our collateral estoppel jurisprudence is consistent with the notion that due process concerns are relevant in assessing whether a federal court should enforce a tribal court judgment. See *Crocog Co. v. Reeves*, 992 F.2d 267, 270 (10th Cir. 1993) (stating that due process requires that a party have a full and fair opportunity to be heard in a tribal court case) (citing *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 482-83 & n.24 (1982)).

Collateral estoppel, or, as it is often known, issue preclusion, "bars a party from relitigating an issue once it has suffered an adverse determination on the merits of that issue. Issue preclusion arises when the party is pursuing or defending against a different claim or cause of action in a subsequent lawsuit." *Res., Ltd. Liab. Co. v. U.S. Dep't of Agric.*, 378 F.3d 1132, 1136 (10th Cir. 2006).

circuit, application of issue preclusion requires four elements:

(1) the issue previously decided is identical with the one presented in the current action in question, (2) the prior action has been finally adjudicated

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merits, (3) the party against whom the doctrine is invoked was a party in privity with a party, to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Dodge v. Cotter Corp., 203 F.3d 1190, 1198 (10th Cir. 2000) (citation omitted). (10)

As to the "inquiry into whether a party had a full and fair opportunity to litigate the issue . . . [we] focus on whether there were significant procedural limitations in the proceeding, whether the party had the incentive to litigate fully the issue, and whether effective litigation was limited by the nature or relationship of the party to the issue." UTE Indian Tribe of Uintah & Ouray Reservation, 975 F.2d 683, 689 (10th Cir. 1992) (internal citation omitted); see also Bell v. Dillard Dep't Stores, 85 F.3d 1190, 1198 (10th Cir. 1996) (listing several authorities for the proposition that a lack of opportunity to litigate the issue may weigh against finding that a party had a full and fair opportunity to litigate the issue).

Under the circumstances present in this case, we conclude that both the public policy doctrine weigh against recognizing the tribal court's sovereign immunity defense. In the initial matter, we note that the close relationship between the tribal court and the individual tribal officials causes us to carefully scrutinize the tribal court's decision in this case.

First, the procedural posture leading up to the tribal court's ruling supports a finding of issue preclusion. Although the first tribal judge conducted two days of evidentiary hearings, he failed to make any rulings on the parties' pending motions after four years. The Burrells presented some evidence that the Burrells did not have a forum to fully and fairly litigate their claims. Further, when the Burrells returned to the tribal court, they encountered a new tribal judge who had not presided over the two days of hearings. Whether the new judge had reviewed or had any knowledge of the testimony from those hearings is unclear. The record reflects that the first tribal judge never responded to the parties' motions.

transcript of the proceedings. Without any further hearings or ruling on a pending motions, the second tribal judge issued a one-page order granting the Pueblo sovereign immunity (and presumably extending the Pueblo's immunity to the tribal officials), and dismissed the Burrells' claims. This one-page order contains no reference to any testimony from the evidentiary hearing, or for that matter any explanation of the tribal court's reasoning.

Second, we are troubled by the lack of a tribal appellate court to review the tribal judge's decision. (10)

Elements one and three are clearly satisfied in this case. Element two is not satisfied because a dismissal for lack of jurisdiction, such as sovereign immunity, is an exception to the final adjudication on the merits requirement. See *Park Lane*, 1136 (internal citations and quotations omitted) (stating that, although a dismissal on jurisdictional grounds is not a final adjudication on the merits, "dismissal on jurisdictional grounds preclude relitigation of the issues determined in ruling on the question").

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tribal judge's decision. At one point in the litigation, counsel for the Burrells pursued an appeal before the tribal council, presided over by the tribal judge at 204. Counsel later corrected that statement, noting that when the tribal court is the "Contemporary Tribal Court," it did not provide for any appeal to the tribal council. *Id.* Not only do counsel's statements demonstrate the unavailability of any appellate review, they shed light on the nature of the relationship between the tribal court and the named defendants in this action.

In reaching our decision, we emphasize that federal courts are not the appellate body for tribal courts. As the Supreme Court has instructed, the policies of promoting tribal self-government and self-determination instruct us to provide deference to tribal court systems, their practices, and procedures. See, e.g., *United States v. Farmers*, 471 U.S. at 856. This heed we do not take lightly. Moreover, we reject the Burrells' position that the district court had a duty to monitor the proceedings of the tribal court.

