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Civil Procedure

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CIVIL PROCEDURE

OVERVIEW

Six significant cases testing the limits of federal court jurisdiction came before the Tenth Circuit during this survey term. A dispute originating in Utah between an oil company and an Indian tribe over oil and gas leases required delineation of the limits of tribal court sovereignty and the availability of the federal courts to a non-Indian plaintiff.[1] An action by several aliens challenging deportation practices of the Immigration and Naturalization Service limited the original jurisdiction of the circuit courts of appeals under section 106(a) of the Immigration and Nationality Act[2]. The personal jurisdiction cases for the term raised the questions of whether federal court diversity jurisdiction over necessary third parties can reach out of the forum state,[3] and whether a district court can inquire into its jurisdiction over parties *sua sponte*.[4] Intervention was denied a party whose interests were not sufficiently coterminous with those of the litigants in a case, resolving an apparent conflict in prior Tenth Circuit analyses of the interest requirement for intervention of right.[5] Finally, a state court's determination and enforcement of the statute of limitations against a section 1983 civil rights plaintiff was accorded res judicata effect.[6]

I. LIMITS OF INDIAN TRIBAL COURT JURISDICTION: *SUPERIOR OIL CO. V. UNITED STATES*

A. *Facts*

Superior Oil filed a complaint in federal district court arising from a dispute between it and the Navajo Indian Tribe over oil and gas leases granted by the tribe to Superior's predecessors in interest.[7] Sole authority to regulate oil and gas exploration on the tribal reservation was claimed by Superior to be vested in the Secretary of the Interior, preempting regulatory control by the tribe. Superior contended that the tribe intentionally sought to deprive it of property interests in the oil and gas leases by refusing to grant permits allowing seismic operations. Superior further alleged that the sole reason for the refusal was to cause the leases to expire, so that the tribe could negotiate new leases on more favorable terms. The tribe moved for summary judgment and dismissal

1. Superior Oil Co. v. United States, 605 F. Supp. 674 (D. Colo. 1985), *rev'd*, 798 F.2d 1324 (10th Cir. 1986).

2. 8 U.S.C. § 1105(a) (1982); Salehi v. District Director, INS, 575 F. Supp. 1237 (D. Colo. 1983), *rev'd*, 796 F.2d 1286 (10th Cir. 1986).

3. Quinones v. Pennsylvania Gen. Ins. Co., 804 F.2d 1167 (10th Cir. 1986).

4. Williams v. Life Sav. & Loan, 802 F.2d 1200 (10th Cir. 1986).

5. FDIC v. Jennings, 816 F.2d 1488 (10th Cir. 1987).

6. DeVargas v. Montoya, 796 F.2d 1245 (10th Cir. 1986).

7. Superior Oil Co. v. United States, 605 F. Supp. 674 (D. Colo. 1985), *rev'd*, 798 F.2d 1324 (10th Cir. 1986).

asserting that the court did not have subject matter jurisdiction and that its sovereign immunity shielded it from suit.[8] The district court dismissed the case agreeing that the determination of whether to issue seismic permits was within the tribe's sovereign authority. The court, therefore, did not have subject matter jurisdiction over Superior's claim.[9]

B. *The Tenth Circuit's Holding*

The Tenth Circuit reversed the dismissal of Superior's complaint relying on *National Farmer's Union Insurance Cos. v. Crow Tribe of Indians*,[10] which was handed down after the district court's decision. Although 28 U.S.C. § 1331[11] empowers a federal district court to review the federal question of whether a tribe's action has exceeded the limits of its sovereign authority, the Tenth Circuit held that the district court erred in reaching the question of whether the tribe's sovereign immunity shielded it from suit, without first requiring Superior to exhaust its claim in tribal court.[12] *National Farmers* was quoted for the proposition that exhaustion of tribal remedies is not required where tribal authority is asserted in bad faith. The court then held that Superior's claims concerning the tribe's motives for withholding the seismic permits were allegations of bad faith which, if proven, would be sufficient to vest jurisdiction in the district court before all tribal court remedies were exhausted.[13]

C. *Background*

Two obstacles must be overcome to challenge a tribe's assertion of its sovereign powers in a federal court action. The tribe's sovereign immunity must be circumvented, and the question presented must be one over which a federal district court has subject-matter jurisdiction.

1. Tribal Sovereignty

Indian tribes preceded the United States as North American political entities.[14] Tribal sovereignty (and its concomitant power of self-government) is recognized as inherent by virtue of the tribes' existence as independent political communities.[15] Limits are placed on tribal sov-

8. 605 F. Supp. at 676-77.

9. *Id.* at 686. The United States contended that it had no authority over the granting of seismic permits, and therefore the suit was dismissed on the ground that there was no case or controversy involving it. The Tenth Circuit did not address the question of the government's dismissal. 798 F.2d 1324, 1331.

10. 471 U.S. 845 (1985).

11. "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1982).

12. *Superior Oil*, 798 F.2d at 1329.

13. *Id.* at 1330-31.

14. *See generally* Russell, *The Influence of Indian Confederations on the Union of the American Colonies*, 22 J. AM. HIST. 53 (1928).

15. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832). *See also* F. Cohen, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, 229-252 (1982). Cohen's book is the classical

ereignty because of the protectorate relationship existing between the United States and Indian tribes.[16] The limits derive from tribes' incorporation within United States territory and acceptance of its protection, federal statutes (which evidence Congress' plenary control over tribal sovereignty)[17] and treaties where sovereign powers have been given up voluntarily.[18]

Shaped through treaties, federal statutes, and to a lesser extent judicial decisions, tribal sovereignty over Indians includes the right to determine tribe membership,[19] and jurisdiction to try and punish Indians for criminal offenses committed on Indian lands, the power to legislate, and the right to determine the form of tribal government.[20] The power over non-Indians is more narrowly defined. It includes the power to exclude persons from tribal territory,[21] some degree of jurisdiction over civil disputes between Indians and non-Indians, and various other powers derived from inherent sovereignty which have not been withdrawn by treaty, statute or as a result of the Indians' dependent status on the United States.[22] The extent of this jurisdiction has not been "fully determined."[23]

For some time after the enactment of the Indian Civil Rights Act of 1968,[24] several tribes purported to exercise criminal jurisdiction over non-Indians.[25] In *Oliphant v. Suquamish Indian Tribe*,[26] the Supreme Court held that Indian tribes cannot try non-Indians for crimes committed in Indian country.[27] The Court held that tribal power to try non-Indians is inconsistent with Indian tribes' submission to the overriding sovereignty of the United States.[28]

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work in the area of federal Indian Law, and is recognized as authoritative by the courts. *See, e.g., Nat'l Farmer's*, 471 U.S. at 855 n. 17; Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 139 nn.6, 8 (1982); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 199 n.9 (1978).

16. *See* F. COHEN, *supra* note 10, at 234; *Worcester*, 31 U.S. (6 Pet.) at 557. *See generally* Mettler, *A Unified Theory of Indian Tribal Sovereignty*, 30 HASTINGS L.J. 89 (1978).

17. Conquest of tribes by the United States rendered them subject to its legislative power. *See* F. COHEN, *supra* note 10, at 241.

18. United States v. Wheeler, 435 U.S. 313, 323 (1978); Montana v. United States, 450 U.S. 544 (1981).

19. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); F. COHEN, *supra* note 10, at 248.

20. *See Oliphant*, 435 U.S. at 194-96. *See generally* F. COHEN, *supra* note 10, at 247-49.

21. *See Merrion*, 455 U.S. at 137.

22. *Wheeler*, 435 U.S. at 323. *See also Oliphant*, 435 U.S. 191. *See generally* McCoy, *The Doctrine of Tribal Sovereignty*, 13 HARVARD C.R.-C.L. L. REV. 357 (1978); Collins, *Implied Limitations on the Territorial Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479 (1979).

23. F. COHEN, *supra* note 10, at 253. *See generally* Note, *Implication of Civil Remedies Under the Indian Civil Rights Act*, 75 MICH. L. REV. 210 (1976).

24. Pub. L. No. 90-284, 82 Stat. 77 (codified at 25 U.S.C. § 1302 (1982)).

25. *Oliphant*, 435 U.S. 191.

26. *Id.* Oliphant was a non-Indian resident of the reservation. He was arrested by tribal authorities at an annual tribal celebration and charged with assaulting a tribal officer and resisting arrest. *Id.* at 194.

27. "Indian country" has been defined as "all land within the limits of any Indian reservation . . . .", 18 U.S.C. § 1151 (1982).

28. *Oliphant*, 435 U.S. at 210. The Court's conclusions on tribal authority were based largely on congressional, executive and lower federal court opinions which hold that tribal courts do not have the power to try non-Indians. *Id.* at 206. Justice Rehnquist's majority

Two recent Supreme Court cases have helped delineate the authority of Indian tribes to exercise jurisdiction over civil disputes between Indians and non-Indians. In *Washington v. Confederated Tribes*,[29] the Colville tribal government refused to collect a Washington state sales tax on cigarettes sold on the reservation. Instead, the tribe collected a smaller tribal tax, enabling merchants on the reservation to undercut the prices of non-reservation competitors, with the result that non-Indians living nearby came to the reservation to buy cigarettes.[30] The tribe argued that the practice was justified because the revenue generated enabled it to provide necessary governmental services to tribal members on the reservation.[31] The Court rejected this argument, holding that the price differential achieved by refusing to collect the state tax was not generated by activities on the reservation in which the tribe had a significant interest; therefore, the action was not part of the inherent sovereignty retained by the tribe.[32]

The "significant interest" test was also employed in *Montana v. United States*,[33] where the issue was the authority of the Crow Tribe to regulate hunting and fishing by non-Indians on reservation lands owned by non-Indians.[34] Recognizing that a tribe retains inherent civil authority over the actions of non-Indians when those actions threaten or directly affect the political or economic security of the tribe, the Court held that the hunting and fishing rights in question were not of sufficient importance to justify the tribe's exercise of its sovereignty over them.[35]

As part of tribal sovereignty, Indian tribes possess the traditional common-law sovereign immunity from suit, similar to that enjoyed by the United States.[36] The immunity is subject to Congress' plenary control and may be expressly waived by Congress, or in limited situations, by the tribe itself.[37]

Tribal sovereignty was considered in *Santa Clara Pueblo v. Martinez*,[38]

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opinion contains an excellent historical outline of all three branches' views on the subject. *Id.* at 197-206.

29. 447 U.S. 134 (1980).

30. *Id.* Similar taxes on motor vehicles were challenged as well.

31. *Id.* at 154. The Court found that the tribes did have the sovereign power to collect their own taxes on the reservation, but the tribal power to tax did not oust the state's taxation power. *Id.* at 152, 155.

32. *Id.* at 155. The tribe based its challenge on federal statute, policies favoring tribal self-government, and the Indian Commerce Clause, all of which were discussed and found unsupportive of the tribe's position.

33. 450 U.S. 544 (1981).

34. *Id.* at 547.

35. *Id.* at 566. The Court overturned the Ninth Circuit's holding which stated that inherent sovereignty, and United States treaties with the Crow Tribe in combination with the federal trespass statute, 18 U.S.C. § 1165 (1982), both afforded the tribe regulatory power over the disputed hunting and fishing rights. Montana v. United States, 604 F.2d 1162 (1979).

36. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58; F. COHEN, *supra* note 10, at 324.

37. *See Santa Clara Pueblo*, 436 U.S. at 58; F. COHEN, *supra*, note 10, at 325-27.

38. 436 U.S. 49. Respondent Martinez brought suit challenging a tribal rule that excluded her children from membership in the tribe because their father was not a member. *Id.* at 52-53. The district court and Tenth Circuit both reached the merits of respondent's claim. The district court ruled that the tribe's membership rules did not violate the equal

an action brought by a member of the Pueblo against the Pueblo and its officers individually. The Court held that sovereign immunity protected the tribe, but did not extend to its officers.[39] In analyzing *Santa Clara Pueblo*, the Tenth Circuit relied on the principle that tribal immunity extends to its officers when the tribe's power to perform the action complained of is not disputed because the tribe has the necessary authority to act.[40] Where the sovereign's authority to make or enforce the law under which the official act is attacked, however, the official is subject to suit.[41]

Because of the potential for injustice in disputes between a tribe and a non-Indian where the tribe refuses access to its courts and asserts its sovereign immunity to suit in federal court, a narrow exception to sovereign immunity as described in *Santa Clara Pueblo*[42] has developed. This exception was promulgated in the Tenth Circuit's *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*[43] decision. The Dry Creek Lodge was closed by the tribe after a tribe member complained that the access road to the lodge infringed on his property. The tribal court refused to hear the lodge owners' case. Next, the lodge initiated a suit against the tribe in federal district court which was dismissed pursuant to the tribe's assertion of its immunity to suit.[44] The Tenth Circuit reversed, holding that sovereign immunity[45] should not be applied to leave a plaintiff without a forum.[46]

2. Federal Jurisdiction over Civil Disputes Between Indians and Non-Indians

Determining whether the exercise of jurisdiction by a tribal court is

protection language in the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302(8). ("No Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws . . ."), because the tribe was best situated to balance the competing interests of those seeking membership, with its own interests in preserving its cultural identity by controlling tribe membership. 402 F. Supp. 5, 18-19 (D.N.M. 1975). The Tenth Circuit reversed, holding that the tribe's interest in controlling its membership was not sufficient to justify the sexual discrimination inherent in the membership rules. 540 F.2d 1039, 1047-48 (10th Cir. 1976). On appeal the Supreme Court held that the equal protection clause of the ICRA did not expressly or impliedly waive the tribe's sovereign immunity; therefore, the tribe was competent to assert its immunity to bar respondent's action. 436 U.S. at 58, 60-73.

39. *Santa Clara Pueblo*, 436 U.S. at 59.

40. Tenneco v. Sac and Fox Tribe, 725 F.2d 572, 574 (10th Cir. 1984).

41. *Id.* The fact situation in *Tenneco* bears a close resemblance to that in *Superior Oil*. In *Tenneco*, the Sac and Fox Tribe attempted to impose new taxes and licensing requirements on oil and gas leases held by Tenneco and its predecessors in interest for over 50 years. 725 F.2d at 573-74. Like Superior, Tenneco bypassed tribal remedies for federal court. The Tenth Circuit held that there was federal question jurisdiction and remanded the case to the district court for a determination of the sovereign immunity issue. *Id.* at 574-75. Exhaustion of tribal remedies was not an issue because *Tenneco* was decided before *Nat'l Farmer's*. 471 U.S. at 845.

42. 436 U.S. 49, 58. *See also supra* text accompanying notes 33-36.

43. 623 F.2d 682 (10th Cir. 1980).

44. *Id.* at 683-84.

45. 436 U.S. 49, 58. The tribal sovereign immunity set forth in *Santa Clara Pueblo* is the traditional common law immunity, subject to Congress' power to waive it.

