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The Curious Case of Disappearing Federal Jurisdiction over Federal Enforcement of Federal Law: A Vehicle for Reassessment of the Tribal Exhaustion/Abstention Doctrine

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BLAKE A. WATSON*

For the Federal Government and its agencies, the federal courts are the forum of choice.

*NLRB v. Nash-Finch Company*¹

[T]he presence of federal-law issues must always be a major consideration weighing against surrender [of federal court jurisdiction].

*Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*²

The fact that the Government is attempting to enforce federal law [in federal court] is immaterial. The alleged trespass was to tribal land and considerations of comity require that the tribal courts get the first opportunity to resolve this case.

*United States v. Plainbull*³

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1. 404 U.S. 138, 147 (1971).

2. 460 U.S. 1, 26 (1982).

3. 957 F.2d 724, 728 (9th Cir. 1992).

I. INTRODUCTION

The Supreme Court has "often acknowledged that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress."⁴ Because this duty is not absolute,⁵ the Court "has devised a number of complex, often interrelated doctrines to justify either rejection or postponement of the assertion of federal court power even though Congress has vested jurisdiction in the federal courts to hear the cases in question."⁶ Prior to 1985, these doctrines were developed in the context of the "question of overlapping and conflicting *state-federal* jurisdiction."⁷ However, in its 1985 decision in *National Farmers Union Insurance Companies v. Crow Tribe*,⁸ the Supreme Court announced that, while a federal district court does possess federal question jurisdiction under 28 U.S.C. § 1331 to determine whether a *tribal court* has exceeded the lawful limits of its jurisdiction, the "[e]xhaustion of tribal court remedies . . . is required before such a claim may be

4. *Quackenbush v. Allstate Ins. Co.*, 116 S. Ct. 1712, 1720 (1996) (citations omitted). See also *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 (1908) ("When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction."). This duty of the federal courts was characterized by Chief Justice John Marshall as an absolute obligation. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.").

5. *Quackenbush*, 116 S. Ct. at 1720.

6. MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 281 (2d ed. 1990).

7. John B. Oakley, *Proceedings of the Western Regional Conference on State-Federal Judicial Relationships*, 155 F.R.D. 233, 334 (1993) (emphasis added). As summarized by Rex Lee and Richard Wilkins, federal courts may abstain from exercising their jurisdiction in favor of state proceedings:

(1) where clarification of state law might avoid a federal constitutional ruling (commonly called *Pullman* abstention); (2) where decision of an unclear issue of state law in a diversity case might threaten important state interests (commonly called *Thibodaux* abstention); (3) where an assertion of federal jurisdiction might interfere with important state administrative goals (commonly called *Burford* abstention); (4) where there are simultaneously pending state court proceedings (commonly called *Younger* abstention); and (5) where there are duplicative state and federal court proceedings (commonly referred to as *Colorado River* abstention).

Rex E. Lee & Richard G. Wilkins, *An Analysis of Supplemental Jurisdiction and Abstention with Recommendations for Legislative Action*, 1990 BYU L. REV. 321, 335-36. See generally *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *Younger v. Harris*, 401 U.S. 37 (1971); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

8. 471 U.S. 845 (1985).

entertained by a federal court.”⁹ In the subsequent 1987 case of *Iowa Mutual Insurance Co. v. LaPlante*,¹⁰ the Court held that, despite the presence of diversity jurisdiction under 28 U.S.C. § 1332, “the exhaustion rule announced in *National Farmers Union* applies.”¹¹ The rule requires the federal district court, “as a matter of comity”¹² and for reasons “analogous to principles of abstention,”¹³ to “stay its hand in order to give the tribal court a ‘full opportunity to determine its own jurisdiction.’”¹⁴

Almost ten years have now passed since *Iowa Mutual* reaffirmed the *National Farmers Union* “exhaustion” doctrine. In the ensuing decade, federal district and appellate courts have issued over eighty reported decisions construing and applying *National Farmers Union* and *Iowa Mutual*. The results, to say the least, have been mixed. First and most fundamentally, the courts have been unable to reach a consensus with respect to the scope of this “utterly novel rule”¹⁵ in large part because “the Supreme Court did not clearly delineate the class of cases to which the tribal exhaustion doctrine applies.”¹⁶ Second, the courts have split over the closely related issue of whether *National Farmers Union* and *Iowa Mutual* constitute an “inflexible bar” mandating that federal courts abstain from exercising their jurisdiction, or whether the individual circumstances of each case may be examined “in order to determine if deference is necessary, in light of the purposes of the exhaustion requirement.”¹⁷ Finally, disagreement has arisen regarding the role, if any, to be played by the federal courts *after* tribal court remedies have been exhausted.¹⁸

Not surprisingly, *National Farmers Union* and *Iowa Mutual* have also

9. *Id.* at 857.

10. 480 U.S. 9 (1987).

11. *Id.* at 16.

12. *Id.* at 16 n.8.

13. *Id.* More precisely, the Court equated the *National Farmers Union* exhaustion rule with the particular abstention doctrine set forth in *Colorado River* by noting that “[i]n *Colorado River*, as here, strong federal policy concerns favored resolution in the nonfederal forum.” *Id.* (citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976)).

14. *Iowa Mut.*, 480 U.S. at 16 (quoting *National Farmers Union*, 471 U.S. at 857).

15. Richard W. Hughes, *Indian Law*, 18 N.M. L. REV. 403, 450 (1988).

16. Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C. L. REV. 1089, 1091 n.4 (1995). See also *infra* Part IV.C.

17. *Stock West Corp. v. Taylor*, 942 F.2d 655, 661 (9th Cir. 1991), *aff'd in part and vacated in part*, 964 F.2d 912, 920 (9th Cir. 1992). See also *infra* Part IV.B.

18. See *infra* note 171.

generated substantial (and divisive) commentary regarding the proper relationship between tribal courts and the federal judiciary.¹⁹ Praise, criticism, and damnation of the tribal exhaustion/abstention doctrine have been offered up not only by academicians, but also by tribal attorneys,²⁰ tribal judges,²¹ and private practitioners.²²

This Article looks at the tribal exhaustion/abstention doctrine from yet another perspective: the perspective of the federal government. Prior to becoming a law professor in 1992, I was an attorney for ten years in the United States Department of Justice. During this period, I represented the United States, both in federal and state court, in numerous cases involving Indian tribes and individual Indians.²³

19. See, e.g., FRANK POMMERSHEIM, *BRAID OF FEATHERS* (1995); Patti Alleva et al., *Dispute Resolution in Indian Country: Does Abstention Make the Heart Grow Fonder?*, 71 N.D. L. REV. 541 (1995); P.S. Deloria et al., *Litigating an Indian Jurisdiction Case: Where Must You Go First?*, 71 N.D. L. REV. 313 (1995); Timothy W. Joranko, *Exhaustion of Tribal Remedies in the Lower Courts After National Farmers Union and Iowa Mutual: Toward a Consistent Treatment of Tribal Courts by the Federal Judicial System*, 78 MINN. L. REV. 259 (1993); Phillip Wm. Lear & Blake D. Miller, *Exhaustion of Tribal Court Remedies: Rejecting Bright-Line Rules and Affirmative Action*, 71 N.D. L. REV. 277 (1995); Reynolds, *supra* note 16; Alex Tallchief Skibine, *Deference Owed Tribal Courts' Jurisdictional Determinations: Towards Co-Existence, Understanding, and Respect Between Different Cultural and Judicial Norms*, 24 N.M. L. REV. 191 (1994); Lynn H. Slade, *Dispute Resolution in Indian Country: Harmonizing National Farmers Union, Iowa Mutual, and the Abstention Doctrine in the Federal Courts*, 71 N.D. L. REV. 519 (1995); Philip J. Smith, *National Farmers Union and its Progeny: Does it Create a New Federal Court System?*, 14 AM. INDIAN L. REV. 333 (1989).

20. See Joranko, *supra* note 19; Michael Taylor, *Modern Practice in the Indian Courts*, 10 U. PUGET SOUND L. REV. 231 (1987).

21. See POMMERSHEIM, *supra* note 19; Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841 (1990); Carey N. Vicenti, *The Reemergence of Tribal Society and Traditional Justice Systems*, 79 JUDICATURE 134, 140 (1995). Carey Vicenti is the chief judge of the Jicarilla Apache Tribe. Frank Pommersheim and Robert Clinton both enjoy dual status as law professors and tribal judges.

22. See Mark A. Jarboe, *Fundamental Legal Principles Affecting Business Transactions in Indian Country*, 17 HAMLINE L. REV. 417 (1994); Lear and Miller, *supra* note 19; Slade, *supra* note 19.

23. See, e.g., *Hodel v. Irving*, 481 U.S. 704 (1987); *United States v. Plainbull*, 957 F.2d 724 (9th Cir. 1992); *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2d Cir. 1990), *cert. denied*, 499 U.S. 975 (1991); *United States v. 29 Acres of Land, More or Less, Situated in Dunn County, State of North Dakota*, 809 F.2d 544 (8th Cir. 1987); *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741 (10th Cir. 1987); *United States v. Eberhardt*, 789 F.2d 1354 (9th Cir. 1986); *Pueblo De San Felipe v. Hodel*, 770 F.2d 915 (10th Cir. 1985); *Lower Brule Sioux Tribe v. United States*, 712 F.2d 349 (8th Cir. 1983); *Goodface v. Grassrope*, 708 F.2d 335 (8th Cir. 1983); *State v. Lewis*, 861 P.2d 235 (N.M. Ct. App. 1993); *State ex rel. Greely v. Water Court*, 712 P.2d 754 (Mont. 1985); *State ex rel. Greely v. Water Court*, 691 P.2d 833 (Mont. 1984).