Given our conclusion that the tribal court's decision is not entitled to deference under either principles of comity or collateral estoppel, we proceed to address the issue of the sovereign immunity issue.

C. Sovereign Immunity for the Pueblo

"As a matter of federal law, an Indian tribe is subject to suit only if it has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Ind. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). Congress's intent to abrogate

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immunity must be unequivocally expressed, while a tribe's waiver of its immunity must be clear. *C&L Enters., Inc.*, 532 U.S. at 418.

Again, the only argument that the Burrells raise to challenge the Pueblo's sovereign immunity is that the provisions of the BIA lease required arbitration of damage claims before the Secretary of the Interior.<sup>(11)</sup> Having already determined that the Pueblo's argument is without merit, we conclude that the Pueblo is entitled to sovereign immunity. *D. Claims Against the Individual Tribal Officials*

An Indian tribe's "sovereign immunity does not extend to an official if the official is acting as an individual or outside the scope of those powers that have been delegated to him." *Tenneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F.2d 1000 (10th Cir. 1984) (McKay, J., concurring). Thus, "[w]hen a complaint alleges that tribal officials named as defendants have acted outside the amount of authority that the tribe is capable of bestowing, an exception to the doctrine of sovereign immunity is applicable." *Id.* at 574; see also *Burlington N. R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 904 (10th Cir. 1991) (stating that a tribe's immunity extends to officials "acting in their official capacity and within the scope of their valid authority").

Accepting the allegations in the Burrells' complaint as true, we conclude that the Burrells have sufficiently pled that the individual tribal officials acted outside the tribe's authority, and thus, are not entitled to sovereign immunity. The question

(11)

The Burrells do not argue that Congress waived tribal sovereign immunity civil rights claims, and therefore, we do not reach those questions.

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whether the Burrells' complaint states a claim for relief pursuant to 42 U.S.C. § 1983, or 1985, or for breach of the lease.

Both parties have briefed the merits of the Burrells' claims under Fed. R. Civ. P. 12(b)(6). At this juncture, the Burrells' 1983 and breach of lease claim are disposed of quickly. First, the Burrells' complaint alleges that the individual tribal officials acted under color of tribal law, as opposed to state law. See App. at 17 (conduct and omissions of the Defendants complained of were committed by persons acting under color of tribal law.); App. at 17 ("These defendant tribal officials acted clothed under tribal authority at all times . . . ."). A 1983 action is available to persons alleging deprivation of constitutional rights under color of tribal law. See *Williams Co. v. Ft. Belknap Hous. Auth.*, 719 F.2d 979, 982 (9th Cir. 1983).

We also dismiss the Burrells' breach of lease claim. The IBIA terminated the lease in May 2000, despite the Burrells' allegations that discrimination by the IBIA and its officials amounted to a constructive termination and breach of the lease. The Burrells' failure to seek review of the IBIA's final decision prevents them from asserting a breach of lease claim here. See, e.g., *McAlpine v. United States*, 112 F.3d 1000 (10th Cir. 1997) (reviewing an IBIA decision under the Administrative Procedure Act, 5 U.S.C. § 551-706).

Lastly, we express no opinion as to the merits of the Burrells' 1981 and 1983 claims against the individual tribal officials. Instead, we remand those claims to the district court for consideration in the first instance.

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Accordingly, we REVERSE the district court's decision to give preclusive effect to the Burrells' 1981 and 1983 claims.

to the tribal court's ruling and its subsequent dismissal of the Burrells' basis. However, we DISMISS the Pueblo from this action because it is entitled to sovereign immunity, and DISMISS the Burrells' 1983 and breach of lease claim against the individual tribal officials for failure to state a claim. Finally, we affirm the Burrells' 1981 and 1985 claims against the individual tribal officials to be heard by the district court to address in the first instance. We express no opinion on the remaining claims.

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Burrell v. Armijo, 03-2223

McCONNELL, Circuit Judge, concurring in the judgment.