46. *Dry Creek Lodge*, 623 F.2d at 685.

lawful requires analysis of the limits of tribal sovereignty.[47] Petitioners in *National Farmers* successfully argued that because federal law regulates tribal sovereignty, questions relating to the limits of that sovereignty are within the jurisdiction of the federal courts.[48] Specifically, petitioners took the position that the right to be protected against an unlawful exercise of tribal jurisdiction has its source in federal law.[49]

A grant of exclusive federal jurisdiction in the civil area by the *National Farmer's* court, as the *Oliphant* court granted in the criminal area, would have foreclosed tribal court jurisdiction over claims involving non-Indians.[50] Owing to the lack of a congressional pronouncement on tribal exercise of civil jurisdiction over non-Indians, and the government's larger interest in protecting the rights at stake in criminal cases than in civil controversies, *Oliphant* was distinguished, enabling the *National Farmer's* court to hold that tribal court civil jurisdiction is not automatically foreclosed.[51] Instead, tribal authority to exercise jurisdiction over civil disputes involving non-Indians is first determined in the tribal court. In making the determination, the tribal court must conduct a careful analysis to determine that tribal sovereignty in the subject area has not been divested by treaties, executive branch policies, or judicial decisions.[52]

The requirement that tribal remedies be exhausted before a federal court will review the tribal court's exercise of jurisdiction has an analogue. Federal courts refuse to take jurisdiction of claims alleging violations of constitutional rights in a state court proceeding, or as a result of the enforcement of a state statute, when the complaining party has an opportunity to present those claims in a state court.[53] Situations where exhaustion of tribal remedies is not required derive from the same analogy. Where the exercise of tribal sovereign authority (by its courts or otherwise) is "motivated by a desire to harass or is conducted in bad faith," or where exhaustion would otherwise be futile, exhaustion of remedies is not required.[54]

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47. *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). The Court evaluated the tribe's retained inherent powers to determine its ability to try a non-Indian for a crime committed in Indian country.

48. National Farmer's Union Insurance Cos. v. Crow Tribe of Indians, 471 U.S. 845, 850-51 (where petitioners' claim of federal jurisdiction was founded on 28 U.S.C. § 1331 (1982)). *See supra* note 10.

49. *Nat'l Farmer's*, 471 U.S. at 851. The Court reasoned that the jurisdiction question is a federal issue, because the Indian tribe's power to exert civil jurisdiction over a party is dependent on whether federal law has divested the tribe of that power. *Id.* at 852.

50. *Id.* at 854.

51. *Id.* The Court also relied on an 1855 advisory opinion by Attorney General Cushing, 7 Op. Att'y Gen. 175, 179-181 (1855), stating that Congress had only divested the tribes of jurisdiction in the criminal area.

52. *Nat'l Farmer's*, 471 U.S. at 855-56.

53. Younger v. Harris, 401 U.S. 37 (1971).

54. *Nat'l Farmer's*, 471 U.S. at 856 n.21 (quoting Juidice v. Vail, 430 U.S. 327 (1977) where the *Juidice* Court stated that the principles of Younger v. Harris, 401 U.S. 37 (1971), do not apply where exhaustion of state remedies for alleged Constitutional violations would be futile).

D. *Analysis*

The standard that applies to determinations of whether a tribal court's exercise of jurisdiction over a dispute involving non-Indians is lawful is the "significant interest" test.[55] In *Superior Oil*, the Tenth Circuit followed the reasoning set forth in *National Farmer's*, by holding that the first opportunity to determine the significance of the tribe's interest in its dispute with Superior rested with the tribe.[56] The court noted that the extent of tribal court jurisdiction over non-Indians is not well-defined, and that the requirement of exhaustion of tribal remedies[57] provides a method of determining that jurisdiction in a manner consistent with the "significant interest" test.[58] Congress' policy of encouraging tribal self-government,[59] and the value of the tribal court record in reviewing the significance of the tribe's interest[60] were also cited as favoring an initial tribal court determination of its authority over the dispute.[61]

Due to Superior's allegation of bad faith on the tribe's part, the Tenth Circuit had occasion to apply the exception of the exhaustion of tribal remedies requirement set forth in *National Farmer's*.[62] This exception apparently applies only to the extent of allowing a non-Indian plaintiff to take its dispute directly to federal district court. *National Farmer's* does not explicitly address what effect a tribal assertion of sovereign immunity to the federal court proceedings would have following the finding of a bad faith assertion of tribal jurisdiction over a claim. However, a review of the range of possible outcomes to the tribe's assertion of sovereign immunity verifies that the process[63] set forth in *National Farmer's* will not deny the non-Indian plaintiff a forum to air his complaint.

In one situation, the (non-Indian) plaintiff's complaint poses a challenge (which a federal district court is able to entertain because one of the *National Farmer's* requirements has been satisfied[64]) to some tribal action as being outside the bounds of its sovereignty. *Tenneco*[65] and

55. *See supra* text accompanying notes 24-30.

56. *Superior Oil*, 798 F.2d 1324, 1329. The Tenth Circuit also held that the district court could review the exercise of tribal court jurisdiction under federal question jurisdiction. *See Nat'l Farmer's*, 471 U.S. at 852-53.

57. *Nat'l Farmer's*, 471 U.S. at 857.

58. *Superior Oil*, 798 F.2d at 1329.

59. *See Nat'l Farmer's*, 471 U.S. at 856; New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 138; Washington v. Confederated Tribes, 447 U.S. 134.

60. *Nat'l Farmer's*, 471 U.S. at 856-57.

61. In light of the Tenth Circuit's observation that the reach of tribal court jurisdiction over non-Indians is "far from determined," *Superior Oil*, 798 F.2d at 1329, the value of tribal court guidance in evaluating the significance of the tribe's interest is all the more apparent.

62. 471 U.S. at 856 n.21. *See also supra* text accompanying note 47.

63. *See Superior Oil*, 798 F.2d at 1329. *Nat'l Farmer's* detailed the processes to evaluate the reach and extent of a tribal court's jurisdiction.

64. *See supra* text accompanying notes 47-48.

65. 725 F.2d 572 (10th Cir. 1984).

Santa Clara Pueblo[66] stand for the proposition that where the validity of a law under which a tribal officer purported to act is challenged, the officer is liable for the action, even though the tribe itself can successfully assert sovereign immunity.[67] In this situation, the federal courts serve as the final forum for relief.

In another situation, where the plaintiff is forced to concede that the tribe has the authority to act, *Santa Clara Pueblo* seems to foreclose access to a federal forum because the tribal officers are shielded by sovereign immunity.[68] If the tribe refuses to open its courts to the plaintiff, *Dry Creek Lodge*[69] comes into play. *Dry Creek Lodge* provides a narrow exception to the holding announced in *Santa Clara Pueblo* in that a non-Indian can sue a tribe in federal court when there would otherwise be no forum to adjudicate the controversy.[70] If the tribal court takes jurisdiction over the dispute, its decision is final. The review mechanism of *National Farmer's*[71] is inapposite, because by hypothesis, the tribe's action giving rise to the dispute is concededly within its sovereign powers.[72] Its courts, therefore, have exclusive subject-matter jurisdiction over the dispute.

The final situation to consider is dismissal of a case by the federal district court, pursuant to *National Farmer's*,[73] because the plaintiff has not exhausted all tribal remedies. Subsequent refusal by the tribal court to adjudicate the dispute presumably triggers the *Dry Creek* exception to *Santa Clara Pueblo* in order to avoid leaving the plaintiff without a forum.[74] Thus, although narrow, the *Dry Creek* exception serves as a safety net for plaintiffs who would otherwise be left without a remedy by the *National Farmer's* strict holding.

II. APPELLATE COURT JURISDICTION UNDER SECTION 106(A) OF THE IMMIGRATION AND NATIONALITY ACT: *SALEHI V. DISTRICT DIRECTOR, I.N.S.*

A. *Facts*

In a consolidated action, petitioners Salehi, Lahigani, and Hakimzadeh, all Iranian citizens living illegally in the United States, filed habeas corpus petitions in United States District Court after being arrested by the Immigration and Naturalization Service (INS).[75] The

66. 436 U.S. 49 (1978).
67. *Tenneco*, 725 F.2d at 574.
68. *Id.*
69. 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981).
70. 623 F.2d at 685. *See also supra* text accompanying notes 37-40.
71. *See supra* text accompanying notes 45-46.
72. The facts in *Dry Creek Lodge* provide an example of this situation. There the plaintiffs did not allege that the tribe did not have the authority to close the lodge, but that the tribe member's complaint resulting in the closure was without foundation. *Dry Creek Lodge*, 623 F.2d at 683-84.
73. *See supra* text accompanying notes 45-46.
74. *Dry Creek Lodge*, 623 F.2d at 685.
75. Salehi v. District Director, INS, 575 F. Supp. 1237 (D. Colo. 1983), *rev'd*, 796 F.2d 1286 (10th Cir. 1986).

court granted preliminary injunctions restraining the INS from detaining petitioners pending resolution of their claims. Petitioners claimed the right to apply for asylum, and the affirmative right not to be deported if section 243(h) of the Immigration and Nationality Act (Act),[76] or article 33 of the Protocol Relating to the Status of Refugees[77] were satisfied. They also alleged they had been denied due process of law because INS regulations failed to provide for a stay of deportation and automatic hearing upon application for asylum. Petitioner Salehi contended that INS denial of his application for a stay of deportation constituted an abuse of discretion.[78] The district court dismissed the action for lack of subject-matter jurisdiction under section 106(a) of the Act.[79]

B. *The Tenth Circuit's Holding*

The Tenth Circuit reviewed the district court's jurisdiction over both the habeas writ and petitioners' requests for declaratory relief.[80] The court held that section 106(a) of the Act did not operate to vest exclusive jurisdiction in the court of appeals because the petitioners did not directly challenge the validity of a final order of deportation. Since the district court was held to have jurisdiction over the general claims, the Tenth Circuit did not address the types of claims for relief that could be entertained in an action based exclusively on habeas corpus.[81] The district court also had jurisdiction over Salehi's abuse of discretion claim because again, the claim did not constitute a direct challenge to the validity of the final order of deportation outstanding against him.[82]

C. *Background*

In section 106(a), Congress provided for the judicial review of final orders of deportation entered by the INS pursuant to hearings authorized under section 242(b) of the Act.[83] The review procedure of section 106(a) vests exclusive jurisdiction over appeals of final deportation orders of the INS in the United States Courts of Appeals.[84] This judicial review mechanism is the method by which final orders of other adminis-

76. "The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1253(h)(1) (1982).

77. Protocol Relating to the Status of Refugees, 1968, art. 33, 19 U.S.T. 6223, 6276, T.I.A.S. No. 6577, 189 U.N.T.S. 150.

78. *Salehi*, 575 F. Supp at 1238-9. *See generally Eligibility for Withholding of Deportation: The Alien's Burden Under the 1980 Refugee Act*, 49 BROOKLYN L. REV. 1193 (1983).

79. Section 106(a), 8 U.S.C. § 1105a(a) (1982), provides that the United States Courts of Appeals have exclusive jurisdiction to review final orders of deportation entered pursuant to administrative proceedings conducted under 8 U.S.C. § 1252(b) (1982).

80. *Salehi*, 796 F.2d at 1289.

81. *Id.*

82. *Id.* at 1290, 1292.

83. "A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and . . . [and] shall make determinations, including orders of deportation." 8 U.S.C. § 1252(b) (1982).

84. *See* 8 U.S.C. § 1105a(a) (1982) and 28 U.S.C. § 2342 (1982). 28 U.S.C. § 2342 provides for circuit court jurisdiction over appeals of orders of several administrative

trative agencies are reviewed by the courts.[85] Congress justified its choice of the court of appeals as the initial forum for judicial review under section 106(a) on two grounds: the appeals courts' experience in reviewing orders of other administrative agencies and the House-Senate conference committee's conclusion that initial appellate court review would result in greater protection of the rights and security of the alien seeking review.[86] Because section 106(a) is somewhat vague[87] in specifiying exactly which INS orders are within the appeals courts' exclusive jurisdiction, the courts have undertaken to interpret it and its legislative history on a number of occasions.

1. Section 106(a) of the Act

Congress' stated intent in enacting section 106(a) was to "[c]reate a single, separate, statutory form of judicial review of administrative orders for the deportation . . . of aliens from the United States . . . ."[88] The need for a single form of review arose out of exploitation of the existing review procedure by aliens intent on frustrating their legitimate deportation.[89] The existing procedure allowed declaratory and habeas corpus review,[90] as well as injunctive relief[91] of final orders of deportation, resulting in a virtually unlimited appeal process.[92]

The right of an alien in custody to petition for habeas corpus is preserved by section 106(a)(9).[93] Such review is not limited to the courts of appeals.[94] In order to curtail dilatory appeals, however, section 106(c)[95] limits the circumstances under which appeals to deportation orders may be taken. Exhaustion of administrative remedies is required before an alien may seek habeas corpus or statutory review pursuant to section 106(a).[96] A petitioner is required to disclose whether the deportation order affecting him has been upheld in a prior judicial proceeding; petitions challenging orders which have been judi-

agencies and was adopted as the method for controlling review of INS determinations of deportability under section 106(a) of the Act, 8 U.S.C. § 1105a(a).

85. *See* 28 U.S.C. §§ 2341-2351 (1982).

86. H.R. REP. No. 1086, 87th Cong., 1st Sess. 27, *reprinted in* 1961 U.S. CODE CONG. & ADMIN. NEWS 2950, 2972.

87. *See* Tai Mui v. Esperdy, 371 F.2d 772, 778, n.3 (2d Cir. 1966) *cert. denied*, 386 U.S. 1017 (1967). *See generally* Friendly, *The Gap in Lawmaking-Judges Who Can't and Legislators Who Won't*, 63 COL. L. REV. 787, 795-796 (1963).

88. H.R. REP. No. 1086, 87th Cong., 1st Sess. 21, *reprinted in* 1961 U.S. CODE CONG. & ADMIN. NEWS 2950, 2966.

89. H.R. REP. No. 1086, 87th Cong., 1st Sess. 22-23, *reprinted in* 1961 U.S. CODE CONG. & ADMIN. NEWS 2950, 2967-68. For a documented example of the delay tactics referred to in the House Report, *see* United States *ex rel.* Marcello v. District Director, INS, 634 F.2d 964, 973-977, app. (5th Cir.) *cert.denied*, 452 U.S. 917 (1981).

90. *See* Brownell v. Rubinstein, 346 U.S. 929 (1954) *mem.*, *aff'g*, 206 F.2d 449 (D.C. Cir. 1953).

91. *See* Shaughnessy v. Pedreiro, 349 U.S. 48 (1955).

92. *See Marcello*, 634 F.2d at 967 n.1.