Following the lead of Frank Pommersheim, Judith Resnik, and others, this Article will use the words "Indian" and "tribe" rather than "Native American." See POMMERSHEIM, *supra* note 19, at 1 n.1; Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal*

Although I obviously cannot (and do not purport to) represent the views of the federal government, my experiences inevitably cause me to view *National Farmers Union* and *Iowa Mutual* through a somewhat different lens. From my vantage point, the vision of an inflexible, all-encompassing tribal exhaustion/abstention doctrine appears to be both unfocused and short-sighted. Those who hold such a vision fail to look closely at what the Supreme Court actually decided (and did not decide) in *National Farmers Union* and *Iowa Mutual*. Proponents of a mandatory exhaustion/abstention doctrine also lose sight of the fact that “[a]bstention from the exercise of federal jurisdiction is the exception, not the rule,”²⁴ and that obedience to the “virtually unflagging obligation of the federal courts to exercise the jurisdiction given them”²⁵ is “particularly ‘appropriate’”²⁶ in certain circumstances—such as when federal law issues predominate and/or when the federal government exercises the “right to apply to its own courts.”²⁷ Finally, it is entirely possible that an overzealous discernment of *National Farmers Union* and *Iowa Mutual* may prove myopic; for example, mandatory exhaustion of tribal court remedies could pressure federal courts to take an aggressive stance on tribal court jurisdiction and, as Phillip Lear and Blake Miller have suggested, could “diminish rather than enhance tribal court sovereignty” by fostering the assumption “that tribal courts are somehow inferior or weaker and require greater protection.”²⁸

This Article uses a specific scenario—the enforcement of federal law by the federal government in cases involving Indians—as a vehicle for reassessment of the tribal exhaustion/abstention doctrine.²⁹ Part II begins with a discussion of *United States v. Plainbull*,³⁰ which was an enforcement action brought by the United States on behalf of the Crow

Courts, 56 U. CHI. L. REV. 671, 679 (1989).

24. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976).

25. *Id.* at 817.

26. *Id.* at 825 (Stewart, J., dissenting).

27. *In re Debs*, 158 U.S. 564, 584 (1895).

28. Lear & Miller, *supra* note 19, at 278, 295.

29. I choose to characterize the rule of *National Farmers Union* and *Iowa Mutual* as the “exhaustion/abstention” doctrine in order to underscore its dual nature. On one hand, the two cases command federal courts to await the exhaustion of tribal court remedies before addressing the (federal) question of the permissible scope of tribal court jurisdiction. On the other hand, by limiting federal court review of tribal court decisions to the question of tribal court jurisdiction, the rule of *National Farmers Union* and *Iowa Mutual*—when applicable—requires federal district courts to abstain from adjudicating the merits of cases over which they possess concurrent jurisdiction. See *infra* Part III.D.

30. 957 F.2d 724 (9th Cir. 1992).

Tribe against Crow Indians for grazing livestock in trespass on tribal lands. As noted by Mark Jarboe, the Ninth Circuit's *Plainbull* decision calls into question the outer limits of *National Farmers Union* and *Iowa Mutual*:

The significance of a decision like *Plainbull* should not be underestimated. The case involved the federal government itself, bringing an action to enforce a federal statute that imposed a federal penalty, in a situation where three separate federal jurisdictional statutes extended jurisdiction to the federal district court. Nevertheless, the federal courts abstained from hearing the matter and ruled that the federal government was required to bring its action in Crow tribal court. *A stronger case for federal court jurisdiction could hardly be imagined*, even so, the courts ruled that the federal interest in supporting tribal self-government was stronger.³¹

Part III examines the origins of the tribal exhaustion/abstention doctrine, focusing on the facts and holdings of the two seminal Supreme Court decisions. What appears most striking is the "imprecision of the language of the Supreme Court opinions in *National Farmers* and *Iowa Mutual*,"³² particularly with respect to policies underlying and justifying the exhaustion/abstention doctrine, the circumstances in which the doctrine applies, and the role played by federal courts when recourse to tribal courts is required.

The lower federal courts, not surprisingly, have "produced wide-ranging inconsistencies"³³ in addressing these issues and other questions left unanswered by the Supreme Court. Part IV surveys the development of the tribal exhaustion/abstention doctrine following *National Farmers Union* and *Iowa Mutual*. Shifting then from a descriptive mode, Part V critiques the efforts of courts and commentators to buttress the tribal exhaustion/abstention doctrine by drawing analogies to other judicial doctrines that affect the exercise of federal jurisdiction, such as the doctrine of exhaustion of administrative remedies, the notion of comity, and the various abstention doctrines. Due to the unique relationship between "tribal governments, and in particular tribal courts, and the rest of the federal union,"³⁴ these analogies ultimately fail, and the viability of *National Farmers Union* and *Iowa Mutual* must instead rest on the three policy concerns identified by the Supreme Court:

31. Jarboe, *supra* note 22, at 441 (emphasis added).

32. Alleva et al., *supra* note 19, at 543 (statement of Laurie Reynolds).

33. *Id.* at 542.

34. Clinton, *supra* note 21, at 843.

supporting tribal self-government, promoting the orderly administration of justice, and obtaining the benefit of tribal expertise.³⁵

Part VI comes full circle, returning to *United States v. Plainbull*. The United States Court of Appeals for the Ninth Circuit in *Plainbull* correctly identified the two issues presented by the district court's invocation of the exhaustion/abstention doctrine: (1) whether Congress had "confer[red] exclusive jurisdiction to the federal courts in the instant case,"³⁶ and (2) whether "the district court abused its discretion by electing to abstain."³⁷ The court, however, erred in its resolution of both issues. With regard to the question of whether a grant of jurisdiction to district courts "exclusive of the courts of the States," also divested tribal courts of any concurrent jurisdiction, the Ninth Circuit simplistically invoked the "plain language" rule and refused to consider the overwhelming evidence that Congress intended its grant to vest district courts with exclusive jurisdiction.³⁸ With respect to the application of the tribal exhaustion/abstention doctrine, the court of appeals fundamentally misread *National Farmers Union* and *Iowa Mutual* when it declared that "[t]he fact that the Government is attempting to enforce federal law is immaterial" because "considerations of comity require the exhaustion of tribal remedies."³⁹ To the contrary, because *National Farmers Union* and *Iowa Mutual* do not mandate federal court abstention in all cases involving Indians and Indian tribes, the right of the federal government to access federal courts to enforce federal law is a highly material consideration that weighs strongly against the surrender of federal court jurisdiction.

Reassessment of the tribal exhaustion/abstention doctrine in light of the "*Plainbull* scenario" ultimately leads to two conclusions. First, federal courts should strive to effectuate the animating purposes of *National Farmers Union* and *Iowa Mutual* by closely examining the "circumstances of the action before a decision to defer is made."⁴⁰ Second, while the policy concerns underlying the tribal exhaustion/abstention doctrine—particularly the federal policy of supporting tribal self-government—should cause federal courts to abstain in most cases involving Indians and Indian tribes, these policy concerns are not

35. See *National Farmers Union*, 471 U.S. at 856-57; *Texaco, Inc. v. Zah*, 5 F.3d 1374, 1377-78 (10th Cir. 1993).

36. *United States v. Plainbull*, 957 F.2d 724, 726 (9th Cir. 1992).

37. *Id.*

38. *Id.*

39. *Id.* at 728 (emphasis added).

40. *Stock West Corp. v. Taylor*, 942 F.2d 655, 661 (9th Cir. 1991).

mandatory "imperatives,"⁴¹ but rather should yield, in appropriate circumstances, to the competing federal policy of having the federal courts "exercise the jurisdiction that is conferred upon them by Congress."⁴²

II. THE "PLAINBULL SCENARIO"

Cyril and Arvilla Plainbull, enrolled members of the Crow Tribe, resided in the 1980s on allotted lands located on the western side of the Crow Reservation near Pryor, Montana.⁴³ Situated next to the Plainbulls' allotments are reservation lands, which are held in trust by the United States for the Crow Tribe and utilized as tribal range units for grazing livestock.⁴⁴

The Plainbulls for many years grazed livestock on the tribal range units without a valid grazing permit and without paying grazing fees.⁴⁵ In October 1985, the Crow Tribe passed Resolution No. 86-5, which provides in pertinent part that:

No livestock of any kind will be grazed free of charge on Tribal land. The owner of any livestock grazing in trespass on Indian Trust land within the boundaries of the Crow Reservation will be in violation of this resolution and may be fined in accordance with the Code of Federal Regulation, Paragraph 166.24.⁴⁶

After several years of documented trespass by the Plainbulls' livestock on tribal lands, the Department of the Interior's Bureau of Indian Affairs (BIA) billed the Plainbulls in 1987 and 1988 for trespass penalties

41. *Burlington N. R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991).