I agree with the majority that the district court improperly gave preclusive effect to the tribal court's judgment. I would reach this conclusion, however, on a different ground. Instead of deciding that the court system of the Santa Ana Pueblo did not provide a full and fair opportunity to litigate, I would reverse on the ground that the district court lacked jurisdiction to hear federal civil rights claims brought under 42 U.S.C. § 1983.

We may consider the jurisdiction of the tribal court sua sponte, as we have strong reasons to do so.

This case is essentially a civil rights action under 42 U.S.C. § 1983. In *Nevada v. Hicks*, 533 U.S. 353, 366-69 (2001), the Supreme Court established that a tribal court cannot entertain claims under 42 U.S.C. § 1983, and I see no reason to distinguish the 1983 claim in *Hicks* from the Burrells' 1981 and 1985 claims. (The Pueblo essentially conceded as much at oral argument.) It follows that the district court's ruling was not a "court of competent jurisdiction," and its ruling is therefore entitled to no deference nor to preclusive effect. See *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) ("Unless a federal court determines that the Tribal Court lacked jurisdiction, however, proper deference to the tribal court system precludes relitigation of the LaPlantes' bad-faith claim and resolved in the Tribal Courts."); *Morales*

States, 440 U.S. 147, 153 (1979) (noting that collateral estoppel requires "court of competent jurisdiction"); *Hilton v. Guyot*, 159 U.S. 113, 202-03 (

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(requiring the same for comity). As the majority notes, the Burrells challenge jurisdiction of the tribal court in their first federal suit but have not "issue in this case." *Op. of Briscoe, J.*, at 17 n.6. Two questions remain: raise the jurisdiction of the tribal court sua sponte, and whether we should

There is no controlling precedent on raising the jurisdiction of the tribal court sua sponte, but the best conclusion is that we may do so. As a general matter, the court disfavours enforcing judgments of tribal courts that act without jurisdiction. *San Juan County*, 309 F.3d 1216, 1225 (10th Cir. 2002) ("We are unwilling to enforce judgments of tribal courts acting beyond their authority, especially where a federal right is to be protected against an unlawful exercise of Tribal Court power." (quoting *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985)); see also *Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997) (it is not "discretionary" but rather "a threshold inquiry" whether the tribal court has matter jurisdiction).

This Court has not yet decided whether a tribal court's judgment is preclusive under the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, U.S.C. § 1738, or as a matter of comity. *MacArthur*, 309 F.3d at 1225; cf. *Wilson*, 127 F.3d at 807 (concluding "that the principles of comity, not full faith and credit govern whether a district court should recognize and enforce a tribal court judgment"). The majority uses both approaches. Either way, it is appropriate for a federal court to consider whether the court that rendered the underlying judgment had jurisdiction.

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so.

It is well established that a court may raise the issue of preclusion sua sponte, in appropriate cases. *Arizona v. California*, 530 U.S. 392, 412 (2000) (that res judicata might be raised sua sponte in "special circumstances"); *Id.*; *Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995) (noting "that trial courts may in appropriate cases raise the res judicata bar on their own motion"); *Scherer*

Life Assurance Soc'y, 347 F.3d 394, 398 n.4 (2d Cir. 2002) (noting that "a raise [res judicata] sua sponte, even if the parties have seemingly waived noting that a court has "no obligation to" and may even have good reasons r Mowbray v. Cameron County, Texas, 274 F.3d 269, 281-82 (5th Cir. 2001) (upl district court's dismissal sua sponte on res judicata grounds); see also Ch Wright, Arthur R. Miller & Edward H. Cooper, 18 Federal Practice and Proce 4405 (2d ed. 1990 & Supp. 2005) ("[I]t has become increasingly common to ra question of preclusion on the court's own motion.").

It would seem to follow that a court may consider preclusion sua spont federal jurisdiction. Without a discretionary power to raise a tribal cour sua sponte, the federal court could be in the awkward position of acceding judgment of a court that self-evidently lacked jurisdiction. Justice requi recognizing the judgments of courts of competent jurisdiction but also refu recognize a judgment that manifestly lacks legal validity.