93. 8 U.S.C. § 1105a(a)(9) (1982).

94. H.R. REP. No. 1086, 87th Cong., 1st Sess. 28, *reprinted in* 1961 U.S. CODE CONG. & ADMIN. NEWS 2950, 2973.

95. 8 U.S.C. § 1105(c) (1982).

96. *Id.*

cially upheld will not be entertained. This limitation applies to both statutory review and habeas corpus.[97]

2. Judicial Interpretation of Section 106(a)

The Supreme Court has handed down several decisions addressing the breadth of appellate court jurisdiction under section 106(a).[98] The Court's first case to address a jurisdictional question arising under section 106(a) was *Foti v. INS*.[99] *Foti* addressed whether INS denials of discretionary relief in proceedings in which a final order of deportation is entered come under the statutory grant of appellate court jurisdiction in section 106(a).

In an opinion by Chief Justice Warren, the Court acknowledged that the phrase "final orders of deportation" in section 106(a) is susceptible to varying interpretations and therefore turned to the Act's legislative history to resolve the ambiguity.[100] *Foti* recognized that Congress' purpose in providing a single statutory form of review was to curtail dilatory appeals. The Court deemed this purpose best served by broadening the court of appeals' jurisdiction under section 106(a) to include all determinations made during and incident to administrative proceedings conducted pursuant to section 242(b).[101]

The holding of *Foti* expressly excluded the question of whether judicial review of a Board of Immigration Appeals' refusal to reopen deportation proceedings was included under section 106(a).[102] *Giova v. Rosenberg*[103] subsequently answered the question affirmatively in a brief memorandum opinion. The next case appearing before the Court which involved the application of section 106(a) illustrated that the *Giova* holding was a logical extension of *Foti*.[104]

In *Cheng Fan Kwok v. INS*,[105] the trend of broadening circuit court jurisdiction under section 106(a) established by *Foti* and *Giova* was

97. *Id. See generally* Note, *The Forum for Judicial Review of Administrative Action: Interpreting Special Review Statutes*, 63 B.U.L. REV. 765 (1983).

98. *See* Foti v. INS, 375 U.S. 217 (1963); Giova v. Rosenberg, 379 U.S. 18 (1964), *mem. rev'g*, 308 F.2d 347 (9th Cir. 1962); Cheng Fan Kwok v. INS, 392 U.S. 206 (1968); INS v. Chadha, 462 U.S. 919 (1983).

99. 375 U.S. 217.

100. *Id.* at 224-5. The Court accepted statements made on the House floor during debates by three Congressmen who were "knowledgeable in deportation matters" as indicating that Congress knew that determinations of deportability and rulings on discretionary relief were commonly made in the same administrative proceedings. *Id.* at 223-24; *see* 105 CONG. REC. 12728 (statements of Reps. Walter, Lindsay and Moore). The Court based its analysis of legislative purpose on the House Judiciary Committee report concerning section 106(a). *Id.* at 224-25; *see* H.R. REP. NO. 1086, 87th Cong., 1st Sess. 22-23, *reprinted in* 1961 U.S. CODE CONG. & ADMIN. NEWS 2950, 2967.

101. 375 U.S. at 229.

102. *Id.* at 231. The Court stated that the question of refusal to reopen hearings is somewhat different than determinations made during the hearings, because the determination of refusal to reopen is not made in the proceedings entering the final orders of deportation.

103. 379 U.S. 18 (1964), *mem., rev'g*, 308 F.2d 347 (9th Cir. 1982).

104. *See Cheng Fan Kwok*, 392 U.S. at 217 (1968).

105. *Id.* at 206.

halted. The issue in *Cheng Fan Kwok* was whether INS refusals of discretionary relief, not entered in the course of proceedings conducted under section 242(b), come within section 106(a).[106] Neither *Foti* nor *Giova* was held to be controlling, and the question of construction presented was remarked to be much closer than in either of those cases.[107] The Court rested its decision on the lack of any language in section 106(a) itself to indicate that the statutory judicial review process was to extend beyond determinations made during and incident to proceedings conducted under section 242(b). Reliance was also placed on the lack of any intent to so extend section 106(a) in the legislative history.[108]

The narrow holding of *Cheng Fan Kwok* sets forth that section 106(a) only applies to judicial review of determinations made in proceedings conducted under section 242(b), including determinations made incident to motions to reopen those proceedings.[109] Several circuit courts decided jurisdictional questions to which section 106(a) was urged to apply subsequent to *Cheng Fan Kwok*. A majority of those courts held that petitions for relief "not inconsistent with"[110] final orders of deportation (rather than those which posed a direct attack on such orders) were not within the jurisdictional grant of section 106(a).[111] The Third Circuit, however, read *Cheng Fan Kwok* as holding that section 106(a) covered only those issues that could be raised in section 242(b) proceedings.[112] In *INS v. Chadha*,[113] the Court resolved the conflict among the appeals courts. The appeal in *Chadha* involved a challenge to the constitutionality of 8 U.S.C. § 1254(c)(2), which provided that the House of Representatives could overturn INS decisions entered pursuant to proceedings conducted under section 242(b).[114] *Chadha* expressly adopted the test espoused by the majority of the circuits which had ruled on the issue and concluded that matters on which the validity of the final order is contingent are included within the appellate court jurisdiction granted by section 106(a).[115]

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106. *Id.* at 207-8. Petitioner was a seaman who had deserted his ship and remained unlawfully in the United States. In deportation proceedings conducted pursuant to § 242(b), 8 U.S.C. § 1252(b), he conceded deportability, but was granted permission to leave the United States voluntarily. After failing to depart, petitioner was ordered to surrender for deportation, at which time he requested a stay of deportation while he applied for discretionary relief from the order.

107. *Id.* at 211.

108. *Id.* at 213-15. For a review of immigration law at the time section 106(a) was enacted, *see* Note, *Deportation and Exclusion: A Continuing Dialogue Between Congress and the Courts*, 71 YALE L.J. 760 (1962).

109. *Cheng Fan Kwok*, 392 U.S. at 216.

110. *Id.* at 213 (quoting Tai Mui v. Esperdy, 371 F.2d 772, 777 (1966)).

111. *See* Pilapil v. INS, 424 F.2d 6 (10th Cir.), *cert. denied*, 400 U.S. 908 (1970); Tai Mui v. Esperdy, 371 F.2d 772 (1966) *cert. denied*, 386 U.S. 1017 (1967); Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982), *rev'd* on other grounds *sub nom.* Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984); Waziri v. INS, 392 F.2d 55 (9th Cir. 1968).

112. *See* Dastmalchi v. INS, 660 F.2d 880 (3d Cir. 1981).

113. 462 U.S. 919 (1983). The implications of the *Chadha* holding are discussed in Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473 (1984).

114. Chadha v. INS, 634 F.2d 408 (9th Cir. 1981).

115. *Chadha*, 462 U.S. 919, 938. Several cases appeared before *Chada* which determined the application of section 106(a) by applying the test of whether an appeal stating

3. Expansion of Habeas Corpus

Changes in the availability of habeas corpus resulting from the redefinition of the phrase "in custody" have the potential of substantially increasing the use of the *habeas* writ as a vehicle for review of deportation orders.[116] At the time section 106 was enacted, custody as applied to *habeas corpus* meant physical detention.[117] That definition was substantially broadened by two subsequent Supreme Court cases. In *Jones v. Cunningham*,[118] the Court held that a person on parole was in custody for habeas purposes. Then, in *Hensley v. Municipal Court*,[119] a person free on his own recognizance was held to be in custody and therefore, eligible to sue out a writ of *habeas corpus*. *Jones* set forth the test stating that persons subject to governmentally imposed restraints not shared by the general public satisfied the custody requirement for habeas corpus relief.[120] *Hensley* applied the *Jones* standard to find that a person free on his own recognizance was subject to sufficient restraints to be eligible for habeas corpus because he could be ordered to appear at any time or place by a court of competent jurisdiction.[121]

In *United States ex rel. Marcello v. District Director, INS*, the Fifth Circuit, citing *Hensley*, held that an alien subject to a final order of deportation was in custody for *habeas* purposes.[122] Marcello challenged the validity of a final order of deportation through habeas corpus proceedings. Although noting that the use of *habeas corpus* in this fashion defeated the purpose of section 106(a), the Fifth Circuit went on to determine the merits of Marcello's challenge to the deportation order.[123] A situation similar to *Marcello* occurred in *Daneshvar v. Chauvin*,[124] decided by the Eighth Circuit. The court again held that the existence of an outstanding order of deportation was a sufficient restraint on liberty to make habeas corpus relief available.[125] The Eighth Circuit, however, con-

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constitutional grounds poses a direct challenge to the validity of the final order of deportation. *See* Pilapil v. INS, 424 F.2d 6 (10th Cir. 1970); Menezes v. INS, 601 F.2d 1028 (9th Cir. 1979); Ferrante v. INS, 399 F.2d 98 (6th Cir. 1968).

116. *See Marcello*, 634 F.2d at 967; Daneshvar v. Chauvin, 644 F.2d 1248 (8th Cir. 1981). *See generally* Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991 (1985).

117. *See Marcello*, 634 F.2d at 967.

118. 371 U.S. 236 (1963).

119. 411 U.S. 345 (1973).

120. *Jones*, 371 U.S. at 242.

121. *Hensley*, 411 U.S. at 351.

122. *Marcello*, 634 F.2d at 971. The petitioner in *Marcello* was perhaps the ultimate example of a litigant engaged in dilatory tactics. Marcello's habeas corpus petition followed nearly 30 years of litigation in the courts of the United States and Italy. The Fifth Circuit included a history of Marcello's attacks on his deportation orders in two appendices to its opinion. *See Marcello*, 634 F.2d at 973-79.

123. 634 F.2d at 972.

124. 644 F.2d 1248, 1249 (1981). Daneshvar had admitted his deportability during deportation proceedings, and was granted permission to leave the United States voluntarily. Rather than leaving within the time allowed, he moved to reopen the deportation proceedings. The writ of habeas corpus was filed after Daneshvar was arrested and jailed for failing to leave. His release on bail was ordered by the district court which held that it had jurisdiction over the actions of the INS in taking Daneshvar into custody, but no jurisdiction to review the validity of Daneshvar's final orders of deportation.

125. *Id.* at 1251.

strued section 106(a)(9) as only creating district court habeas jurisdiction when the petitioner's challenge does not directly attack the validity of a final order of deportation.[126] By having statutory review and *habeas corpus* apply to mutually exclusive situations, this holding preserves the integrity of the single statutory form of review intended in section 106(a).[127]

D. *Analysis*

In reaching its decision in *Salehi*,[128] the Tenth Circuit relied on the Supreme Court constructions of section 106(a), as set forth in *Foti*, *Giova*, *Cheng Fan Kwok* and *Chadha*. The Tenth Circuit first found that under *Foti*, *Giova* and *Cheng Fan Kwok*, it did not have exclusive jurisdiction of petitioners' asylum and due process claims because those claims did not constitute direct attacks on the validity of the final orders of deportation against the petitioners. The court then separately applied the standard developed in *Chadha*.[129]

Application of the *Chadha* standard also yielded the result that section 106(a) did not apply to the petitioners' claims. The rationale was that, even if successful, the petitioners would be entitled only to a hearing to determine their eligibility for asylum; therefore, the validity of the final orders was not contingent on the success of their claims.[130] The court also pointed out that a subsequent finding that the petitioners were eligible for asylum would not overturn the deportation order, rather it would constitute collateral relief from the order.[131]

From a factual perspective, *Salehi* and *Cheng Fan Kwok* bear a close resemblance to one another. It is not surprising that their holdings are also in accord. The consistency of outcomes in *Salehi* of the separate applications of the *Chadha* and *Cheng Fan Kwok* standards is also not surprising, considering that the Supreme Court set out to achieve a result in *Chadha* which was in accord with *Cheng Fan Kwok*. This observation leads to the conclusion that the *Salehi* decision could have been based on *Chadha* or *Cheng Fan Kwok* without losing its force of reason.

A broader issue raised by the *Salehi* decision is how effective it is in preserving the congressional intent of curtailing dilatory appeals to deportation orders. Admittedly, the *Salehi* holding does provide for an extra level of judicial review, which superficially appears to thwart the purpose of section 106(a). In addition, *Salehi* could open the door to evasion of the statutory review procedure by the use of habeas corpus. There are, however, considerations which support the Tenth Circuit's holding in *Salehi*.

126. *Id. See also* United States *ex rel.* Parco v. Morris, 426 F.Supp. 976 (E.D. Pa. 1977); Te Kuei Liu v. INS, 483 F. Supp. 107 (S.D. Tex. 1980).
127. *See supra* text accompanying note 83.
128. *Salehi*, 796 F.2d at 1286.
129. *See supra* text accompanying notes 109-111.
130. *Salehi*, 796 F.2d at 1291.
131. *Id.*

The *Salehi* holding is rather narrow. The types of challenges to which section 106(a) does not apply are limited to (1) applications for relief collateral to the final deportation order and (2) procedural attacks on INS practices. Respecting collateral challenges to final deportation orders, the Supreme Court decision in *Cheng Fan Kwok* held that such challenges were intended by Congress to be outside the application of section 106(a), foreclosing any appellate court discretion in the matter. Procedural attacks are of a sufficiently limited class that they do not provide a significant opportunity for delay oriented appeals. Procedural attacks are limited because they apply only to allegations that INS practices of general application are unconstitutional; section 106(a) presumably applies to appeals of procedural rulings in individual cases.[132]

The *Salehi* court avoided deciding whether section 106(a)(9) should be construed as limiting district court habeas jurisdiction to those claims not directly attacking deportation orders. The court noted that in *Pilapil*[133] it had suggested in dicta that section 106(a)(9) would permit direct attacks on deportation orders. The court also noted that there was authority to the contrary provided by *Daneshvar*.[134] Refusal to decide the issue in *Salehi*, coupled with the recognition that prior Tenth Circuit authority is not binding, leaves the court free to decide the question entirely on its own merits in a future case.

III. THE RULE 4(F) EXPANSION OF PERSONAL JURISDICTION OVER NECESSARY THIRD PARTIES: *QUINONES V. PENNSYLVANIA GENERAL INSURANCE CO.*

A. *Facts*

In an action commenced in the state court system of New Mexico, Quinones, a New Mexico resident, filed a claim for damages against Penn General under an uninsured motorist policy.[135] The claim arose out of an automobile accident that occurred in Texas between plaintiff and Mowad, a resident of Texas. Penn General removed the suit to the United States District Court for the District of New Mexico, and filed a third-party complaint under Rule 14[136] for subrogation against appellee Mowad. Mowad was served in Texas, pursuant to Rule 4(f)[137] at a point approximately forty miles from the federal court in Las Cruces, New Mexico. The district court dismissed the complaint against Mowad on his motion asserting that the court lacked personal jurisdiction.[138] Quinones appealed several evidentiary rulings and Penn General appealed the dismissal of the complaint against Mowad.