42. *Quackenbush v. Allstate Ins. Co.*, 116 S. Ct. 1712, 1720 (1996).

43. This summation of the litigation between the United States and the Plainbulls is taken from the government's opening brief, prepared by the author in May 1991, in the United States Court of Appeals for the Ninth Circuit. See Brief for Appellant at 3-9, *United States v. Plainbull*, 957 F.2d 724, 725 (9th Cir. 1992) (No. 91-35224).

Although Indians traditionally adhered to notions of communal ownership of land, individual Indian ownership of real property was encouraged through a series of statutes authorizing "allotments" of tribal lands. See *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 142 (1972) ("Allotment is a term of art in Indian law. It means a selection of [specified] land awarded to an individual allottee from a common holding."). See also Blake A. Watson, *State Acquisition of Interests in Indian Land: An Overview*, 10 AM. INDIAN L. REV. 219, 224-26 (1982).

44. Brief for Appellant at 3-9, *United States v. Plainbull*, 957 F.2d 724, 725 (9th Cir. 1992) (No. 91-35224).

45. *Id.*

46. Crow Tribe Resolution (No. 86-5) (1985). A similar resolution (No. 86-30) was passed in April 1986.

and for the value of consumed forage.⁴⁷ Because the Plainbulls refused to comply with orders to pay annual grazing fees and to desist in trespassing, the United States filed suit in federal district court in its own right and on behalf of the Crow Tribe.⁴⁸ The federal government sought a money judgment for past due grazing fees, trespass penalties, damages for the value of forage consumed, and a permanent injunction enjoining the Plainbulls from grazing livestock on tribal range units without a valid grazing permit.⁴⁹ The claim for past due grazing fees was based on federal statutes and regulations, including 25 U.S.C. § 466 and 25 C.F.R. § 166.21.⁵⁰ The claim for trespass penalties was based on 25 U.S.C. § 179 and 25 C.F.R. § 166.24.⁵¹ The complaint did not refer

47. *Plainbull*, 957 F.2d at 725.

48. At the time of the suit, the Department of the Interior's regulations provided that "[i]f the case is to be initiated on behalf of an Indian or Indian entity, the concurrence of the Indian or Indian entity must also be supplied by the Bureau of Indian Affairs." Department of the Interior, Solicitor's Manual, Part I, Section 6.4.B. According to the Interior Department, the Crow Tribe Department of Natural Resources provided its concurrence in a January 31, 1989, letter to the BIA.

49. *See United States v. Plainbull*, 788 F. Supp. 1147, 1148 (D. Mont. 1990), *aff'd*, 957 F.2d 724 (9th Cir. 1992).

50. Section 6 of The Indian Reorganization Act of 1934, provides:

The Secretary of the Interior is directed . . . to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

25 U.S.C. § 466 (1994). 25 C.F.R. § 166.21 states that "[a]nnual grazing fees for all grazing permits shall be paid in advance and the date due shall be a provision of the permit. Payment shall be made to the Bureau of Indian Affairs unless otherwise provided by the permit." 25 C.F.R. § 166.21 (1996)

51. Section 9 of the Act of June 30, 1834, 25 U.S.C. § 179 provides:

Every person who drives or otherwise conveys any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of \$1 for each animal of such stock. This section shall not apply to Creek lands.

25 U.S.C. § 179 (1994). 25 C.F.R. § 166.24(a) prohibits, on Indian trust or restricted lands under the jurisdiction of the BIA, the "grazing upon or driving across any individually owned, tribal, or Government lands of any livestock without an approved grazing or crossing permit." 25 C.F.R. § 166.24(a) (1996). The consequences of engaging in such unauthorized actions is addressed in § 166.24(b):

The owner of any livestock grazing in trespass on trust or restricted Indian lands is liable to a penalty of \$1 per head for each animal thereof for each day of trespass . . . together with the reasonable value of the forage consumed by their livestock and damages to property injured or destroyed, and for expenses incurred in impoundment and disposal. The Superintendent shall take action to collect all such penalties and damages, reimbursement for expenses incurred in impoundment and disposal, and seek injunctive relief when appropriate. All payments for such penalties and

to Crow Tribe Resolutions 86-5 and 86-30 and did not otherwise suggest that the United States was seeking to enforce tribal law.

The suit against the Plainbills presented two difficult questions of federal law. First, the Plainbills contended that the Interior Department's grazing regulations may not be enforced against them because the regulations are authorized solely by Section 6 of the Indian Reorganization Act (IRA), 25 U.S.C. § 466, and hence are inapplicable to non-IRA tribes such as the Crow Tribe.⁵² This argument, if accepted, would have the sweeping consequence of removing from federal regulation all grazing activities conducted on the lands of tribes that did not elect to organize their governments pursuant to the provisions of the 1934 IRA.⁵³ In response, the United States asserted that the federal grazing regulations found at 25 C.F.R. Part 166 are authorized not only by 25 U.S.C. § 466, but also by general delegations of authority found in 25 U.S.C. §§ 2 and 9,⁵⁴ and by the government's trust powers.

damages shall be credited to the landowners where the trespass occurs except that the value of forage or crops consumed or destroyed may be paid to the lessee of the lands not to exceed the rental paid, and reimbursement for expenses incurred in impoundment and disposal shall be credited as appropriate.

25 C.F.R. § 166.24(b). In addition, § 166.24(b) was the authority cited by the United States for seeking damages on behalf of the Crow Tribe for the value of the forage consumed by the Plainbills' livestock.

52. *Plainbill*, 788 F. Supp. at 1148.

53. Section 18 of the Indian Reorganization Act of 1934, provides that the Act would not apply to any reservation wherein a majority of the adult Indians voted against its application. 25 U.S.C. § 478. Many tribes, including the Navajo Nation, affirmatively rejected the IRA. See Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 972 (1972) ("In these elections, 181 tribes (129,750 Indians) accepted the Act and 77 tribes (86,365 Indians, including 45,000 Navajos) rejected it. The IRA also applies to 14 groups of Indians who did not hold elections to exclude themselves.").

54. 25 U.S.C. § 2 provides that "[t]he Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations." 25 U.S.C. § 2 (1994). In a similar fashion, § 9 is a general delegation of authority which states that "[t]he President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs." 25 U.S.C. § 9.

The government's position that the Indian Reorganization Act is simply an *additional* source of authority for regulating grazing on Indian lands is supported by the legislative history of the IRA. See 78 CONG. REC. 11730 (1934) (statement of Rep. Howard) ("The bill seeks, through section 6, to assure a proper and permanent management of the Indian forest and grazing lands and makes such management mandatory on the Secretary of the Interior instead of optional, as at present"). Following the enactment of the IRA, the Solicitor of the Department of the Interior issued an opinion which states that the Department's regulatory powers arise not only from Section 6 of the IRA, 25 U.S.C. § 466, but also from 5 U.S.C. § 485, 25 U.S.C. § 2, 25 U.S.C. § 9, and "the authority of the Interior Department to protect

The second question of federal law concerned the scope of the trespass prohibition contained in 25 U.S.C. § 179. The Plainbills argued that the statute was not intended to apply to activities of tribal members on their own reservation because its purpose, when enacted in 1834, was to protect Indians and their lands from encroachment by white settlers.⁵⁵ In reply, the United States asserted that the Interior Department's interpretation of 25 U.S.C. § 179, which by its plain language encompasses "[e]very person" who causes unauthorized grazing on lands belonging to an Indian tribe, should be accorded deference and accepted.⁵⁶

The United States District Court for the District of Montana agreed with the Plainbills on both issues, finding (1) that Congress "did not

Indian tribal lands against waste." OPINIONS OF THE SOLICITOR, U.S. DEP'T OF THE INTERIOR, GRAZING ON TRIBAL LANDS—DEPARTMENTAL POWERS, 573-74 (1935). Several courts have also accepted the government's contention that non-IRA tribes, as well as IRA tribes, are subject to the federal grazing regulations. *See, e.g.*, *United States ex rel. Whitehorse v. Briggs*, 555 F.2d 283, 288 (10th Cir. 1977) (citing 5 U.S.C. § 301 and 25 U.S.C. §§ 1(a) and 2 in support of holding that the trespass regulation—now 25 C.F.R. § 166.24—is a valid exercise of the Secretary's authority); *United States v. Camp*, 169 F. Supp. 568, 569-71 (E.D. Wash. 1959) (specifically rejecting the argument that Interior's grazing regulations do not apply to non-IRA tribes); *United States v. Fraser*, 156 F. Supp. 144, 147 (D. Mont. 1957), *aff'd*, 261 F.2d 282 (9th Cir. 1958) (noting, in a case arising on the Crow Reservation, that the federal grazing regulations were issued pursuant to the authority conferred by 5 U.S.C. § 22 [now 5 U.S.C. § 301] as well as 25 U.S.C. § 466). *See also* *United States v. Eberhardt*, 789 F.2d 1354, 1359 n.8, 1360 (9th Cir. 1986) (stating in dicta that 25 U.S.C. §§ 2 and 9 "furnish Interior with broad authority to supervise and manage Indian affairs and property commensurate with the trust obligations of the United States" and thus "provide a statutory basis" for various Interior regulations administering Indian lands, including 25 C.F.R. pt. 166).