If we are dealing here with comity, rather than res judicata or collat

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the argument is even stronger. "[I]nquiry into jurisdiction is a part of c John v. Baker, 30 P.3d 68, 72 n.14 (Alaska 2001), and a court "need not rec judgment of the court of a foreign state if . . . the court that rendered t have jurisdiction of the subject matter of the action." Restatement (Third Relations Law 482(2)(a) (1987) (including case citations to comity analys court judgments). Put simply, lack of jurisdiction in a foreign court is a accepted ground for refusing to recognize or enforce the judgment of a fore Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Fec Statute 6 cmt. a (Apr. 11, 2005).

Venerable decisions of the Supreme Court suggest that a court may alwa consider the jurisdiction of a foreign court in cases where a party seeks r foreign judgment as a matter of comity. See Thompson v. Whitman, 85 U.S. ( 457, 461 (1873) ("[A]s to a foreign judgment it is perfectly well settled t always open, whether the court by which it was rendered had jurisdiction of

the thing."); *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 268-69 (1808) (Marshall (concluding that as a matter of principle the personal and subject-matter jurisdiction of a foreign court "may be considered by that tribunal which is to decide on the sentence").

The Ninth Circuit has gone so far as to hold that federal courts have to determine whether the tribal court had jurisdiction before according its preclusive effect as a matter of comity. *Marchington*, 127 F.3d at 810-11 (

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courts must neither recognize nor enforce tribal judgments if . . . the tribal court has both personal and subject matter jurisdiction."). Whether such an inquiry is mandatory or discretionary, however, sua sponte consideration appears to be the practice:

Generally the courts feel free to examine the factual basis of jurisdiction under foreign law without considering whether the jurisdictional question was raised in the foreign court, or whether it could be raised in a collateral judgment in the foreign country. Usually no reason is assigned for reexamination of the foreign court's jurisdiction.

Robert B. von Mehren and Michael E. Patterson, *Recognition and Enforcement of Foreign-Country Judgments in the United States*, in *Enforcement of Foreign-Country Judgments* 15, 33 (Robert B. von Mehren ed., 1974); see also *Conflicts of Law: Foreign Judgments, Basis of Jurisdiction of Foreign Court Determined by Forum's Comity*, *Va. L. Rev.* 956, 957 (1948) ("[W]ant of jurisdiction of the court over the subject matter will always negative the validity of the judgment."). Therefore, in a comity analysis, we at least may consider sua sponte whether the tribal court had subject matter jurisdiction.

Whether the inquiry is preclusion or comity, we have strong prudential reasons to address the jurisdiction of the tribal court in this case. First, the tribal court's right to hear cases under the 1981 and 1985 treaties is a purely legal question, requiring no further development. See *Russell v. SunAmerica Sec., Inc.*, 962 F.2d 1169, 1172 (5th Cir. 1992) (considering *res judicata* on the court's own motion because, "where all of the facts are contained in the record before us and all are uncontroverted, [a

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ignore their legal effect, nor may [it] decline to consider the application

rules of law to the dispositive facts, simply because neither party has seen attention to the issue by technically correct and exact pleadings").

Second, after Hicks, the answer is clear. Hicks held unequivocally that a tribal court cannot entertain claims under 42 U.S.C. § 1983. Although application of § 1983 to claims brought under § 1981 and § 1985 is technically a question of first impression in our Circuit, there is no reason to distinguish one section of the Reconstruction Amendments from the others. The Hicks Court reasoned that tribal courts do not have general jurisdiction with respect to nonmembers, 533 U.S. at 367, and "no federal law provides for tribal-court jurisdiction over § 1983 actions." The same is true of § 1981 and § 1985.

Third, and most important, reliance on jurisdictional grounds—unlike a procedural defect—does not impugn the tribal courts. Cf. *Hilton v. Guyot*, 159 U.S. 130 (1895) (noting that if a defendant can "prove that [a prior] judgment was rendered by a foreign court, which had no jurisdiction," then "he has no occasion to impeach the judgment"). To suggest that another court fails to provide a full and fair opportunity to litigate, not only in one case but as a matter of basic structure, should not take lightly. By applying Hicks, we would straightforwardly decide the case without impugning the basic procedural fairness of the courts of the Santa Clara Pueblo.

Accordingly, I concur in the judgment of the Court.