132. *See* Haitian Refugee Center v. Smith, 676 F.2d 1023, 1033 (5th Cir. 1982). For a discussion of due process in deportation proceedings, see Verkuil, *A Study of Immigration Procedures*, 31 UCLA L. REV. 1141 (1984).
133. 424 F.2d 6, 8-9 (10th Cir. 1970).
134. 644 F.2d 1248 (8th Cir. 1981).
135. Quinones v. Pennsylvania Gen. Ins. Co., 804 F.2d 1167, 1169 (10th Cir. 1986).
136. FED. R. CIV. P. 14.
137. FED. R. CIV. P. 4(f).
138. *Quinones*, 804 F.2d at 1169.

B. *The Tenth Circuit's Holding*

The district court had disallowed testimony from several of the plaintiff's witnesses ruling that an adequate foundation had not been laid to establish the relevance of the testimony.[139] The Tenth Circuit upheld all of the trial court's rulings noting that it had not abused its discretion in making them.[140] Turning to the jurisdictional issue, the Tenth Circuit held that by providing for service of third-party defendants at locations outside the forum state, but within 100 miles of the federal courthouse, Rule 4(f) did confer personal jurisdiction over Mowad, even though he did not have any contacts with the forum state (New Mexico).[141]

C. *Background*

Before the promulgation of the Federal Rules of Civil Procedure, the Judiciary Act of 1789[142] limited the in personam jurisdiction of the federal district courts to parties served within the district.[143] Rule 4(f) as first promulgated provided for service "anywhere within the territorial limits of the state in which the district court is held."[144] The rule was amended in 1963 to provide for service of necessary third parties brought pursuant to Rules 14 and 19 who could be served within 100 miles of the forum court.

1. The Purpose Underlying the Amendment of Rule 4(f)

The advisory committee's note pertaining to the 1963 amendment of Rule 4(f) provides insight into the intentions behind the change.[145] In enacting the provision in Rule 4(f) that provides for extended service on necessary third parties (regardless of whether such parties are within the forum state), the stated intent was to "promote the objective of enabling the court to determine entire controversies."[146] Considering modern travel and communication capabilities, the advisory committee felt that extension of the territorial range in which service is allowed would not work hardship on parties summoned.[147] The advisory committee's note has been interpreted as intending that Rule 4(f) extend the

139. *Id.* at 1170-1172.

140. *Id.* The Tenth Circuit relied on several of its cases for the elementary proposition that a trial court ruling on evidence will not be disturbed absent a showing of abuse of discretion. *See*, Fortier v. Dona Anna Plaza Partners, 747 F.2d 1324, 1331 (10th Cir. 1984); Rasmussen Drilling, Inc. v. Kerr-Mcgee Nuclear Corp., 571 F.2d 1144, 1149 (10th Cir.), *cert. denied*, 439 U.S. 862 (1978) (this case contains a veritable gold mine of evidentiary propositions along with Tenth Circuit supporting authority for them at 1148-1149). Because the evidentiary rulings in *Quinones* are neither controversial nor of first impression, they will not be discussed further.

141. *Quinones*, 804 F.2d at 1177.

142. 1 Stat. 73 (1789).

143. Robertson v. Railroad Labor Bd., 268 U.S. 619 (1925).

144. *See* Mississippi Publishing v. Murphree, 326 U.S. 438, 443 (1946).

145. *See* Sprow v. Hartford Ins. Co., 594 F.2d 412 (5th Cir. 1979); Coleman v. American Export Isbrandtsen Lines, Inc., 405 F.2d 250 (2d Cir. 1968).

146. FED. R. CIV. P. 4(f) advisory committee's note.

147. *Id.*

territorial limits of district court jurisdiction, rather than merely providing for service on necessary third parties already subject to the jurisdiction of the forum state.[148]

2. Power to Determine the Limits of Federal Process

Determining that the intent in amending Rule 4(f) was to effect an increase in district court jurisdiction resulted in a need to decide whether the Supreme Court, acting through its advisory committee, had the power to make such a change.[149] In *Mississippi Publishing Corp. v. Murphree*,[150] the Supreme Court was faced with the analogous question of whether, under the original version of Rule 4(f), it had the power to promulgate a rule expanding district court service of process to encompass the whole of the forum state.

The Court, after pointing out that Congress could provide for service of process anywhere in the United States,[151] analyzed whether Congress had delegated that power to the Court.[152] The Act of June 19, 1934, authorizing the promulgation of the Federal Rules of Civil Procedure, provided that the rules were not to "abridge, enlarge or modify" the substantive rights of litigants.[153] In *Sibbach v. Wilson & Co.*,[154] the court held that the proper test for a rule's validity was not whether it might affect a litigant's rights, but whether it was directed at regulating "the judicial *process* for enforcing rights and duties recognized by substantive law . . . ."[155] *Mississippi Publishing* expressly recognized that rules fixing jurisdiction did affect the rights of litigants, but relied on *Sibbach* as allowing such abridgments if incidental to the operation of a procedural rule.[156] The Court then emphasized that a rule specifying a federal court's jurisdiction did nothing to change the rules of decision

148. *See* Coleman v. American Export Isbrandtsen Lines, Inc., 405 F.2d 250, 251 ("If the amendment had done no more than [permit personal service on necessary third parties already subject to the court's jurisdiction] . . . it would have accomplished little."). *Id.* at 251-52.

149. *See Id.* at 252; Sprow v. Hartford Ins. Co., 594 F.2d 412, 416.

150. 326 U.S. 438, 440.

151. *Id.* at 442 (citing Robertson v. Railroad Labor Bd., 268 U.S. 619, 622 (1925); United States v. Union Pac. R.R. Co., 98 U.S. 569, 604 (1879); Toland v. Sprague, 37 U.S. (12 Pet.) 300, 328 (1838)). For a critical review of the constitutionality of nationwide service of process in diversity cases, *see* Abraham, *Constitutional Limitations Upon the Territorial Reach of Federal Process*, 8 VILL. L. REV. 520 (1963).

152. *Mississippi Publishing*, 326 U.S. at 445.

153. 48 Stat. 1064 (1934).

154. Sibbach v. Wilson & Co., 312 U.S. 1 (1941).

155. *Id.* at 14 (emphasis added). Petitioner in *Sibbach* had originally brought a personal injury action against respondent. Petitioner had been jailed for contempt by the district court for refusing to submit to a court ordered medical examination for the purpose of determining the extent of her injuries. *Id.* at 6-7. Her only challenge to the district court's action was based on her claim that FED. R. CIV. P. 35(a), providing for medical examinations when physical condition is an issue, was invalid because it abridged her substantive rights. *Id.* at 11. The Court rejected this claim, but ordered the petitioner's release based on plain error, because the remedy for failure to submit to a medical examination ordered pursuant to rule 35(a), provided in FED. R. CIV. P. 37(b)(2), does not include punishment for contempt. *Id.* at 16.

156. *Mississippi Publishing*, 326 U.S. at 445-446 (citing *Sibbach*, 312 U.S. at 11-14).

used by the court to adjudicate the parties' rights.[157] Interpreting Rule 4(f) as extending federal court jurisdiction over necessary third parties beyond the forum state's borders presents an issue not covered in *Mississippi Publishing*. The doctrine of *Erie Railroad v. Tompkins*[158] has been interpreted as requiring that federal court in personam jurisdiction in an ordinary diversity case be determined with reference to state law.[159] In *Arrowsmith*, Judge Friendly, writing for the Second Circuit, held that in the absence of an overriding federal statute, rule or policy, a federal district court cannot assert personal jurisdiction over a party in a diversity case, unless a court of the forum state would assert its jurisdiction over that party.[160] The *Arrowsmith* court did not express an opinion on whether Rule 4(f) would be limited by the forum state's jurisdictional bounds.[161]

3. Constitutional Due Process

By providing for service of process beyond the borders of the forum state, Rule 4(f) raises questions of due process under the minimum contacts standard set forth in *International Shoe v. Washington*.[162] The specific issue is whether the area of minimum contacts analysis remains confined to the forum state, or expands beyond its borders. In *Coleman v. American Export Isbrandtsen Lines, Inc.*,[163] the Second Circuit held that out of state service on a party pursuant to Rule 4(f) is valid if the state in which service is made could serve the party there. This is equivalent to extending the area of minimum contacts analysis to the whole of the state of service.

The Second Circuit pointed out that limiting the minimum contacts area to the forum state would result in Rule 4(f) providing a federal court with nothing more than a method of utilizing the forum state's long-arm statute.[164] Under such a limitation, the amendment of Rule 4(f) would have little effect, since Rule 4(e) expressly provides for service pursuant to a state's long-arm statute.[165] The Second Circuit also found support for extension of the minimum contacts area by reading the advisory committee's note as intending to expand district court jurisdiction.[166]

Expansion of the minimum contacts area relating to Rule 4(f) was

157. *Id.* (citing Guarantee Trust Co. v. York, 326 U.S. 99 (1945)).
158. 304 U.S. 64 (1938).
159. *See* Arrowsmith v. UPI, 320 F.2d 219 (1963).
160. *Id.* at 223. The court held that federal law would only come into play in a challenge to the state's ability to constitutionally assert jurisdiction. *Id.* at 222.
161. *Id.* at 228 n.9. *See generally* Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 623 (1958).
162. 326 U.S. 310 (1945).
163. Coleman v. American Export Isbrandtsen Lines, Inc., 405 F.2d 252, 253 (1968). The court indicated that out of state service pursuant to Rule 4(f) would "very likely" be valid only on persons over which the state of service would actually choose to exercise jurisdiction. *Id.* at 252.
164. *Id.* at 252.
165. *Id.*
166. *Id. See also supra* text accompanying notes 142-145.

deemed necessary by the Fifth Circuit in *Sprow v. Hartford Insurance Co.*[167] The court again found that confining Rule 4(f) to providing for service on parties having sufficient minimum contacts with the forum state would reduce it to a duplicate of Rule 4(e).[168] The Fifth Circuit also adopted the Second Circuit's interpretation of the purpose behind the amendment of Rule 4(f).[169]

Sprow and *Coleman* differ on the extent of expansion of the minimum contacts area under Rule 4(f). The *Sprow* court held that a third party must have minimum contacts with either the forum state or the 100 mile bulge to be amenable to service under Rule 4(f).[170] Keeping the minimum contacts area coincident with the territory of the forum's jurisdiction was put forth as the most logical method of adapting the *International Shoe* due process test to the expansion of diversity jurisdiction beyond state borders.[171] The Fifth Circuit also noted that it might be fundamentally unfair to subject certain parties served in the 100 mile bulge area to the jurisdiction of a federal court sitting in another state. The court's example of such a party was a corporation which had an agent for service of process in the state containing the bulge, but no contact with the forum state or the 100 mile bulge other than the agent's temporary presence within the bulge.[172] Under the Second Circuit's standard set forth in *Coleman*, since the same hypothetical corporation's agent could be served by a court in the state containing the bulge at any place within its borders, the agent could be served in the bulge by a federal district court of the forum state.

D. *Analysis*

Sprow and *Coleman* were reviewed with approval in *Quinones* as reaching what the Tenth Circuit considered to be the proper result.[173] Rather than relying on those holdings, however, the jurisdictional reach of Rule 4(f) was analyzed according to basic principles.

The Tenth Circuit first relied on *Sibbach v. Wilson* as authorizing Congress to delegate rule-making power to regulate federal court procedure to the Supreme Court.[174] The extension of common-law jurisdiction brought about by Rule 4(f) as originally promulgated was then reviewed.[175]

As the first case to consider the provisions of the original Rule 4(f),

167. 594 F.2d 412, 416 (1979).

168. *Id.* at 417.

169. *See supra* text accompanying note 162. The purpose behind the expansion in jurisdiction was seen by both the Second and Fifth Circuits as that expressed in the advisory committee's note to Rule 4(f). *Coleman*, 405 F.2d at 250 n.3; *Sprow*, 594 F.2d at 417. *See also supra* text accompanying notes 142-145.

170. 594 F.2d at 416.

171. *Id. See also* Kaplan, *Amendments of the Federal Rules of Civil Procedure*, 1961-1963, 77 HARV. L. REV. 601, 633 (1964).

172. *Sprow*, 594 F.2d at 416.

173. *Quinones*, 804 F.2d at 1173-1174.

174. *Id.* at 1174 (citing *Sibbach v. Wilson*, 312 U.S. at 9-10).

175. *Quinones*, 804 F.2d at 1174-1175.

Mississippi Publishing[176] was recognized as a road map for interpreting the extension of district court jurisdiction by a procedural rule of the Court. The central proposition of *Mississippi Publishing*, that Rule 4(f) accomplished a congressionally authorized enlargement of district court territorial jurisdiction,[177] was used to dispose of appellee's contention that Rule 4(f) merely described effective service, rather than the extent of the district court's in personam jurisdiction.[178] To extend *Mississippi Publishing* to the case at bar, reference was made to the advisory committee's note to ascertain that the 1963 amendment of Rule 4(f) was intended to expand the district court's territorial jurisdiction.[179] By direct analogy with *Mississippi Publishing*, the Tenth Circuit then held that the intended expansion of territorial jurisdiction was accomplished by Rule 4(f).[180]

The Tenth Circuit became the first circuit court to go through a reasoned discussion to support the holding that the Rule 4(f) extension of diversity jurisdiction beyond state lines is not precluded by the *Erie* doctrine.[181] As suggested in *Arrowsmith*,[182] the Tenth Circuit held that if a federal rule or policy so requires, a federal district court may assert personal jurisdiction in a diversity suit where a state court would not.[183] Reading Rule 4(f) in the light of its underlying federal policy of ending controversies with one lawsuit, convinced the court that there was sufficient justification for finding that the rule did extend the federal district court's jurisdiction beyond the borders of the forum state.[184]

The *Quinones* court followed *Sprow* by interpreting *International Shoe* as requiring minimum contacts with the territory of the forum, rather than minimum contacts with the forum state.[185] This reading mandated the finding that the area of minimum contacts analysis for Rule 4(f) is the forum state plus the 100 mile bulge area. Since Rule 4(f) is of federal origin, it makes sense to dispense with the concept that federal court territorial jurisdiction is inextricably linked to one or more states' borders. The Tenth Circuit's well-reasoned finding that the *Erie* doctrine does not compel adherence to state law in the case of Rule 4(f)[186] makes this conclusion all the more compelling. Thus, the interpretation

176. 326 U.S. 438. *See supra* text accompanying note 147.