55. *Plainbill*, 788 F. Supp. at 1149.

56. *Id.* The Act of June 30, 1834, ch. 161, 4 Stat. 729, was the final enactment in a series of "Nonintercourse" Acts designed to regulate trade with the Indian Tribes. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 115 (1982). Significantly, the language of Section 9 of the 1834 Act differed from the predecessor statutes insofar as the trespass prohibition was extended to "any person" instead of "any citizen of, or other person resident in the United States." The current version, codified at 25 U.S.C. § 179, likewise unambiguously applies to "every person" whose stock engages in unpermitted grazing on Indian lands (other than Creek lands). 25 U.S.C. § 179 (1994). Moreover, the government argued that departing from the plain language of Section 9 of the 1834 Act to exclude tribal members actually *hinders* the true purpose of the livestock trespass prohibition: the protection of Indian lands from unauthorized grazing. Put another way, the chief focus of Congress in 1834 was the act of trespass and not the identity of the trespasser, and since the Crow Tribe did not authorize the Plainbills to graze their stock on tribal lands, the statute should apply. *See also* *Connolly v. United States*, 149 F.2d 666, 667-68 (9th Cir. 1945) (noting, in dicta, that two Blackfeet Indians caught herding cattle and horses without a permit on the Blackfeet Reservation could have been penalized under 25 U.S.C. § 179 had the statute been invoked by the government).

intend for [25 U.S.C.] § 179 to apply to Indian persons";⁵⁷ and (2) that "[none] of the jurisdictional bases pled by plaintiff serve[s] to establish this Court's subject matter jurisdiction over efforts by the Tribe, or the United States on its behalf, to enforce a *tribal resolution*."⁵⁸

Although the district court's dubious resolution of these issues is significant by itself, it is the court's alternative disposition of the federal government's suit against the Plainbulls which is truly noteworthy. After acknowledging the federal government's right to enforce federal laws in a federal forum,⁵⁹ the court held that it would decline to exercise the jurisdiction granted to it by Congress:

The Court also notes that because this case essentially involves the enforcement of a tribal resolution against a tribal member, it appears to be an internal tribal matter which ought to be resolved in the tribal court system. The Courts have recognized a "longstanding policy of encouraging tribal self-government", [sic] *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14, 107 S.Ct. 971, 975, 94 L.Ed. 2d 10 (1987), which this Court will adhere to as an alternative basis for dismissal of the present action out of considerations of comity.⁶⁰

On appeal, the United States Court of Appeals for the Ninth Circuit noted that, "[b]arring other considerations, the federal government,

57. *Plainbull*, 788 F. Supp. at 1149.

58. *Id.* at 1150 (emphasis added). The district court assumed (mistakenly) that the government was claiming that it may enforce the grazing regulations by virtue of the fact that the federal grazing regulations were incorporated by reference in Crow Tribe Resolutions 86-5 and 86-30. Consequently, the district court failed to address the government's argument that the federal grazing regulations may be enforced against the members of non-IRA tribes by the authority of 25 U.S.C. §§ 2 and 9 and the government's trust powers.

59. See *Plainbull*, 788 F. Supp. at 1148 ("This Court finds that it may properly exercise jurisdiction over the claims asserted under 28 U.S.C. §§ 1331, 1345 and 1355 . . ."). Congress, in § 1331, provided generally that "[t]he 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 (1994). More specifically, Congress empowered federal district courts to hear cases brought by the United States as plaintiff in § 1345, which states that, "[e]xcept as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress." 28 U.S.C. § 1345. Finally, in § 1355(a), Congress directed that:

[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress, except matters within the jurisdiction of the Court of International Trade under Section 1582 of this title.

28 U.S.C. § 1355(a).

60. *Plainbull*, 788 F. Supp. at 1150.

attempting to enforce federal legislation, may bring an action in federal court.”⁶¹ However, after making the rather unremarkable announcement that a suit by the United States can be maintained in federal district court, the court of appeals held that the district court “did not abuse its discretion by deferring to the tribal courts for resolution of this dispute.”⁶²

To reach this conclusion, the court of appeals had to overcome two obstacles. First, 28 U.S.C. § 1355 provides that federal district courts “shall have original jurisdiction, exclusive of the states, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title.”⁶³ Despite virtually conclusive evidence that Congress intended 28 U.S.C. § 1355 to confer exclusive jurisdiction to federal courts,⁶⁴ the Ninth Circuit seized upon the phrase “exclusive of the courts of the States” and held that “[s]ince a tribal court is not a state court . . . it does not fall within the exclusive jurisdiction provision of section 1355.”⁶⁵

After establishing at least the possibility of concurrent tribal court jurisdiction, the court of appeals turned to the question of “whether the district court abused its discretion by dismissing, out of concerns for comity, a case over which it had jurisdiction.”⁶⁶ In this instance, the chief hurdle was not the intent of Congress, but rather the fact that “[t]he Supreme Court has stated that the doctrine of abstention ‘is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.’”⁶⁷ Nevertheless, the court concluded that abstention was appropriate:

The Supreme Court has repeatedly recognized a federal policy favoring the promotion of tribal self-government. *See, e.g., Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14, 107 S.Ct. 971, 975, 94 L.Ed.2d 10 (1987); *Three Affiliated Tribes v. Wold Eng’g*, 476 U.S. 877, 890, 106 S.Ct. 2305, 2313, 90 L.Ed.2d 881 (1986); *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856, 105 S.Ct. 2447, 2454, 85 L.Ed.2d 818 (1985); *Merrion v.*

61. *United States v. Plainbull*, 957 F.2d 724, 725 (9th Cir. 1992).

62. *Id.* at 727.

63. 28 U.S.C. § 1355(a) (1994). *See also supra* note 54.

64. *See infra* Part VI.A.

65. *Plainbull*, 957 F.2d at 726.

66. *Id.* at 727.

67. *Id.* (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959)).

Jicarilla Apache Tribe, 455 U.S. 130, 138 n.5, 102 S.Ct. 894, 902 n.5, 71 L.Ed.2d 21 (1982).

. . . . In *Iowa Mutual*, the Supreme Court recognized that both state courts and federal courts would undermine the ability of tribes to govern themselves by exercising jurisdiction over activities taking place on tribal lands. 480 U.S. at 15, 107 S.Ct. at 976.

. . . . Because the Plainbills grazed their cattle on tribal land without obtaining a tribal permit, the Government should have filed in tribal court. *The fact that the Government is attempting to enforce federal law is immaterial. The alleged trespass was to tribal land and considerations of comity require that the tribal courts get the first opportunity to resolve this case.*⁶⁸

The Ninth Circuit's decision in *Plainbill* identifies and implicates four background norms: (1) the trust obligation of the United States towards Indian tribes;⁶⁹ (2) the federal government's right of access to federal courts for enforcement of federal legislation;⁷⁰ (3) the duty of a district court to adjudicate controversies over which it has jurisdiction;⁷¹ and (4) "the judicial policy of encouraging tribal self-government."⁷² As discussed below,⁷³ the first three of these four policy objectives favor the exercise of federal jurisdiction; nevertheless, the court of appeals in effect played the fourth goal—promoting tribal governments—as a "trump card," and held that the district court's decision to abstain was not an abuse of discretion, and furthermore "was the most appropriate action."⁷⁴ In this regard, *Plainbill* is representative of the considerable number of federal district and appellate courts that have construed and applied the tribal exhaustion/abstention doctrine as a preponderant rule. Whether this construction and employment of the doctrine is appropriate

68. *Id.* at 727-28 (emphasis added).

69. *See id.* at 725 (noting that the "reservation lands [are] held in trust by the United States for the Crow Tribe."). The notion that a fiduciary relationship exists between the United States and the Indian tribes dates back to Chief Justice John Marshall's opinion in *Cherokee Nation v. Georgia*. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (describing the relationship between Indian tribes and the United States as "resembl[ing] that of a ward to his guardian."). *See also* *Nevada v. United States*, 463 U.S. 110, 127 (1983) ("This Court has long recognized 'the distinctive obligation of trust incumbent upon the Government' in its dealings with Indian tribes.") (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)); Reid P. Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975).

70. *Plainbill*, 957 F.2d at 725.

71. *Id.* at 727.

72. *Id.* at 728.

73. *See infra* Part VI.B.

74. *United States v. Plainbill*, 957 F.2d 724, 728 (9th Cir. 1992).

depends in large part on how one reads—or what one reads into—the foundational *National Farmers Union* and *Iowa Mutual* decisions.

III. THE ORIGINS OF THE TRIBAL EXHAUSTION/ABSTENTION DOCTRINE

In order to trace the lineage of the exhaustion/abstention doctrine of *National Farmers Union* and *Iowa Mutual*, it is useful to first sketch the history of tribal judicial systems in the United States. As discussed below, although Indian tribes have “engaged in dispute-resolution processes, of varying levels of formality, since their inception,”⁷⁵ the widespread assertion of jurisdiction by tribes over nonmembers, and the recognition of tribal courts as appropriate fora for resolution of federal rights, are relatively recent developments. Frank Pommersheim has wryly observed that “the more important tribal courts become, particularly in their authority over non-Indians, the more need there seems to be for increasing federal scrutiny.”⁷⁶ In *National Farmers Union* and *Iowa Mutual*, which both involved tribal court actions instituted against nonmembers, the Supreme Court attempted to prescribe the appropriate level of federal “scrutiny” and review of tribal court decisions.