177. *Mississippi Publishing*, 326 U.S. at 444-445. *Mississippi Publishing* also addressed the question of whether the Court's interpretation of Rule 4(f) as expanding territorial jurisdiction was inconsistent with FED. R. CIV. P. 82 which prohibits construing the rules to extend or limit district court jurisdiction. The Court in *Mississippi Publishing* found no inconsistency by interpreting Rule 82 as applicable to subject matter jurisdiction and venue, but not personal jurisdiction. *Id.* at 445. The appellee in *Quinones* advanced the same inconsistency argument, which the Tenth Circuit rejected in the same way. *Quinones*, 804 F.2d at 1175 n.6.

178. *Quinones*, 804 F.2d at 1175.

179. *See supra* text accompanying notes 142-145.

180. *Quinones*, 804 F.2d at 1175.

181. *Id.* at 1176-1177.

182. 320 F.2d 219, 226 (1963). *See also supra* text accompanying notes 155-156.

183. *Quinones*, 804 F.2d at 1177.

184. *Id. See also supra* text accompanying notes 142-145.

185. *Quinones*, 804 F.2d at 1177. *See also Sprow*, 594 F.2d at 416-417.

186. *See supra* text accompanying notes 177-180.

of the minimum contacts area in *Quinones* is preferable to that adopted in *Coleman*.[187] There may be little practical difference between the two standards because of the limited application of Rule 4(f),[188] and the scarcity of situations in which a party served in the bulge area would have minimum contacts with the state of service, but not the bulge itself.

IV. RES JUDICATA EFFECT OF STATE COURT DISMISSAL OF SECTION 1983 ACTION: *DEVARGAS V. MONTOYA*

A. *Facts*

The facts underlying plaintiff's claim were simple: DeVargas alleged that guards at the New Mexico State Penitentiary beat him while he was incarcerated there.[189] The procedural aspects of the ensuing litigation complicated matters considerably. The alleged beating occurred on September 21, 1976. On July 6, 1977, DeVargas filed a complaint in New Mexico state court alleging violation of his civil rights under 42 U.S.C. § 1983[190] by the state of New Mexico, its Department of Corrections, and several prison guards and officials.[191] Following defendants' motion to dismiss, DeVargas allowed the case to lie dormant for 28 months.[192] On August 5, 1980, plaintiff filed a pleading, entitled "Amended Complaint," altering the parties' defendant, referring by name to seven parties listed as "Does" in the original complaint and adding several claims for relief. The New Mexico Court of Appeals found the new complaint to be original and dismissed it on the defense's assertion of the statute of limitations.[193] DeVargas then turned to federal district court, filing a complaint containing claims brought in state court, several new claims, and alleging that the decisions on the statute of limitations by the state court of appeals were in error.[194] Defendants again raised the statute of limitations and the district court dismissed the action, relying on the doctrine of claim preclusion in adopting the state court's determination that the action was time-barred. On appeal to the Tenth Circuit, DeVargas claimed denial of due process and equal protection in the state court proceedings and asked for review of both the state court rulings that the action was time-barred and the federal dis-

187. *See supra* text accompanying note 159.

188. *See Quinones*, 804 F.2d at 1173.

189. DeVargas v. Montoya, 796 F.2d 1245, 1247 (10th Cir. 1986).

190. 42 U.S.C. § 1983 (1982) provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

191. *DeVargas*, 796 F.2d at 1247.

192. *Id.* The delay was allegedly due to an oral agreement with defense counsel to enter into settlement negotiations.

193. DeVargas v. State *ex rel* New Mexico Dept. of Corrections, 97 N.M. 447, 640 P.2d 1327 (Ct. App. 1981), *cert. quashed*, 97 N.M. 563, 642 P.2d 166 (1982).

194. *DeVargas*, 796 F.2d at 1248.

trict court's adoption of the state court decisions.[195]

B. *The Tenth Circuit's Holding*

Ruling on the applicability of claim preclusion, the Tenth Circuit first held that the state court dismissal of the action as time-barred constituted a determination on the merits for purposes of res judicata.[196] The Tenth Circuit found no error in the state court's choice of the applicable statute of limitations; therefore, the state court's refusal to extend the statute of limitations was entitled to res judicata[197] effect in federal court.[198] Finally, the court ruled that the plaintiff had not been denied due process or equal protection rights in the state courts.[199]

C. *Background*

1. Res Judicata

State court judgments are generally entitled to full faith and credit in federal court.[200] In determining whether to grant preclusive effect to a state court judgment under the doctrine of *res judicata*, 28 U.S.C. § 1738 directs a federal court to refer to the preclusive effect that the judgment would have in the state of its issuance.[201] *Res judicata* is not available to dispose of an issue or claim in federal court when the party against whom it is asserted did not have a full and fair opportunity to litigate the issue or claim in state court.[202] The operation of res judicata is also inapplicable when a federal statute expressly or impliedly effects a

195. *Id.* DeVargas alleged that defendants were estopped from asserting the statute of limitations because of alleged concealment and misrepresentation of information needed by DeVargas to cure defects in his original complaint. *Id.* at 1248. *See generally* Note, *Citizen Trust and Government Cover-up: Refining the Doctrine of Fraudulent Concealment*, 95 YALE L.J. 1477 (1986). DeVargas also appealed the dismissal of claims added to the complaint when it was filed in federal district court. *DeVargas*, 796 F.2d at 1248.

196. *DeVargas*, 796 F.2d at 1250.

197. The general term "res judicata" will be used here to encompass the more specific terms of "issue preclusion," referring to the effect of a judgment in barring relitigation of an issue previously adjudicated, and "claim preclusion," which bars relitigation of matters which should have been raised in a prior action. *See* Marrese v. American Academy of Orthopedic Surgeons, 470 U.S. 373, 376, n.1 (1985); Migra v. Warren City School Dist., 465 U.S. 75, 77, n.1 (1984).

198. *DeVargas*, 796 F.2d at 1252-54.

199. *Id.* at 1254-56.

200. 28 U.S.C. § 1738 (1982) provides in relevant part that "[J]udicial proceedings [of any state] shall have the same full faith and credit in every court within the United States . . . as they have . . . in the courts of such State . . . ." The phrase "every court within the United States" has been construed to include the federal courts. *See* Huron Holding Corp. v. Lincoln Mine Operations Co., 312 U.S. 183, 193 (1941); Davis v. Davis, 305 U.S. 32, 40 (1938).

201. *See* Allen v. McCurry, 449 U.S. 90 (1980). *See also supra* text accompanying notes 19-20, 26-29.

202. The Court has recognized the full and fair opportunity to litigate exception in both the issue preclusion and claim preclusion contexts. With regard to issue preclusion, *see Allen*, 449 U.S. at 95; Montana v. United States, 440 U.S. 147, 153 (1979); Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 328-29 (1971). With regard to claim preclusion, *see* Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982).

partial repeal of 28 U.S.C. § 1738.[203]

Because of the importance of the federal interest in protecting individual civil rights and a perception that state courts are an inadequate forum for their protection, it has been suggested that full faith and credit need not be given to all state court decisions in section 1983 actions.[204] In *Allen v. McCurry*,[205] the Supreme Court found that section 1983 does not contain an implied repeal of the 28 U.S.C. § 1738 doctrine of preclusion. The Court reached its conclusion of no implied repeal because Congress, in enacting section 1983, did not manifest a clear intent to override either 28 U.S.C. § 1738 or the common law doctrine of *res judicata*.[206]

Although rejecting the implied repeal theory, the *Allen* Court reaffirmed the policy of not allowing preclusion to be asserted against a party who did not have a full and fair opportunity to litigate the claim or issue in state court.[207] This policy was stated more generally in *Kremer v. Chemical Construction Corporation*,[208] where the Court held that a judgment not meeting the requirements of due process could have no *res judicata* effect. The Court reasoned that since a state could not grant preclusive effect to a judgment not meeting the requirements of due process, 28 U.S.C. § 1738 prevented the federal courts from allowing such a judgment to be used preclusively.[209]

Implicit in the due process prerequisite to the application of res judicata is the requirement that the judgment for which preclusive effect is sought was an adjudication on the merits of the claim or issue in question. A prior judgment need not have reached the substantive issues of

203. *See Kremer*, 456 U.S. at 468, *Allen*, 449 U.S. at 98-99. *See generally* Smith, *Full Faith and Credit and Section 1983: A Reappraisal*, 63 N.C.L. REV. 59, 110-111 (1984).

204. *See*, Preiser v. Rodriguez, 411 U.S. 475, 509 n.14 (1973) (Brennan, J., dissenting). *See also* Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317 (1973); Averitt, *Federal Section 1983 Actions after State Court Judgment*, 44 U. COLO. L. REV. 191 (1972); *Developments in the Law-Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1335-43 (1977).

205. 449 U.S. at 90, 99 (1980). Several of the circuit courts have suggested that in section 1983 actions, claim preclusion should not bar federal court litigation of a federal issue which was not, but could have been, raised in a prior state court proceeding. *See* Graves v. Olgiati, 550 F.2d 1327 (2nd Cir. 1977); Lombard v. Bd. of Education, 502 F.2d 631 (2nd Cir. 1974); Mack v. Florida Bd. of Dentistry, 430 F.2d 862 (5th Cir. 1970). The *Allen* Court noted but expressed no opinion on this narrow exception. *Allen*, 449 U.S. at 97 n.10. Another narrow exception to the operation of claim preclusion occurs when a plaintiff has multiple claims, some of which fall within the exclusive jurisdiction of the federal courts, arising out of a single set of facts. The Court has stated that an implied partial repeal of 28 U.S.C. § 1738 might be appropriate in such a case (depending on the congressional intent in conferring exclusive federal jurisdiction) if state preclusion rules would bar subsequent litigation of the exclusively federal claims. Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 386 (1985).

206. 449 U.S. at 99. The Court required a clear intent to repeal 28 U.S.C. § 1738, because repeals by implication are disfavored. *Allen*, 449 U.S. at 99 (citing Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976)).

207. *Allen*, 449 U.S. at 101.

208. 456 U.S. 461, 482 (1982).

209. *Id. Kremer* was a Title VII action brought in federal court after dismissal of administrative and state court claims arising from the same alleged injury: the defendant's failure to rehire petitioner after being layed off, when several other employees laid off by defendant were rehired.

a claim in order to have provided a full and fair opportunity for the parties to litigate their claims.[210] In *Angel v. Bullington*,[211] the Court stated that an adjudication declining to reach the ultimate substantive issues may be sufficient to bar a subsequent action attempting to relitigate the same issues.

2. Due Process Limits on Full Faith and Credit

As suggested above, the fourteenth amendment due process clause assures that state judicial proceedings which do not afford a party a full and fair opportunity to litigate can not be used preclusively against that party.[212] For situations covered by 28 U.S.C. § 1738, *Kremer* provides that state court proceedings which meet the minimum due process requirements of the fourteenth amendment qualify for full faith and credit.[213]

Satisfaction of fourteenth amendment due process is determined in an individual case by examining the procedures available to a state court litigant in prosecuting his claim.[214] The Court has stressed that due process does not require a uniform type of procedure, nor is there a single model by which due process is to be judged.[215]

Due process review of state court judgments in order to determine their preclusive effect arises frequently when a litigant attempts to pursue federal claims subsequent to state court litigation arising out of the same alleged injury.[216] When this occurs, the federal courts assess whether a litigant had a full and fair opportunity to pursue his federal claim in the state court.[217] A determination that the state court pro-

210. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) ("the State certainly accords *due* process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule, citing Hammond Packing Co. v. Arkansas, 212 U.S. 322, 351 (1909)).

211. 330 U.S. 183, 190 (1947). Due process must be satisfied in an action dismissed on procedural grounds in order for it to bar a subsequent attempt to relitigate claims arising out of the same facts. *See supra* text accompanying notes 24-26.

212. *See supra* text accompanying notes 204-05. *See also Kremer*, 456 U.S. at 481.

213. *Kremer*, 456 U.S. at 482. The Court pointed out that under the Full Faith and Credit Clause of the Constitution, Art. IV, § 1, a full and fair opportunity to litigate entails the procedural requirements of due process. *Kremer*, 456 U.S. at 483 n.24 (citing Sherrer v. Sherrer, 334 U.S. 343, 348 (1948)); Baldwin v. Iowa Traveling Men's Ass'n, 283 U.S. 522, 524 (1931); Chicago Life Ins. Co. v. Cherry, 244 U.S. 25, 30 (1917). Interpreting the purpose underlying the enactment of 28 U.S.C. § 1738 as implementing the Full Faith and Credit Clause, provided the connection between due process and full faith and credit. *Kremer*, 456 U.S. at 483 n.24 (citing Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943)); Davis v. Davis, 305 U.S. 32, 40 (1938).

214. *See Kremer*, 456 U.S. at 483; Kiowa Tribe v. Lewis, 777 F.2d 587 (10th Cir. 1985).

215. *See* Mitchell v. W.T. Grant Co., 416 U.S. 600, 610 (1974); Stanley v. Illinois, 405 U.S. 645, 650 (1972); Cafeteria Workers v. McElroy, 367 U.S. 885, 895 (1961); NLRB v. Mackay Co., 304 U.S. 333, 351 (1938).

216. *See* District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985); Spence v. Latting, 512 F.2d 93 (10th Cir. 1975).

217. *See Marrese*, 470 U.S. at 380. Even if there was not a full and fair opportunity to litigate the federal claim in state court, issue preclusion may still apply to issues common to the federal and state claims. *See Kremer*, 456 U.S. at 466-67, 485; *Marrese*, 470 U.S. at 381-82, 385. *See generally* Smith, *Full Faith and Credit and Section 1983: A Reappraisal*, 63 N.C.L. REV. 59 (1984).

ceedings did not provide an opportunity to litigate the federal claim does not necessarily mean that full faith and credit can not bar the federal action. Assuming that state preclusion rules would bar the subsequent federal action if it were brought in state court, analysis of whether 28 U.S.C. § 1738 is expressly or impliedly partially repealed by the federal statute creating the claim must be undertaken.[218] Even though adherence to full faith and credit may bar a federal action without the plaintiff having had any previous opportunity to pursue the federal claim, the rigorous "implied repeal" test, which developed in cases where the federal claim was litigated in state court,[219] is applied.[220]

3. Statutes of Limitations Applicable to Section 1983 Actions

In section 1983 actions, 42 U.S.C. § 1988 requires that federal courts refer to state law in deciding issues not provided for by federal law.[221] There is no federal statute of limitations applicable to section 1983; therefore, state law must provide the statute of limitations. Prior to *Wilson v. Garcia*,[222] courts entertaining section 1983 claims adopted the statute of limitations applicable to the most analogous state cause of action.[223] The Tenth Circuit's approach before *Garcia* was to analyze the nature of the claim's allegations and adopt the statute of limitations applicable to the comparable state action.[224] In *Garcia*, the Supreme Court resolved the inconsistencies in the methods used by courts to determine the most similar state action, holding that state statutes of limitations applicable to personal injury actions were to apply to section 1983.[225]

One important exception to the adoption of state statutes of limitations in civil rights actions is the proviso that the state limitations statute

218. *See Marrese*, 456 U.S. at 383.

219. *See supra* text accompanying notes 201-02.

220. *See Marrese*, 456 U.S. at 381, 385. As the Court noted in *Marrese*, since most state preclusion laws do not apply where the subject matter jurisdiction of the initial court was not competent to entertain the subsequent claim, the potential for unfairness due to the rigor of the "implied repeal" test is lessened. *Id.* at 382.

221. 42 U.S.C. § 1988 (1982) provides that federal statutory civil rights shall be enforced in conformity with the laws of the United States. If the laws of the United States are deficient in an area, state law is to be used, as long as it is not inconsistent with the Constitution and laws of the United States.

222. 471 U.S. 261 (1985). For a discussion of the applicability of tort remedies to fill in the gaps in federal section 1983 law, *see* Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

223. *See* Robertson v. Wegmann, 436 U.S. 584 (1978).

224. *See* Clulow v. Oklahoma, 700 F.2d 1291, 1299-1300 (10th Cir. 1983) (section 1983 action alleging wrongful confinement in a mental hospital); Zuniga v. AMFAC Foods, Inc., 580 F.2d 380, 383 (10th Cir. 1978) (action for wrongful discharge from employment). The Third Circuit followed the same procedure as the Tenth Circuit. *See* Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 900-903 (3d Cir. 1977). The Seventh Circuit rejected the case-by-case determination method in favor of a uniform limitation for all claims founded on federal civil rights statutes. *See* Beard v. Robinson, 563 F.2d 331, 336 (7th Cir. 1977).

225. *Garcia*, 471 U.S. at 276. *See generally* Note, *Statutes of Limitations in Civil Rico Actions after Wilson v. Garcia*, 55 FORDHAM L. REV. 529 (1987).

not be applied if it is inconsistent with federal law.[226] Inconsistency is to be determined by reference to the Constitution, federal statutes, and the policies underlying both.[227] Despite the acknowledged "broad sweep"[228] of section 1983, the Court, in *Robertson v. Wegmann*,[229] held that there is nothing in section 1983 or its underlying policies that is inconsistent with a state law causing an action to abate.[230]

The Court has required that federal courts honor not only state statutes of limitations, but also state rules on how the statutes are to be tolled. In *Board of Regents v. Tomanio*,[231] a New York rule providing that the statute of limitations is not tolled during a period when a plaintiff pursues a related but independent claim, was upheld to bar a federal action resting on section 1983.[232] Writing for the Court, Justice Rehnquist applied the test that absent an inconsistency between the New York tolling rule and the policies underlying section 1983, the state tolling rule was to be followed in federal court.[233]

Relying on the foundation laid by *Robertson*,[234] the Court noted that there is no presumption or policy in federal law disfavoring state policies of repose.[235] Recognizing that the two principal purposes behind section 1983 are deterrence and compensation,[236] the Court found that the New York rules of repose did not hamper a plaintiff's ability to obtain relief under section 1983.[237]

In contrast to the uniform federal acceptance of state tolling rules, several circuits determine the accrual of actions according to federal law.[238] The Tenth Circuit views accrual as analogous to tolling, and in

226. This exception is contained in 42 U.S.C. § 1988 (1982). *See supra* note 217. *See also Robertson*, 436 U.S. at 589-90; *cf.* UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966) (choice of statute of limitations in suits on collective bargaining contracts under the Labor Management Relations Act, 29 U.S.C. § 185 (1982)).

227. *See Robertson*, 436 U.S. at 590; Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 465 (1975).

228. *Robertson*, 436 U.S. at 590 (citing Griffin v. Breckenridge, 403 U.S. 88, 97 (1971)).

229. 436 U.S. 584 (1978).

230. In *Robertson*, the Court was concerned with a Louisiana statute that caused the deceased plaintiff's action to abate because he was not survived by a spouse, parents, siblings or children. *Robertson*, 436 U.S. at 587.

231. 446 U.S. 478 (1980).

232. *Id.* at 480 (plaintiff was a practicing chiropractor in New York, but was unable to pass a state board examination required by a newly enacted state statute. Plaintiff claimed that the state's refusal to waive the examination requirement, in view of her professional experience, violated due process of law).

233. *Id.* at 485-86.

234. *See supra* text accompanying notes 222-26.

235. *Tomanio*, 446 U.S. at 488.

236. *See Robertson*, 436 U.S. at 590-91.

237. *Tomanio*, 446 U.S. at 488. The Court also rejected the argument that federal uniformity in the area of tolling rules was of sufficient importance to justify striking down New York's rule. *Id.* at 489.

238. *See* Sevier v. Turner, 742 F.2d 262, 272 (6th Cir. 1984); Keating v. Carey, 706 F.2d 377, 382 (2d Cir. 1983); Perez v. Laredo Junior College, 706 F.2d 731, 733 (5th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984); Gowin v. Altmiller, 663 F.2d 820, 822 (9th Cir. 1981); Bireline v. Seagondollar 567 F.2d 260, 263 (4th Cir. 1977), *cert. denied*, 444 U.S. 842 (1979).

Clulow v. Oklahoma,[239] held that questions of accrual are to be answered by reference to state law. The court reached its holding by reading *Tomanio* and *Johnson v. Railway Express Agency*[240] as directing federal courts to follow state rules relating to limitations statutes as well as the statutes themselves, unless there is an inconsistency between the state rules and federal law.[241]

D. *Analysis*

In *DeVargas v. Montoya*,[242] the Tenth Circuit, was faced with a federal action issue, as well as a collateral attack on prior state court adjudications. Defenses of res judicata and failure to comply with the statute of limitations were asserted to bar both actions. The court analyzed the actions separately, and that format will be adopted here as well.

1. Original Federal Action

The New Mexico Court of Appeals, in dismissing DeVargas' complaint, never reached the substantive issues;[243] therefore, the first task before the Tenth Circuit was to determine whether the state court dismissal constituted an adjudication on the merits.[244] Following the well established rule that a federal court refer to the preclusive effect a judgment would have in the state of its issuance,[245] the Tenth Circuit determined that the dismissal was a judgment on the merits pursuant to state law,[246] and that New Mexico adhered to the majority rule that claim preclusion was applicable both to issues which were and which could have been raised.[247] These basic issues were dispensed with essentially in summary fashion by the court.

DeVargas's only serious challenge to the applicability of res judicata was that the federal courts' independent powers to determine issues such as tolling, waiver and estoppel somehow avoided the mandate of full faith and credit.[248] In disposing of this argument, the Tenth Circuit undertook a brief analysis of the extent of independent federal power. It was noted that the Supreme Court settled conclusively that state toll-

239. 700 F.2d 1291 (1983).

240. 421 U.S. 454 (1975).

241. *See Clulow*, 700 F.2d at 1300. In *Clulow*, the Tenth Circuit went on to find that there was no conflict between the section 1983 or its underlying policies and Oklahoma's accrual rules. *Id.* at 1301.

242. 796 F.2d 1245 (10th Cir. 1986).

243. DeVargas v. State *ex rel.* New Mexico Dept. of Corrections, 97 N.M. 447, 642 P.2d 166 (1982).

244. *DeVargas*, 796 F.2d at 1249.

245. *See supra* text accompanying note 197.

246. *DeVargas*, 796 F.2d at 1249. The court cited Campos v. Brown, 85 N.M. 684, 515 P.2d 1288 (N.M. Ct. App. 1973) and Adams v. United Steelworkers of America, 97 N.M. 369, 640 P.2d 475 (1982) for their holdings that a dismissal with prejudice constitutes an adjudication on the merits.

247. *DeVargas*, 796 F.2d at 1251. The court relied on First State Bank v. Muzio, 100 N.M. 98, 666 P.2d 777 (1983) as authority for New Mexico's view on applicability of claim preclusion to issues which could have been raised.

248. *DeVargas*, 796 F.2d at 1250.

ing rules are to be followed in section 1983 actions.[249] *Clulow v. Oklahoma* was cited for the proposition that a claim of estoppel due to concealment of information[250] was a question of accrual, and also for the Tenth Circuit's position that accrual is determined according to state rules.[251]

Because of the well established consistency between state policies of repose and section 1983,[252] no investigation concerning the success with which state rules fulfilled the purposes of federal statutes was undertaken in *DeVargas*. The Tenth Circuit assumed the existence of independent federal power to determine issues of tolling or accrual, but promptly discarded the idea of using such federal power, because claim preclusion barred relitigation of the New Mexico decision, refusing to recognize any extension of the limitations period. Presumably, in a case where a party was able to put forth a claim in which the consonance of state law and federal statute was not settled, the court would have undertaken an analysis similar to that in *Tomanio*[253] to determine whether the state law was inconsistent with a federal statute or its underlying purpose.

2. Collateral Attacks on State Court Proceedings

DeVargas attacked the state court proceedings based upon theories of inconsistency with federal law and denial of due process. The inconsistency theory was grounded mainly upon *Gunther v. Miller*,[254] which was claimed to establish a binding determination that the four-year New Mexico statute of limitations applied to section 1983 actions.[255] *Gunther* was distinguished by the Tenth Circuit as holding only that the two-year limitations period of the New Mexico Tort Claims Act[256] did not apply.[257]

After the dismissal of plaintiff's action by the New Mexico courts, the Supreme Court handed down *Garcia v. Wilson*,[258] which mandates use of state personal injury limitations statutes in section 1983 actions. Retroactive application of *Garcia* would not have helped *DeVargas*, who needed the four-year statute for miscellaneous actions, not the three-year personal injury statute.[259] Probably because of the court's interest

249. *Id.* at 1252. *See supra* text accompanying note 221.
250. *See supra* note 7.
251. *See supra* text accompanying notes 235-37.
252. *See supra* text accompanying note 229.
253. 446 U.S. 478. *See supra* text accompanying note 230-33.
254. 498 F. Supp. 882 (1980).
255. The four-year statute, N.M. STAT. ANN. § 37-1-4 (1978), is a catch-all provision for miscellaneous actions not covered by specific limitations statutes. Other relevant statutes of limitations are the two-year period set by the New Mexico Tort Claims Act, N.M. STAT. ANN. § 41-4-12 (1978), and the three-year period for personal injury actions, N.M. STAT. ANN. § 37-1-8 (1978).
256. N.M. STAT. ANN. § 41-4-12 (1978).
257. *Gunther*, 498 F. Supp. at 882-83.
258. 471 U.S. 261 (1985). *See supra* text accompanying notes 218-21.
259. *See supra* note 251. *See also* Note, *Wilson v. Garcia and Statutes of Limitations in Section 1983 Actions: Retroactive or Prospective Application?*, 55 FORDHAM L. REV. (1986).

in allowing a chance for DeVargas to obtain an adjudication of his section 1983 claim on its substantive merits, the Tenth Circuit declined to apply *Garcia* retroactively.[260]

In situations where the Tenth Circuit has determined state statutes of limitations applicable to federal laws, part of their analysis has centered upon analogous state court holdings.[261] The *DeVargas* court agreed with the plaintiff's assertion that the characterization of an action, brought in federal court under federal law for purposes of determining the applicable state statute of limitations, is a question of federal law. The burdens of a federal policy not disfavoring state statutes of repose[262] and the existence of a state court decision on the exact federal issue before the federal court, in a circuit with a policy of actively adopting state court rulings on statute of limitations matters, proved to be insurmountable to DeVargas.

The Tenth Circuit made it clear that the state court determination carried great weight. Consequently, the inconsistency claim was again dismissed summarily with no analysis of underlying federal purpose.[263] Such deference to state law characterizations of federal statutes is consistent with the Supreme Court decisions in *UAW v. Hoosier Cardinal Corporation*,[264] *Tomanio* and *Marrese*. *Hoosier* stated the general proposition that state law characterizations of federal law ought to be respected by federal courts, unless inconsistent with federal law.[265] *Tomanio* applied this proposition by accepting state tolling rules as part of state statutes of limitations.[266] *Marrese* indicated the potential ultimate extent of deference to the states by postulating that a plaintiff might be precluded by a prior state court action from bringing a subsequent exclusively federal claim.[267]

DeVargas's due process attack on the state court proceedings was very broad, challenging every adverse decision made by the New Mexico courts.[268] The Tenth Circuit stated the general proposition that full faith and credit required only that the minimum procedural requirements of due process be satisfied.[269] Therefore, no detailed analysis of plaintiff's constitutional claims was pursued. The court pointed out that plaintiff was responsible for the delays in the state court litigation. Because of the Supreme Court's exclusive jurisdiction over such appeals, it was within the court's power to refuse to address the constitutionality of

260. *DeVargas*, 796 F.2d at 1253.

261. Zuniga v. AMFAC Foods, Inc., 580 F.2d 380, 386 (10th Cir. 1978). *See supra* text accompanying notes 219-20.

262. Board of Regents v. Tomanio, 446 U.S. 478, 488 (1980). *See supra* text accompanying note 231.

263. *DeVargas*, 796 F.2d at 1254.

264. 383 U.S. 696 (1966).

265. *Id.* at 706.

266. *Tomanio*, 446 U.S. at 483.

267. Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 386 (1985).

268. *DeVargas*, 796 F.2d at 1244-45.

269. *See supra* text accompanying notes 208-13.

the state court proceedings in areas other than the due process issue.[270]

V. INTERVENTION OF RIGHT: *FDIC v. JENNINGS*

A. *Facts*

This case arose out of the insolvency of Penn Square Bank, N.A. The Federal Deposit Insurance Corporation (FDIC) was appointed receiver for Penn Square and filed suit against former bank officers and directors for breach of fiduciary duty.[271] The complaint was amended to join the accounting firm Peat, Marwick, Mitchell, & Co. ("Peat Marwick"), which was charged with negligence and breach of contract arising out of an audit of Penn Square's financial statements.[272] Penn Square's holding company, First Penn Corporation, moved to intervene in the action pursuant to rule 24(a)(2),[273] alleging both derivative and direct injuries arising from Peat Marwick's audit of Penn Square.[274] The derivative claims sought recovery for losses incurred by First Penn as a shareholder in Penn Square. The direct claims alleged losses suffered by First Penn in transactions with Penn Square which resulted from First Penn's reliance on Peat Marwick's audit of Penn Square.[275] The district court denied the motion to intervene[276] and First Penn appealed.[277]

B. *The Tenth Circuit's Holding*

The Tenth Circuit disposed of the threshold issue of mootness, which arose because of the settlement between the FDIC and Peat Marwick, holding that the settlement did not moot every issue of the action.[278] First Penn dropped its derivative claims; therefore, the Tenth Circuit addressed intervention with respect to the direct claims only.[279] After reviewing the merits of First Penn's intervention claim in detail, the court upheld the district court's dismissal of the motion to intervene.[280]

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270. *DeVargas*, 796 F.2d at 1245. The Tenth Circuit based its lack of jurisdiction over this appeal regarding the constitutionality of the state court decision on District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983), and 28 U.S.C. § 1257 (1982), which grants exclusive jurisdiction over Constitutional appeals from state courts to the Supreme Court.