A. Tribal Judicial Systems: A Brief History

“The essential claim of tribal Indians that distinguishes them from other groups is their claim of sovereignty—the inherent right to promulgate and be governed by their own laws.”⁷⁷ The Indian tribes, without question, “had their own laws, evolved through generations of living together, to solve the ordinary problems of social conflict.”⁷⁸

75. Dennis W. Arrow, *Oklahoma's Tribal Courts: A Prologue, The First Fifteen Years of the Modern Era, and a Glimpse at the Road Ahead*, 19 OKLA. CITY U. L. REV. 7, 8 (1994).

76. POMMERSHEIM, *supra* note 19, at 95. See also Frank Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329, 360 (1989).

77. L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 815 (1996).

78. SIDNEY L. HARRING, *CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY* 10 (1994). “Most aboriginal Indian societies were oral cultures maintained and ordered by clearly understood rules developed by consensus and enforced by peer pressure or, in extreme cases, by penalties including compensation and corporal punishment.” CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME AND THE LAW* 183 n.88 (1987). See generally Fredric Brandfon, Comment, *Tradition and Judicial Review in the American Indian Tribal Court System*, 38 UCLA L. REV. 991, 994-97 (1991); Vincent C. Milani, Note, *The Right to Counsel in Native American Tribal Courts: Tribal Sovereignty and Congressional Control*, 31 AM. CRIM. L. REV. 1279, 1280-81 (1994).

In contrast with federal “Indian law,” which focuses primarily on structuring legal

However, because the traditional mechanisms used by tribes to maintain order among their members were not formalized, non-Indians tended to view tribal societies as lawless, a misconception eloquently refuted by the eighteenth century Mohawk leader Thayendanegea (Joseph Brant): "Among us we have no prisons, we have no pompous parade of courts, we have no written laws, and yet judges are as highly revered among us as they are among you, and their decisions are as highly regarded."⁷⁹

Federal recognition of tribal judicial systems came as "a consequence of federal recognition of tribal sovereignty."⁸⁰ The judicial component of the Indian claim to sovereignty was first acknowledged by the United States Supreme Court in the trilogy of cases—decided during John Marshall's reign as Chief Justice—in which the Court "gave voice to a vision of Indian tribes as distinct sovereign nations with authority over their own territories."⁸¹ For example, by his continual references in *Johnson & Graham's Lessee v. McIntosh*,⁸² to "the courts of this country,"⁸³ "the courts of the conqueror,"⁸⁴ and "our courts,"⁸⁵ Marshall implicitly recognized the existence of competing Indian judicial systems.⁸⁶ The existence of tribal courts played a background role in

relationships with tribes and individual Indians, "tribal law" is the body of law "that the Indian tribes enact and enforce within their own communities." J. Clifford Wallace, *A New Era of Federal-Tribal Court Cooperation*, 79 JUDICATURE 150, 151 (1995). The traditional dispute-resolution procedures of several Indian tribes have been the subject of extensive study. See, e.g., ANGIE DEBO, *THE RISE AND FALL OF THE CHOCTAW REPUBLIC* (2d ed. 1961); HARRING, *supra*, at 10 n.22 (listing books, monographs, and dissertations); K.N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941); JOHN PHILLIP REID, *A LAW OF BLOOD: THE PRIMITIVE LAW OF THE CHEROKEE NATION* (1970); RENNARD STRICKLAND, *FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT* (1975); ERNEST WALLACE & E. ADAMSON HOEBEL, *THE COMANCHES: LORDS OF THE SOUTH PLAINS* (1952); Ken Traisman, Note, *Native Law: Law and Order Among Eighteenth-Century Cherokee, Great Plains, Central Prairie, and Woodland Indians*, 9 AM. INDIAN L. REV. 273 (1981); Vicenti, *supra* note 21, at 137-38 (describing traditional Apache law).

79. SHARON O'BRIEN, *AMERICAN INDIAN TRIBAL GOVERNMENTS* 201 (1989) (statement of Thayendanegea (Joseph Bryant)). See also Margery H. Brown & Brenda C. Desmond, *Montana Tribal Courts: Influencing the Development of Contemporary Indian Law*, 52 MONT. L. REV. 211, 216 (1991).

80. Brandfon, *supra* note 78, at 999.

81. Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1, 3 (1993).

82. 21 U.S. (8 Wheat.) 543 (1823).

83. *Id.* at 572.

84. *Id.* at 588.

85. *Id.* at 593.

86. See also *id.* ("The person who purchases lands from the Indians . . . holds *their* title under *their* protection, and subject to *their* laws.") (emphasis added).

both *Cherokee Nation v. Georgia*,⁸⁷ in which the tribe was described as "a state, . . . a distinct political society, separated from others, capable of managing its own affairs and governing itself,"⁸⁸ and *Worcester v. Georgia*,⁸⁹ where the Court characterized the Cherokee Nation as "a distinct community occupying its own territory . . . in which the laws of Georgia can have no force."⁹⁰

The Supreme Court continued to recognize tribal judicial systems in the last half of the nineteenth century, most notably in *Ex Parte Crow*

The issue in *Johnson v. McIntosh* was "the power of Indians to give, and of private individuals to receive, a title which can be sustained in the courts of this country." *Id.* at 572. Chief Justice Marshall, writing for the Court, held that European discovery gave the discovering nations "the sole right of acquiring the soil from the natives" and thus "their rights to complete sovereignty, as independent nations, were necessarily diminished" in one respect: they lost "their power to dispose of the soil, at their own will, to whomsoever they pleased" *Id.* at 573-74. The private individuals in *Johnson v. McIntosh* who purchased land directly from the tribes were thus without "a title which can be sustained in the Courts of the United States." *Id.* at 604-05.

87. 30 U.S. (5 Pet.) 1 (1831).

88. *Id.* at 16. The Supreme Court held that, while Indian tribes are not "foreign States" within the meaning of Article III, section 2, of the Constitution, they are sovereign "states" and should be characterized as "domestic dependent nations." *Id.* at 17. The Court was well aware of the fact that the Cherokee Nation had "established a constitution and form of government . . . borrowed from that of the United States; . . . formed a code of laws, civil and criminal, adapted to their situation; . . . erected courts to expound and apply those laws, and organized an executive to carry them into effect." *Id.* at 6 (emphasis added) (statement of the case). The Cherokee's Supreme Court (originally designated in 1822 as the National Superior Court) antedated the Supreme Court of Georgia by twenty years. See GRACE STEELE, WOODWARD, THE CHEROKEES 145-46 (1963).

89. 31 U.S. (6 Pet.) 515 (1832).

90. *Id.* at 561. Congress also acknowledged the existence of tribal judicial systems in contemporary enactments. See Arrow, *supra* note 75, at 10, n.15 (noting congressional recognition of tribal judicial processes in the Act of June 30, 1834, ch. 161, § 17, 4 Stat. 729, 731-32).

The powerful bright-line, territorial view of tribal sovereignty announced in *Worcester* has been replaced over the years by a less sanguine version that is based in large part on consent, either by the fact of tribal membership or by entering into consensual relationships with the tribe. See Dussias, *supra* note 81, at 96-97; Gould, *supra* note 77, at 815. See also County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 257 (1992) ("The 'platonic notions of Indian sovereignty' that guided Chief Justice Marshall have, over time, lost their independent sway.") (quoting *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 and n.8 (1973)); *Montana v. United States*, 450 U.S. 544, 564 (1981) ("[The] exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."). But see *United States v. Wheeler*, 435 U.S. 313, 322 (1978) ("The powers of Indian tribes are, in general, 'inherent powers of a limited sovereignty which has never been extinguished.'") (quoting FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945)).

*Dog*⁹¹ and *Talton v. Mayes*.⁹² Formalized court systems, however, did not exist on most reservations until the Secretary of the Interior authorized the creation of Courts of Indian Offenses (CIO) in 1883 in order to enforce a Code of Federal Regulations (CFR) designed in large part to control and "civilize" the Indians.⁹³ These CIO/CFR courts

91. 109 U.S. 556 (1883). In *Crow Dog*, the Supreme Court held that federal courts lacked jurisdiction to try a tribal member for the murder of another tribal member in Indian country, noting that crimes by "Indians against each other were left [by Congress] to be dealt with by each tribe for itself, according to its local customs." *Id.* at 571-72. In response, Congress passed the Major Crimes Act in 1885, which created federal jurisdiction over seven crimes (including murder) committed by Indians in Indian country against either Indians or non-Indians. Major Crimes Act of 1885, 23 Stat. 362, 385 (1885), (codified as amended at 18 U.S.C. § 1153 (1994)). The Major Crimes Act was upheld by the Court in 1886. *United States v. Kagama*, 118 U.S. 375, 385 (1886). See generally HARRING, *supra* note 78, at 134-74.

92. 163 U.S. 376 (1896). The question in *Talton* was "whether the powers of local government exercised by the Cherokee nation are Federal powers created by and springing from the Constitution of the United States, hence controlled by the Fifth Amendment to that Constitution." *Id.* at 382. The Supreme Court answered the question in the negative, holding that "the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution." *Id.* at 384. The Court further held that the issue of

whether a statute of the Cherokee nation which was not repugnant to the Constitution of the United States or in conflict with any treaty or law of the United States had been repealed by another statute of that nation . . . [was] solely [a] matter[] within the jurisdiction of the courts of that Nation.

Id. at 385.

93. See O'BRIEN, *supra* note 79, at 203 (1883 Code "was written to 'civilize' and assimilate Indians."); Arrow, *supra* note 75, at 11-12 (BIA's "model" code was an attempt to "educate" and "civilize" the Indians); Brandfon, *supra* note 78, at 998 (courts were created "[t]o keep law and order on the reservation"); Milani, *supra* note 78, at 1281 (purpose of Code "was to promote acculturation on the reservations."); Judith Resnik, *Multiple Sovereignties: Indian Tribes, States, and the Federal Government*, 79 JUDICATURE 118, 124 (1995) (CIO/CFR courts were "staffed by Indian judges charged with bringing federal legal norms to the tribes."). Although Congress never explicitly provided specific statutory authorization for the CIO/CFR courts, Judge Matthew Deady upheld the courts as a valid exercise of the administrative power of the Department of the Interior. See *Tillet v. Lujan*, 931 F.2d 636, 639 (10th Cir. 1991) (rejecting the contention that CIO/CFR courts are invalid); *United States v. Clapox*, 35 F. 575, 577 (D. Or. 1888) (describing the courts as "mere educational and disciplinary instrumentality, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian."); HARRING, *supra* note 78, at 185-92 (discussing generally the CIO/CFR courts and *Clapox*); Brown and Desmond, *supra* note 79, at 217 n.19 (noting that "some find Congressional authorization in the 1921 Snyder Act . . . and in the continuing appropriations Congress made for the courts"); Frank Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay*, 18 N.M. L. REV. 49, 51 (1988) (concluding "there was, at best, a shaky legal foundation for these tribunals").

The authority of CIO/CFR courts is limited: civil jurisdiction exists over actions against Indian defendants, but not actions against non-Indian defendants, except by stipulation of the parties. See 25 C.F.R. § 11.103 (1996). The rules for CIO/CFR courts were revised in 1993,

have been described—and derided—as a product of federal efforts during the allotment period⁹⁴ to “assimilate Indians forcibly and destroy their culture and tribal institutions.”⁹⁵

The disastrous allotment era ended with the enactment of the Indian Reorganization Act of 1934, which heralded a major shift in federal Indian policy “from assimilation to self-determination,”⁹⁶ in large part by encouraging Indian tribes to adopt their own constitutions and to provide for the own court systems:

[The IRA] recognized as an existing power of Indian tribes the power to provide for tribal law and order Thus, tribes could adopt their own codes of laws and substitute the new codes for those imposed upon them by the Office of Indian Affairs. When a tribe took this course, the court changed from a Court of Indian Offenses, or CFR court (a federal instrumentality), to a tribal court, an institution of tribal self-government.⁹⁷

however, in part to establish that tribal ordinances and custom constitute applicable law if not otherwise prohibited by federal law. 25 C.F.R. § 11.500 (1996); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 232 n.20 (1994).

94. See *supra* note 43.

95. ROBERT N. CLINTON, et. al., *AMERICAN INDIAN LAW* 151 (3d ed. 1991). As noted by Sidney Haring,

the BIA retained full control of the courts and their work. The judges were appointed by the agents and could be removed at will. Each verdict could be modified by the agent. Hence, the courts were in no way “Indian courts” or even “tribal courts.” What was applied was not “Indian law” but rather a set of BIA rules. Their purpose was to promote . . . assimilation . . . by providing order on the reservations and by punishing traditional practices in order to force their abandonment.

HARRING, *supra* note 78, at 191. See also Resnik, *supra* note 23, at 735 (“The purpose of these courts was expressly jurispathic; to ‘civilize’ tribes by banning tribal custom and imposing federal norms.”). When the Creeks, Choctaws, Chickasaws, and Cherokees resisted allotment, Congress reacted by exercising its “plenary power” over Indian affairs and enacting the Curtis Act of 1898, 30 Stat. 495, which provided for forced allotment, made tribal laws unenforceable in the United States Court in Indian Territory, and purported to abolish all tribal courts in Indian Territory. See *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1441-42 (D.C. Cir. 1988).

96. Milani, *supra* note 78, at 1281.

97. Brown & Desmond, *supra* note 79, at 218-19. See also Duro v. Reina, 495 U.S. 676, 691 (1990) (“The new tribal courts supplanted the federal courts of Indian offenses operated by the Bureau of Indian Affairs.”); Barbara Ann Atwood, *Fighting Over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity*, 36 UCLA L. REV. 1051, 1076 n.119 (1989) (stating that the CIO/CFR courts, “never a true arm of tribal government, gave way to tribal courts after the passage of the Indian Reorganization Act of 1934”); Milani, *supra* note 72, at 1281 (“The most significant distinction between the tribal courts and C.F.R. courts is that tribal court judges are responsible to the tribe instead of the BIA, thus allowing the tribes greater autonomy to develop their own tribal judicial systems.”).

A year after the IRA was enacted, Commissioner of Indian Affairs John Collier

Although the tribal courts created after passage of the IRA were manifestations of retained tribal sovereignty,⁹⁸ most tribes that reorganized their governments under the 1934 Act initially adopted codes and constitutions that were drafted by the Bureau of Indian Affairs (BIA). The BIA constitutions, which did not provide for a separation of powers between the legislative and judicial branches of tribal governments, impeded the development of tribal courts by taking a narrow approach to tribal court jurisdiction and by making tribal decisions dependent upon approval by the Department of the Interior.⁹⁹

There are today approximately 150 tribal courts "designed and operated by tribal governments,"¹⁰⁰ and 13 CIO/CFR courts in the United States.¹⁰¹ Many tribes have also established their own appellate courts or have joined with other tribes to form inter-tribal courts of appeal.¹⁰² The ability of tribal courts to function effectively was enhanced by the passage of the Indian Tribal Justice Act of 1993,¹⁰³ which authorizes annual appropriations of more than \$50 million over a seven-year period and which establishes the federal Office of Tribal

promulgated a revised Code of Indian Tribal Offenses for the CIO/CFR courts which "expressly set out the right of the tribes to replace the Courts of Indian Offenses and the Bureau of Indian Affairs (BIA) Code with their own courts and codes." Allison M. Dussias, Note, *Tribal Court Jurisdiction Over Civil Disputes Involving Non-Indians: An Assessment of National Farmers Union Insurance Cos. v. Crow Tribe of Indians and a Proposal for Reform*, 20 U. MICH. J.L. REFORM. 217, 225-26 (1986).

98. See Brandfon, *supra* note 78, at 998.

99. See *Duro*, 495 U.S. at 691; Brown & Desmond, *supra* note 79, at 220; Resnik, *supra* note 23, at 736; Pommersheim, *supra* note 93, at 55.

100. Valencia-Weber, *supra* note 93, at 233.

101. See 25 C.F.R. § 11.100 (1996). See also *The Duro Decision: Criminal Misdemeanor Jurisdiction in Indian Country: Hearing on H.R. 972 Before the House Comm. on Interior & Insular Affairs*, 102d Cong. 9 (1991) (statement of Ronald D. Eden, Director, Office of Tribal Services); *Tribal Court Systems and the Indian Civil Rights Act: Hearing Before the Senate Select Comm. on Indian Affairs*, 100th Cong. 19 (1988) (statement of Donald D. Dupuis, President, National American Indian Court Judges Association); Reynolds, *supra* note 16, at 1090 n.1; Valencia-Weber, *supra* note 93, at 233 n.23.

Not all Indian courts are either CIO/CFR courts or products of the IRA. The Navajo Nation, for example, rejected the IRA and independently developed its court system. Tribal courts also include "traditional courts," which are found among the smaller tribes of the southwestern Pueblos, and which administer unwritten customary law and follow little formal procedure. See Milani, *supra* note 78, at 1282; Brandfon, *supra* note 78, at 998-99. Chief Judge Carey Vicenti of the Jicarilla Apache Tribe has gone even further and identified "five general categories that describe the various developing tribal courts: the American model, the American-traditional hybrid model, the dual model, the traditional model, and the explorative or non-existent model." Vicenti, *supra* note 21, at 139.

102. Milani, *supra* note 78, at 1282-83.

103. Indian Tribal Justice Act of 1993, Pub. L. No. 103-76, 107 Stat. 2004 (codified at 25 U.S.C. §§ 3601-3631 (Supp. 1994)).

Justice in order "to provide the funds and technical assistance to the tribes as well as to promote cooperation between the tribal systems and the federal and state judicial systems."¹⁰⁴

As recently articulated by Attorney General Janet Reno, the federal government is committed "to increasing self-determination for American Indian tribal governments by strengthening tribal justice systems."¹⁰⁵ In particular, Attorney General Reno has gone on record as stating that the "Justice Department's litigation practice supports the *appropriate* exercise of tribal court civil jurisdiction."¹⁰⁶ What constitutes the "appropriate" exercise of tribal court civil jurisdiction, of course, is the significant and unsettled question.