271. FDIC v. Jennings, 816 F.2d 1488, 1490 (10th Cir. 1987).

272. *Id.*

273. FED. R. CIV. P. 24(a)(2).

274. *Jennings*, 816 F.2d at 1490.

275. *Id.*

276. FDIC v. Jennings, 107 F.R.D. 50 (W.D. Okla. 1985).

277. *Jennings*, 816 F.2d at 1490. FDIC and Peat Marwick settled while First Penn's appeal was pending.

278. *Id.* at 1491. The court viewed settlement in a case where an appeal to intervene was pending as posing a particular risk of injustice to a party with a legitimate intervention claim.

279. *Id.*

280. *Id.* at 1493. The court approved both the verdict and reasoning employed by the district court.

C. *Background*

Rule 24(a)(2) sets out standards for intervention by right.[281] The prospective intervenor must claim an interest relating to the property or transaction which is the subject of the action and he must be so situated that the disposition as a practical matter will impede his ability to protect the interest.[282] Intervention is warranted under these circumstances unless the applicant's interest is adequately represented by existing parties to the action.[283] The analysis in intervention cases typically proceeds by analyzing the interest, its impairment, and the adequacy of representation as separate, but frequently related, elements.[284]

1. Intervenor's Interest in the Action

Since the 1966 amendment of Rule 24(a)(2) to its present form, courts have had a difficult time formulating a precise test for the interest necessary to justify intervention.[285] Soon after the rule's amendment, the Tenth Circuit adopted what appeared to be a narrow view, requiring that the interest be specifically legal or equitable.[286] The Supreme Court, in *Donaldson v. United States*,[287] used an approach similar to the Tenth Circuit's, refusing intervention to an applicant who did not have a "significantly protectable interest."[288]

Shortly after the Tenth Circuit's attempt to clarify the meaning of interest, the District of Columbia Circuit, in *Nuesse v. Camp*[289] allowed an applicant asserting a general interest to intervene. The applicant in *Nuesse* was the Wisconsin Banking Commissioner, who sought to intervene in an action between the American State Bank, a Wisconsin chartered bank, and the United States Comptroller of the Currency.[290] American challenged the Comptroller's approval of a national bank's application

281. *See*, FED. R. CIV. P. 24(a)(2), which provides for intervention:
> [W]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

282. *See* Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 578 F.2d 1341, 1343 (10th Cir. 1978).

283. *See* National Farm Lines v. ICC, 564 F.2d 381, 384 (10th Cir. 1977).

284. *See Natural Resources*, 578 F.2d at 1344-45; Jet Traders Inv. Corp. v. Tekair, Ltd., 89 F.R.D. 560 (D. Del. 1981).

285. *See* Sanguine, Ltd. v. United States Dept. of the Interior, 736 F.2d 1416, 1420 (1984) ("[C]ourts have enjoyed little success in attempting to define precisely the type of interest necessary for intervention"); Rosebud Coal Sales Co. v. Andrus, 644 F.2d 849, 850 n.3 (10th Cir. 1981) ("[A]ttempts to add content to Rule 24(a)(2)'s 'interest' requirement have met with questionable success."); Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967).

286. *See* Toles v. United States, 371 F.2d 784 (10th Cir. 1967).

287. 400 U.S. 517 (1971).

288. *Id.* at 531. Donaldson sought to intervene in an action between his former employer, Acme, and the Internal Revenue Service. The IRS sued to enforce summons served on Acme and its accountant requiring them to testify on matters relating to Donaldson's tax liability. Donaldson moved to intervene in the action, citing his potential tax liability as a sufficient interest. *Id.* at 518-19.

289. 385 F.2d 694 (1967).

290. *Id.* at 698.

to open a branch office. The Commissioner's asserted interest was based on his authority to enforce the state banking laws relied on by American in bringing its action.[291] The District of Columbia Circuit rejected a narrow approach in defining "interest," choosing instead to rely on the purpose behind the interest test.[292] The court perceived that the interest test is "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process."[293]

Despite the Tenth Circuit's apparently limited formulation of what constitutes a sufficient interest, it has made statements tending to suggest a broader outlook than the "specific legal or equitable interest" test would suggest.[294] In *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission*,[295] the Tenth Circuit allowed intervention by a party with a general economic interest in the action. In *Natural Resources*, the Natural Resources Defense Council sued to prevent the Nuclear Regulatory Commission (NRC) and the New Mexico Environmental Improvement Agency (NMEIA) from licensing a uranium mill operated in New Mexico by United Nuclear Corporation without first preparing environmental impact statements.[296] Kerr-McGee Nuclear Corporation moved to intervene, claiming an interest in the action because it operated a uranium mill in New Mexico, and had an application for renewal of its operating license pending before the NMEIA.[297]

Describing the nature of interest meriting intervention, the Tenth Circuit stated that the applicant need not have a direct interest in the outcome of the action.[298] The court relied on *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*,[299] a Supreme Court case where the state of California was allowed to intervene in an antitrust action because the outcome of the action might affect California's natural gas supply.[300] The specific legal or equitable interest test was not abandoned in *Natural*

291. *Id.*

292. *Id.* at 700. *See* FED. R. CIV. P. 19 advisory committee's note ("persons materially interested in the subject of an action . . . should be joined as parties so that they may be heard and a complete disposition made.") and FED. R. CIV. P. 24(a)(2) advisory committee's note ("the amendment draws upon the revision of . . . [Rule 19] and the reasoning underlying that revision."). *See generally*, Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U. L. REV. 1061 (1985).

293. *Nuesse*, 385 F.2d at 700.

294. *See National Farm Lines*, 564 F.2d at 384 ("Our court has tended to follow a somewhat liberal line in allowing intervention."); Dowell v. Board of Ed. of Okla. City, 430 F.2d 865, 868 (10th Cir. 1970) ("[I]ntervention . . . should be freely granted so long as it does not seriously interfere with the actual hearings.").

295. 578 F.2d 1341 (10th Cir. 1978).

296. *Id.* at 1342-43.

297. *Id.* at 1344. The American Mining Congress also sought to intervene on behalf of its members who were or might become uranium mill operators in New Mexico.

298. *Id.*

299. 386 U.S. 129 (1967).

300. *Id.* The Court had previously ordered that El Paso Natural Gas divest itself of the Northwest Pipeline Corporation. *See* United States v. El Paso Natural Gas Co., 376 U.S. 651, 662 (1964). The instant action was to assure that Pacific Northwest, a natural gas supplier subsidiary of Northwest Pipeline, be restored to a competitive position in the California Market. *Cascade*, 386 U.S. at 132.

Resources; however, Kerr-McGee's interest was of a more general and attenuated nature than previously merited intervention in the Tenth Circuit.[301]

2. Impairment of Interest

The existence of an interest justifying intervention and the issue of its impairment are not entirely separable.[302] Finding an interest has been conditioned on whether it would be impaired by the outcome of an action.[303] One issue analyzed solely in terms of impairment is the effect of stare decisis on a prospective intervenor's ability to protect his interest in a subsequent action.

Stare decisis was recognized as a sufficient "practical disadvantage"[304] to warrant intervention of right soon after the 1966 amendment of the Federal Rules.[305] *Atlantis Development Corp. v. United States*[306] was an early case on stare decisis impairment. The issue before the *Atlantis* court was one of first impression, a factor upon which considerable emphasis was placed in finding impairment based primarily on stare decisis.[307] The Fifth Circuit reasoned that the issue of first impression, in the present action, would be a part of any subsequent claim brought by Atlantis (the applicant for intervention); therefore, the principal action constituted a trial on the merits of Atlantis's claim in a practical sense.[308]

The applicability of stare decisis to a finding of impairment of inter-

301. In Sanguine, Ltd. v. United States Dept. of Interior, 736 F.2d 1416 (1984), the Tenth Circuit adopted the underlying purpose analysis of *Nuesse*, 385 F.2d 694. This adoption indicated conclusively that the specific legal or equitable interest criterion would not be applied literally. One court has noted that intervention is granted more freely in "cases seeking injunctive relief where the grant of the relief sought would have broad social or economic ramifications" than in actions seeking damages. *See* Jet Traders Inv. Corp. v. Tekair, Ltd., 89 F.R.D. 560 (D. Del. 1981). The Tenth Circuit's decisions seem to line up roughly along this guideline. Thus, intervention was allowed in *Natural Resources*, where the intervenor (American Mining Congress) represented many companies which might be impacted if the Natural Resources Defense Council prevailed. *See supra* text accompanying notes 291-93. Intervention was also granted in *Sanguine*, 736 F.2d at 1416, where the applicant was an Indian tribe affected by a proposed change in the interpretation of oil and gas leases of Indian lands by the Bureau of Indian Affairs. *Sanguine*, 736 F.2d at 1417-18. *But see* Rosebud Coal Sales Co. v. Andrus, 644 F.2d 849 (1981), where intervention was denied. The applicant leased land containing coal deposits to Rosebud. The royalty rate of the lease was tied to the royalty rate that the Department of Interior charged Rosebud on federal lands. Rosebud was disputing an increase in the federal royalty rate and subsequently, the applicant claimed an interest since its royalty rate was tied to the federal rate. *Rosebud*, 644 F.2d at 849-50.

302. *See Natural Resources*, 578 F.2d at 1345.

303. *Id.* at 1344 (citing *Cascade*, 386 U.S. at 135-36).

304. FED. R. CIV. P. 24(a)(2).

305. *See* Atlantis Dev. Corp. v. United States, 379 F.2d 818, 826-29 (5th Cir. 1967); *Nuesse*, 385 F.2d at 702.

306. 379 F.2d 818 (5th Cir. 1967).

307. *Atlantis*, 379 F.2d at 826. At stake in *Atlantis* was the ownership of a number of reefs off the coast of Florida. The United States sued Acme, apparently at Atlantis' behest, to enjoin Acme from building structures on the reefs without first obtaining a permit from the United States Corps of Engineers. Atlantis was also interested in building on the reefs, and moved to intervene. *Id.* at 820-21.

308. *Id.* at 826.

est has been addressed in a number of cases since *Atlantis*, resulting in refinement and definition of the doctrine.[309] Federal courts do not see stare decisis as having any significant impairment effect in cases where the precedent would only have persuasive effect in a subsequent action by the applicant for intervention.[310] Lack of identity of legal issues between the action and the applicant's claim, and federal court actions based on state law, where the applicant's action would be tried in state court, are two principal areas where the stare decisis effect does not rise to the level of practical impairment.[311]

3. Inadequate Representation of an Intervenor's Interest

A footnote in a 1972 Supreme Court case set the standard for evaluating whether the existing parties to an action adequately represent the proposed intervenor's interests. In *Trbovich v. United Mine Workers of America*,[312] the Court stated that an applicant need only show that the representation of his interest by existing parties may be inadequate.[313] The Court went on to say that the applicant's burden in showing inadequacy is minimal.[314]

Prior to *Trbovich*, at least one court had put the burden of showing adequate representation by existing parties on those parties opposing intervention.[315] Even after *Trbovich*, a few courts continued to indicate a preference for saddling parties opposing intervention with the burden of showing adequate representation.[316] In *National Farm Lines v. ICC*,[317] the Tenth Circuit was encouraged by a petitioner for intervention to put

309. *See Jet Traders*, 89 F.R.D. at 569; CRI, Inc. v. Watson, 608 F.2d 1137 (8th Cir. 1979); *Natural Resources*, 578 F.2d at 1341; Florida Power Corp. v. Granlund, 78 F.R.D. 441 (M.D. Fla. 1978); Blake v. Pallan, 554 F.2d 947, 954 (9th Cir. 1977); New York Pub. Interest Research Group, Inc. v. Regents of the Univ. of New York, 516 F.2d 350 (2nd Cir. 1975); Martin v. Travelers Indem. Co. 450 F.2d 542 (5th Cir. 1971).

310. *See* Blake v. Pallan, 554 F.2d 947, 954 (1977); *Jet Traders*, 89 F.R.D. 560.

311. *Jet Traders*, 89 F.R.D. at 569.

312. 404 U.S. 528 (1972). The Secretary of Labor brought suit under § 482(b) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 482(b) (1982), to overturn the results of a United Mine Workers election. Trbovich had initiated the complaint with the Secretary, which led to the suit. *Trbovich*, 404 U.S. at 529. The Court pointed out that the Secretary's statutory duty included protecting both the rights of individual union members and the public's interest in fair union elections. Intervention was granted because the Court perceived the Secretary's dual protectorate role could conceivably result in a conflict. *Trbovich*, 404 U.S. at 538-39.

313. *Id.* at 538 n.10.

314. *Id.*

315. *Nuesse*, 385 F.2d at 702.

316. *See* Corp. v. Merchandise Mart of S.C., Inc., 61 F.R.D. 684 (D. S.C. 1974); Holmes v. Government of Virgin Islands, 61 F.R.D. 3 (D. St. Croix 1973).

317. 564 F.2d 381 (10th Cir.1977). National Farm Lines sought to intervene in an action brought by the National Motor Freight Traffic Association against the ICC, attacking the constitutionality of ICC regulations on motor carriers. *Id.* at 382. In assessing the adequacy of the ICC's representation of National Farm Lines (National Farm Lines benefitted from the reduced competition brought about by the regulation), the Tenth Circuit emphasized the significance of business knowledge and experience possessed by private concerns which a government agency would not have, and the conflict inherent in the agency's desire to protect the interest of both the private business and the general public. *Id.* at 383-84.

the adequacy of representation burden of proof on the opposing party.[318] The court followed *Trbovich*, holding that the burden of showing inadequate representation, though slight, was on the petitioner.[319]

Perhaps the more significant effect of *Trbovich* is its characterization of the intervening applicant's burden as minimal. The Tenth Circuit's interpretation of minimal was defined in *Natural Resources* as finding inadequacy of representation unless "there is no way to say that there is no possibility that . . . [the interests of the intervenor and the existing parties] will not be different . . . ."[320] Having parties before the court in order to bind them to the result as well as to protect prospective intervenors' rights, were relied upon in *Natural Resources* as favoring a near presumption of inadequacy of representation.[321]

D. *Analysis*

Since First Penn dropped its derivative claims against Peat Marwick, the Tenth Circuit only addressed whether First Penn's direct claims entitled it to intervene in the action between the FDIC and Peat Marwick.[322] The court narrowed its analysis to the interest and impairment requirements for intervention after a brief discussion of the FDIC's ability to represent First Penn's interests in the direct claims.[323]

In advancing its direct claims, First Penn would have had to prove that, absent Peat Marwick's alleged negligence in preparing the audit, it would not have entered into certain loan transactions with Penn Square.[324] On the other hand, the FDIC's case did not depend on First Penn's injuries allegedly incurred in reliance on the audit. Because the facts clearly indicated at least a partial lack of overlap in the FDIC's and First Penn's claims, the finding of inadequacy of representation depended on the facts and required no legal analysis.