B. Promoting Tribal Courts While Retaining Federal Jurisdiction: Exhaustion of Tribal Remedies and the Indian Civil Rights Act

Charles Wilkinson notes that the Supreme Court's 1959 decision in *Williams v. Lee*¹⁰⁷ "opened the modern era of federal Indian law."¹⁰⁸ Although decided during the period of "termination,"¹⁰⁹ *Williams* held that Arizona courts lacked jurisdiction over a suit brought by a non-Indian against an Indian where the cause of action arose on a reservation.¹¹⁰ In so doing, the Court endorsed the policy of promoting tribal

104. Jordan Burch, *How Much Diversity is the United States Really Willing to Accept?* 20 OHIO N.U. L. REV. 957, 978 (1994). See also Douglas B.L. Endreson, *The Challenges Facing Tribal Courts Today*, 79 JUDICATURE 142, 145 (1995) ("The [Indian Tribal Justice Act] recognizes that [tribal justice] systems were and are established in the exercise of the inherent sovereign authority of tribes, that they function as 'an essential part of tribal governments,' and that these systems have historically been underfunded"); Reynolds, *supra* note 16, at 1090 n.1.

105. Janet Reno, *A Federal Commitment to Tribal Court Justice Systems*, 79 JUDICATURE 113, 113 (1995). See generally Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations, 61 Fed. Reg. 29,424 (June 10, 1996).

106. *Id.* at 116 (emphasis added).

107. 358 U.S. 217 (1959).

108. WILKINSON, *supra* note 78, at 1.

109. In 1949 the Hoover Commission recommended "an about-face in federal policy: 'complete integration' of Indians should be the goal so that Indians would move 'into the mass of the population as full, taxpaying citizens.'" DAVID H. GETCHES ET AL., *FEDERAL INDIAN LAW: CASES AND MATERIALS* 229 (3rd ed. 1993). The "termination" policy ended the federal-tribal relationship with over 100 tribes and bands, transferring most of the authority over the affected Indians to the states. See *id.* at 229-39. This assimilative policy was abandoned in practice in the early 1960s and officially in 1970 when President Nixon issued a message to Congress calling for a new federal policy of "self-determination" for Indian tribes. *Id.* at 252-54.

110. The non-Indian operator of a general store on the Navajo Reservation brought suit in a state court, against a Navajo couple who resided on the Reservation, to collect for goods sold on credit. *Williams*, 358 U.S. at 217-18. The Supreme Court held that jurisdiction lay in

self-government and tribal courts: "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves."¹¹¹

The policy of protecting tribal governmental institutions, including tribal courts, from "infringement" remains a key component of the federal-tribal relationship, as evidenced by its central role in both *National Farmers Union*¹¹² and *Iowa Mutual*.¹¹³ In the early 1960s, however, effectuation of this policy was complicated by the emergence of a competing concern: "whether Indian tribes either could or would protect individual rights."¹¹⁴ Beginning in 1961, Congress held a series of hearings on this issue and debated legislative proposals to impose limitations on tribal governments similar to those imposed on state and federal governments by the United States Constitution.¹¹⁵ The proposed wholesale application of constitutional restraints to Indian tribes was ultimately rejected in favor of selective incorporation when Congress passed the Indian Civil Rights Act (ICRA) of 1968.¹¹⁶ In addition, although the proposed legislation at one point provided for direct appeals from tribal courts to federal courts (followed by a trial *de novo*), this form of federal review was deemed overly intrusive, and in the final version of the ICRA "challenges to Indian government and court malfeasance were channeled through the privilege of filing a writ of habeas corpus."¹¹⁷

the tribal court rather than in the state court. *Id.* at 223.

111. *Id.* at 223. See generally Reynolds, *supra* note 16, at 1095 (describing *Williams* as "important to the development of the tribal exhaustion rule"); WILKINSON, *supra* note 78, at 2 ("[*Williams*'] paradigm of exclusive tribal judicial jurisdiction is a leading example of the special rules that the Court has recognized during the modern era in order to protect tribal government in Indian country.").

112. 471 U.S. at 856 ("Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination.").

113. 480 U.S. at 15 (holding, after a reference to *Williams'* concern over state interference with tribal self-government, that "[a] federal court's exercise of jurisdiction over matters relating to reservation affairs can also impair the authority of tribal courts.").

114. Endreson, *supra* note 104, at 145.

115. See Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 882-84 (2d Cir. 1996). See generally Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."); Talton v. Mayes, 163 U.S. 376 (1896).

116. 25 U.S.C. §§ 1301-1303 (1982). See generally JOHN WUNDER, "RETAINED BY THE PEOPLE": A HISTORY OF AMERICAN INDIANS AND THE BILL OF RIGHTS 135-40 (1994).

117. WUNDER, *supra* note 116 at 139. See 25 U.S.C. § 1303 (stating that the "privilege of the writ of habeas corpus shall be available to any person, in a court of the United States,

The federal courts—in the ten years prior to the Supreme Court's 1978 decision in *Santa Clara Pueblo v. Martinez*¹¹⁸—developed a doctrine of exhaustion of tribal remedies in connection with the ICRA that was “modeled after the established doctrine of exhaustion of administrative remedies.”¹¹⁹ Assuming (erroneously, as it turned out) that a nonhabeas federal cause of action could be implied under the ICRA, the federal courts soon determined that the policy of promoting tribal self-government announced in *Williams* dictated that tribal remedies must be exhausted before federal court redress could be sought:

Several factors support the implication of such [an exhaustion requirement.] First, this interpretation would reconcile the statute with [Congressional policy to vest tribal governments with responsibility for their own affairs] Second, this interpretation would place primary responsibility for the vindication of rights violated by Indian governmental agencies upon the tribal courts. Such responsibility may well enhance the development of an independent Indian judiciary, thus reconciling the statute with recognized federal policy. See *Williams v. Lee*, 358 U.S. at 222, 79 S.Ct. 269. Third, this interpretation would insure that [federal courts] would intervene only in those instances in which local conflicts cannot be resolved locally.¹²⁰

Significantly, the ICRA exhaustion rule, which was considered “a matter of comity”¹²¹ by at least one court, was “not an inflexible requirement,”¹²² but was instead pragmatically applied in accordance with its underlying purposes.¹²³ In contrast to its predecessor, the tribal

to test the legality of his detention by order of an Indian tribe.”).

118. 436 U.S. 49 (1978).

119. Reynolds, *supra* note 16, at 1099.

120. Dodge v. Nakai, 298 F. Supp. 17, 25 (D. Ariz. 1968). See also Howlett v. Salish and Kootenai Tribes, 529 F.2d 233, 239 (9th Cir. 1976); Janis v. Wilson, 521 F.2d 724, 726-27 (8th Cir. 1975); McCurdy v. Steele, 506 F.2d 653, 656-57 (10th Cir. 1974); O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140, 1144-46 (8th Cir. 1973).

121. Janis, 521 F.2d at 727.

122. O'Neal, 482 F.2d at 1146.

123. See Reynolds, *supra* note 16, at 1099. The Ninth Circuit, in *O'Neal*, posited a balancing test pursuant to which “the need to preserve the cultural identity of the tribe by strengthening the authority of the tribal courts” was weighed against “the need to immediately adjudicate alleged deprivations of individual rights.” *O'Neal*, 482 F.2d at 1146. Exhaustion of tribal remedies, imposed as a matter of principle, was often deemed in practice as futile and/or unnecessary. See, e.g., *Howlett*, 529 F.2d at 240; *Janis*, 521 F.2d at 727; *Dodge*, 298 F. Supp. at 25-26. See also Taylor, *supra* note 20, at 262-63 (criticizing the ICRA “exhaustion doctrine” as an “attempt to include tribal institutions in the process of adjudicating disputes under the Indian Civil Rights Act” that “soon evolved into a paternalistic nod by the federal

exhaustion/abstention doctrine of *National Farmers Union* and *Iowa Mutual* has been characterized (by some courts) as an "inflexible bar" which "mandates" that federal courts abstain from exercising their concurrent jurisdiction.¹²⁴

The theme of promoting tribal self-government continued, but the ICRA exhaustion doctrine ended with the Supreme Court's decision in *Santa Clara Pueblo v. Martinez*.¹²⁵ In *Martinez*, the Court held that Congress' failure to provide remedies other than habeas corpus in the Indian Civil Rights Act was deliberate and that the Act did not impliedly authorize civil actions against tribes or tribal officers in the federal courts:

Creation of a federal cause of action for the enforcement of rights created in Title I, however useful it might be in securing compliance with § 1302, plainly would be at odds with the congressional goal of protecting tribal self-government. Not only would it undermine the authority of tribal forums, . . . but it would also impose serious financial burdens on already "financially disadvantaged" tribes.¹²⁶

courts in the direction of Indian customs and traditions prior to making the decision for the tribe").

124. See *infra* Part IV.B.

125. 436 U.S. 49 (1978).