Turning to the issue of interest in the action, in particular, how to assess a prospective intervenor's interest, the court adopted the previous Tenth Circuit requirement that the interest asserted be a specific legal or equitable one, but stated that the test of interest is determined with reference to the purpose underlying the interest requirement.[325] This juxtaposition of propositions, that had been considered inconsistent by the District of Columbia Circuit in *Nuesse*,[326] indicates that the Tenth Circuit's specific legal or equitable interest requirement does not mean specific in the sense of reliably known at the time of intervention; but rather it means specific in the sense of legally cognizable within the

318. *Id.* at 383.
319. *Id.*
320. *Natural Resources*, 578 F.2d at 1346.
321. *Id.*
322. *Jennings*, 816 F.2d at 1491.
323. *Id.*
324. *Id.* at 1490-91.
325. *Id.* at 1491. *See supra* text accompanying notes 282 and 289.
326. Neusse v. Camp, 385 F.2d 694, 700 (1967).

context of the action in which intervention is requested.[327]

While the divergence of issues worked to First Penn's favor on the adequacy of representation issue, too great a divergence would preclude finding that First Penn had a sufficient interest in the litigation to justify intervention. The court did note that First Penn's claim would interject new issues into the action.[328] In keeping with the recognized interrelationship between interest and impairment, however, the Tenth Circuit addressed impairment before determining how burdensome the introduction of new issues would be; essentially implying that a finding of serious impairment would justify a larger burden on the existing litigation.[329]

The divergence of issues worked to First Penn's detriment in the impairment analysis. The court noted that stare decisis could be sufficient to satisfy the impairment requirement; however, the difference in First Penn's and the FDIC's theories of recovery minimized the stare decisis effect. Furthermore, Oklahoma law controlled First Penn's claims, again minimizing the precedential impact of a federal court ruling.[330]

After finding the impairment of First Penn's claims to be minor, the Tenth Circuit adopted the district court's finding that the introduction of new issues would burden the existing action substantially. Citing the burden on the existing action, the lack of stare decisis impairment, and the divergence of the issues, the Tenth Circuit upheld the district court's determination that First Penn was not entitled to intervene in the action.[331]

VI. SUA SPONTE DISMISSAL FOR LACK OF PERSONAL JURISDICTION: *WILLIAMS V. LIFE SAVINGS AND LOAN*

A. *Facts*

Plaintiff Pamela Williams, acting pro se, filed a Title VII employment discrimination action against her former employer in the Colorado federal district court.[332] Defendant was a Rockford, Illinois bank, over which the court could not obtain personal jurisdiction.[333] The complaint was filed on April 26, 1985 and dismissed sua sponte by the district court on April 29, 1985, for lack of personal jurisdiction over Life Savings.[334]

327. *See supra* text accompanying notes 285-93. *Cf.* Allard v. Frizzell, 536 F.2d 1332 (10th Cir. 1976) (intervention denied to applicants whose interest in the action was an interest held by the public generally which would not be impeded by the disposition of the action).

328. *See supra* text accompanying note 306. *See also Natural Resources*, 578 F.2d at 1345.

329. *Jennings*, 816 F.2d at 1492. *See also supra* text accompanying note 306-07.

330. *Jennings*, 816 F.2d at 1492. *See also* FDIC v. Jennings, 107 F.R.D. 50, 55 (1985).

331. *Jennings*, 816 F.2d at 1493.

332. Williams v. Life Sav. & Loan, 802 F.2d 1200, 1202 (10th Cir. 1986).

333. *Id.*

334. *Id.*

B. *The Tenth Circuit's Holding*

The Tenth Circuit noted that the complaint was dismissed before the date on which the defendant was required to appear or file a responsive pleading.[335] In a per curiam opinion, the court held that a district court's power to inquire sua sponte into its jurisdiction over the parties is not to be exercised until a point is reached in the proceedings where a default judgment could be entered.[336] Because Life Savings was not in default when the complaint was dismissed, the district court's dismissal was reversed, and the case remanded.[337]

C. *Background*

1. Sua sponte dismissal

In certain circumstances, the limited jurisdiction of the federal courts and considerations of judicial economy and fairness permit sua sponte dismissal by the court. A federal court must dismiss an action over which it does not have subject-matter jurisdiction, regardless of whether or not the issue is raised by the parties.[338] A judgment rendered by a court lacking jurisdiction over the subject matter of the action is void,[339] and therefore, legally ineffective.[340] Because subject-matter jurisdiction can never be conferred by waiver or consent,[341] and a judgment rendered in its absence has no legal effect, a court is bound to inquire into its jurisdiction before rendering judgment.[342]

Sua sponte dismissal for lack of prosecution is supported by the policy of judicial efficiency. In *Link v. Wabash R.R. Co.*,[343] the Supreme Court upheld a district court's dismissal of a dilatory plaintiff's action.[344] Writing for the Court, Justice Harlan recognized that a court's authority to control its docket was inherent, and governed by the control necessary to "achieve the orderly and expeditious disposition of

335. *Id.* FED. R. CIV. P. 12(a) provides that:

> [a] defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, except when service is made under Rule 4(e) and a different time is prescribed in the order of court under the statute of the United States or in the statute or rule of court of the state.

336. *Williams*, 802 F.2d at 1203. FED. R. CIV. P. 55(a) provides for the entry of a default judgment "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise. . . ."

337. *Williams*, 802 F.2d at 1203.

338. *See* Mansfield, C. & L. Mich. Ry. v. Swan, 111 U.S. 379, 382 (1884); Fiedler v. Clark, 714 F.2d 77, 78-79 (9th Cir. 1983).

339. *See* Stoll v. Gottlieb, 305 U.S. 165, 171-72 (1938); Thompson v. Whitman, 85 U.S. (18 Wall.) 457, 465 (1873) (a court must have "jurisdiction of parties and cause" for its judgment to be valid); Misco Leasing, Inc. v. Vaughn, 450 F.2d 257 (10th Cir. 1971).

340. *See* Williams v. North Carolina, 325 U.S. 226 (1945); Kalb v. Feuerstein, 308 U.S. 433 (1940).

341. *See* Mitchell v. Maurer, 293 U.S. 237, 243 (1934).

342. *See Mansfield*, 111 U.S. at 382.

343. 370 U.S. 626 (1962).

344. *Id.* at 633.

cases."[345]

With respect to sua sponte dismissal, defects in personal jurisdiction differ from defects in subject-matter jurisdiction and action by a plaintiff which merits dismissal. Waiver of personal jurisdiction by a party may be made as expressly provided for in the Federal Rules of Civil Procedure, or otherwise, subject only to due process protections. Waivers which are not dependent on the Federal Rules include voluntary appearance,[346] and consent to subject oneself to the *in personam* jurisdiction of a particular court by contact.[347]

Under Rule 12(h)(1),[348] the defense of lack of personal jurisdiction is waived if it is not raised in a pre-answer pleading or in the answer itself. Thus, lack of personal jurisdiction is a personal defense, as is the assertion of the statute of limitations to bar an action.[349] Because it is incumbent upon a party to raise the issue of defective jurisdiction over his person, the court is precluded from raising it on his behalf.[350]

A court's assertion of its lack of personal jurisdiction over a defendant in order to dismiss a plaintiff's action is distinguishable from a court's dismissal of an action for reasons which are within the plaintiff's control. In the case of jurisdiction, a sua sponte dismissal requires the court to assert another party's rights against the plaintiff, on behalf of the party. In the case of dismissal for failure of prosecution, the court is essentially asserting its own right to control its docket against the plaintiff.[351]

2. Lack of Personal Jurisdiction in a Default Judgment

Default judgments present a peculiar situation in which a court may, sua sponte, inquire into its jurisdiction over the parties. In determining whether to enter a default judgment, a court has discretion to consider whether it would later have to set it aside on a motion by the defendant.[352] Under Rule 60(b),[353] a court may relieve a party from a final judgment in a number of situations, one being when the judgment is

345. *Id.* at 630-31. Justice Harlan characterized the power of a court to dismiss an action for lack of prosecution as having ancient origins in both law and equity. *Id.*

346. *See* Pennoyer v. Neff, 95 U.S. 714 (1877).

347. *See* National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964); Petrowski v. Hawkeye Security Ins. Co., 350 U.S. 495 (1956) (personal jurisdiction may be conferred by consent of the parties).

348. FED. R. CIV. P. 12(h)(1).

349. *See* Zelson v. Thomforde, 412 F.2d 56 (3d Cir. 1969); Wagner v. Fawcett Publications, 307 F.2d 409, 412 (7th Cir. 1962), *cert. denied*, 372 U.S. 909 (1963) (the statute of limitations is a personal defense, which is waived if not raised by the defendant).

350. *See Zelson*, 412 F.2d at 56. Improper venue is also subject to waiver, and the court is similarly unable to dismiss an action sua sponte for want of venue. *See* Concession Consultants, Inc. v. Mirisch, 355 F.2d 369, 371 (2d Cir. 1966).

351. *See supra* text accompanying note 341.

352. *See* Henry v. Metropolitan Life Ins. Co., 3 F.R.D. 142 (W.D. Va. 1942). A defendant's attack on a default judgment for lack of personal jurisdiction may be made collaterally in the court rendering the judgment, or in a court where the plaintiff attempts to enforce the judgment. *See* Covington Industries, Inc. v. Resintex, A. G., 629 F.2d 730, 733-34 (2d Cir. 1980).

353. FED. R. CIV. P. 60(b).

void. The relief under Rule 60(b) is discretionary in a number of situations; however, there is no discretion in granting relief from a void judgment.[354]

The certainty that a default judgment rendered by a court lacking personal jurisdiction is void and will be vacated in a collateral attack,[355] provides ample justification for a court's sua sponte inquiry into its jurisdiction over the parties before entering a default judgment.[356] After refusing to enter a default judgment, a court has the option of dismissing the action[357] or transferring the action to a district court where it could have been brought.[358]

D. *Analysis*

The law on dismissal of actions pursuant to a court's sua sponte inquiry into its jurisdiction over the parties is well established in both cases and policy.[359] The district court's dismissal of Williams's action prior to the time of the defendant's default[360] was clearly inconsistent with the prevailing rule that a court not dismiss an action (other than an action for a default judgment) for lack of personal jurisdiction on its own motion. As might be expected from the well settled state of the law, the Tenth Circuit spent few words on its reversal of the dismissal.

Any lasting significance that *Williams* might enjoy will be due to the court's dicta approving the transfer of actions which have reached the default judgment stage with defects in personal jurisdiction.[361] By transferring rather than dismissing default judgment actions, both judicial economy and the interests of litigants are advanced. Judicial economy benefits because the action is transferred to a forum where it may be pursued on its merits or dismissed with prejudice. Litigants benefit for much the same reason. Defendants' interest in disposing of litigation expeditiously is furthered because the court to which the action is transferred has the power to make a final disposition of the action.

Plaintiffs bringing actions with such blatant jurisdictional defects as those in *Williams* are usually acting pro se.[362] By transferring the action, a court may further the naive plaintiff's ability to obtain an adjudication of his claim on its merits. Alternatively, in the case of a pro se plaintiff whose action is brought for reasons other than obtaining relief from a

354. *See* V.T.A., Inc. v. Airco, Inc., 597 F.2d 220, 224 n.8 (1979); Austin v. Smith, 312 F.2d 337 (D.C. Cir. 1962); Hicklin v. Edwards, 226 F.2d 410 (8th Cir. 1955).

355. *See Covington Industries*, 629 F.2d at 732.

356. *See* First Nat'l Bank of Louisville v. Bezema, 569 F. Supp. 818, 819 (S.D. Ind. 1983); Bross Utils. Serv. Corp. v. Aboubshait, 489 F. Supp. 1366, 1368 n.3 (D. Conn. 1980).

357. *See, e.g., Bross Utilities*, 489 F. Supp. at 1368.

358. *See Bezema*, 569 F. Supp. at 821.

359. *See supra* text accompanying notes 344-46.

360. *See Williams*, 802 F.2d at 1202.

361. *Id.* at 1203.

362. Prisoners are a common example of pro se plaintiffs. *See* Brandon v. District of Columbia Bd. of Parole, 734 F.2d 56 (D.C. Cir. 1984); Redwood v. Council of the Dist. of Columbia, 679 F.2d 931 (D.C. Cir. 1982); Lewis v. State, 547 F.2d 4 (2d Cir. 1976).

legally cognizable injury, transferring the action furthers the public policy of discouraging litigation for its own sake.[363]

CONCLUSION

On the whole, the cases considered in this article serve to increase the availability of the federal courts to plaintiffs. *Superior Oil* will enhance a non-Indian's ability to utilize the federal courts in disputes with Indians when tribal remedies prove inadequate. The holding in *Salehi* grants full access to the federal court system to aliens with legitimate complaints about Immigration and Naturalization Service practices, particularly those practices affecting their constitutional rights.[364] *Quinones* recognized and furthered the federal policy of resolving controversies in one action by extending diversity jurisdiction in an area where significant rights are not threatened by the expansion. *Williams* is perhaps the clearest expression of the Tenth Circuit's desire to reduce the procedural complexities and resulting inscrutability of the federal courts to non-lawyers.

DeVargas and *Jennings* do not run counter to the trends of simplifying litigation and enhancing the accessibility of the federal courts. *DeVargas* did deny the plaintiff access to the federal courts; however, he had already had his day in state court. Enforcing the policy of repose serves to facilitate access to those whose complaints have yet to be heard. *Jennings* denied a potential plaintiff access not to the courts in general, but to a particular action. A major underpinning for the denial in *Jennings* was the procedural complexity that would be introduced into the case upon the plaintiff's intervention.

None of the Tenth Circuit's holdings in these cases are indicative of a desire to throw open the federal court's doors to all plaintiffs. Rather, the slight expansions of subject-matter and personal jurisdictional bounds seem intended and should serve to ease some of the procedural complexities inherent in accessing and conducting proceedings in the federal courts.[365]

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363. Transfer of an action to a forum where jurisdiction over the parties can be perfected may work a hardship on a plaintiff; however, this hardship is inherent in the requirements of due process, not in the transfer policy advocated by the Tenth Circuit. *See generally* Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283 (1982).

364. *See generally Developments in the Law-Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1395-99 (1983).

365. For an interesting perspective on federal jurisdiction in general, see Kerameus, *A Civilian Lawyer Looks at Common Law Procedure*, 47 LA. L. REV. 493, 495-97, 503-05 (1987).