126. *Id.* at 64 (quotation omitted). The Court, citing *Williams* and other cases, further noted that "[t]ribal forums are available to vindicate rights created by the ICRA," and that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Id.* at 65. Justice White agreed with the *Martinez* majority that Congress was concerned with furthering tribal self-government, but disagreed "that this concern on the part of Congress precludes our recognition of a federal cause of action to enforce the terms of the Act." *Id.* at 82 (White, J., dissenting).

Martinez is a controversial decision in many respects. For example, commentators disagree over whether the decision "was based primarily upon a lack of jurisdiction in the federal court to hear the claim or whether the result was compelled by the Court's determination that the Indian Civil Rights Act did not create an implied right of action." Reynolds, *supra* note 16, at 1099 n.51. See Kevin J. Worthen, *Shedding New Light on an Old Debate: A Federal Indian Law Perspective on Congressional Authority to Limit Federal Question Jurisdiction*, 75 MINN. L. REV. 65 (1990) (arguing the former position). In addition, *Martinez* has been praised as "a case as respectful of tribal sovereignty as any the Supreme Court has written lately." Robert Laurence, *Martinez, Oliphant and Federal Court Review of Tribal Activity Under the Indian Civil Rights Act*, 10 CAMPBELL L. REV. 411, 415 (1988). *Martinez* has also been criticized as "leav[ing] the resolution of civil ICRA violations to the very tribal authorities who violated them." Gould, *supra* note 77, at 860. Gould also suggests that the Court's "solicitous comments about tribal courts," appear "disingenuous" in view of statements in other cases and may best be explained by the fact that *Martinez* was an intra-tribal dispute. *Id.* at 860-61, 863. See *Martinez*, 436 U.S. at 59-60 (stressing that tribal courts should resolve intratribal disputes and disputes "arising on the reservation among reservation Indians")

Except for claims susceptible to habeas review, *Martinez* removed the federal forum option from litigants challenging tribal compliance with the Indian Civil Rights Act, and as a consequence, "for a time, little was heard of the exhaustion doctrine."¹²⁷ Eventually, however, litigants found a new way to obtain federal review of tribal actions. As described by Laurie Reynolds,

[r]ather than attacking the tribal action directly as violative of a specific provision of the Indian Civil Rights Act, litigants began filing federal complaints alleging an absence of tribal power to engage in the challenged activity, thereby recasting the dispute as jurisdictional in nature. In *National Farmers Union Insurance Companies v. Crow Tribe*, the Supreme Court agreed that these jurisdictional challenges did indeed arise under federal law for the purpose of establishing federal question jurisdiction, but instructed the lower courts to stay their hand until the litigants had exhausted their tribal remedies.¹²⁸

As seen below, although the tribal exhaustion/abstention doc-

(quoting *Fisher v. District Court*, 424 U.S. 382, 387-88 (1976)).

The *Martinez* decision has also received considerable attention in feminist scholarship. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Gloria Valencia-Weber & Christine P. Zuni, *Domestic Violence and Tribal Protection of Indigenous Women in the United States*, 69 ST. JOHN'S L. REV. 69 (1995); Carla Christofferson, Note, *Tribal Courts' Failure To Protect Native American Women: A Reevaluation of the Indian Civil Rights Act*, 101 YALE L.J. 169 (1991).

127. Taylor, *supra* note 20, at 263. See also Reynolds, *supra* note 16, at 1100.

Despite *Martinez*, the Tenth Circuit has held that the federal courts may exercise jurisdiction over a suit by a non-Indian against a tribe for alleged violation of constitutional rights if no other forum is available, since to deny access to federal courts in such instances would be "to hold that they have constitutional rights but have no remedy." *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682, 685 (10th Cir. 1980). The *Dry Creek Lodge* decision, however, "has been severely limited by subsequent case law" and is dependent "upon a showing of absolute necessity." *Jimi Development Corp. v. Ute Mountain Ute Indian Tribe*, 930 F. Supp. 493, 496-97 (D. Colo. 1996). The *Dry Creek Lodge* exception to *Martinez* does not resurrect the ICRA exhaustion doctrine. See *White v. Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir. 1984) ("[T]o adhere to the principles of [*Martinez*], the aggrieved party must have actually sought a tribal remedy, not merely alleged its futility. This is not merely a requirement that exhaustion of tribal remedies is a prerequisite to federal jurisdiction, but instead, that tribal remedies, if existent, are exclusive"); Reynolds, *supra* note 16, at 1100 n.52.

128. Reynolds, *supra* note 16, at 1100-01. See also Gould, *supra* note 77, at 881 ("After *Martinez*, civil litigants began challenging tribal jurisdiction as a means of obtaining federal review."); N. Bruce Duthu, *Holding A Great Vision: Engaging the Jurisprudential Voice of Tribal Courts*, 71 N.D. L. REV. 1129, 1142 (1995) (reviewing FRANK POMMERSHEIM, BRAID OF FEATHERS (1995)) ("[T]he result of *Martinez* may actually lead to cases like *National Farmers Union and Iowa Mutual*, where aggrieved litigants have an opportunity to challenge the existence (not merely the exercise) of tribal jurisdiction in federal court.").

trine—announced in *National Farmers Union Ins. Co. v. Crow Tribe*¹²⁹ and refined in *Iowa Mutual*—can trace its lineage to the pre-Martinez ICRA exhaustion doctrine, the latter doctrine diverges from the former in several significant respects.

C. National Farmers Union Insurance Companies v. Crow Tribe

Just as in the case of *United States v. Plainbull*, the *National Farmers Union* dispute arose on the Crow Reservation in Montana.¹³⁰ Leroy Sage, a member of the Crow Tribe and a student at the Lodge Grass Elementary School, suffered a broken leg in May 1982 after he was struck by a motorcycle in the school parking lot.¹³¹ The land on which the school is located, although within the exterior boundaries of the Crow Reservation, is owned by the State of Montana subject to a mineral reservation held by the Tribe. Through his guardian, Sage filed a negligence suit in Crow Tribal Court against the school district, a subdivision of the state government. Although process was served on the chairman of the school board, no one notified the insurance carrier (National Farmers), and no preparation to investigate or defend the claim was made. The insurer was not made aware of the claim until after a default judgment had been entered in the amount of \$153,000.¹³²

In response, the insurer shortly thereafter filed an action in federal district court seeking to enjoin the execution of the tribal court judgment on the ground that the Crow Tribal Court lacked subject matter jurisdiction over the tort that was the basis of the default judgment.¹³³ Eschewing any reliance on the Indian Civil Rights Act in light of *Martinez*, the district court found instead that the suit raised an issue of federal common law and held that it “has the jurisdictional power under 28 U.S.C. § 1331 to determine whether the Tribal Court has exceeded

129. 471 U.S. 845.

130. See *National Farmers Union Ins. Co. v. Crow Tribe*, 560 F. Supp. 213, 214 (D. Mont. 1983), *rev'd*, 736 F.2d 1320, 1321-22 (9th Cir. 1984), *rev'd*, 471 U.S. 845 (1985).

131. *Id.*

132. Sage v. Lodge Grass School Dist., 10 Indian L. Rep. 6019 (Crow Tribal Ct. 1982). According to the order granting a stay pending disposition of the petition for certiorari, Sage's medical bills “came to \$3,000.” *National Farmers Union Ins. Cos. v. Crow Tribe*, 468 U.S. 1315, 1315 (1984).

133. *National Farmers Union*, 736 F.2d at 1321 (“Neither the school district nor [the insurer] contested the default judgment in Crow Tribal Court or sought an appeal to the Crow Tribal Court of Appeals.”).

the lawful limits of its jurisdiction.”¹³⁴ Turning to the merits, the district court held that when the Crow Tribe by tribal law extended its jurisdiction over all civil causes of action arising within the exterior boundaries of the reservation, it “was asserting a power it did not have.”¹³⁵

The Ninth Circuit reversed.¹³⁶ In short, the court of appeals held that the district court erred when it applied *Montana*, which involved “limitations of an Indian tribe’s regulatory jurisdiction,”¹³⁷ instead of *Martinez*, which focused on a tribe’s adjudicatory jurisdiction.¹³⁸ The majority opinion begins by granting that “[t]he question whether a tribe has abused its adjudicatory jurisdiction seems, at first glance, to be as appropriate as a question involving tribal regulatory jurisdiction for

134. *National Farmers Union*, 560 F. Supp. at 214. The district court held that “[t]he extent of tribal court civil jurisdiction over non-Indians as developed by the Supreme Court in *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981) . . . raise[s] the overriding federal interest in determining the extent of tribal sovereignty and therefore form[s] a part of federal common law.” *Id.* at 214-15.

135. *Id.* at 217. The court found that tribal jurisdiction in the case at hand had been neither delegated to the Crow Tribe by federal statute or treaty, nor retained by the Tribe as an element of inherent sovereignty. *Id.* at 215-17. With respect to the latter issue, the district court was guided by the “general proposition” stated in *Montana* “that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.” *Montana*, 450 U.S. at 565. The *Montana* rule, however, was accompanied by two exceptions:

A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 565-66 (citations omitted). The district court in *National Farmers Union* found that the “factual circumstances of the alleged tort” did not fall “within either of *Montana*’s narrow exceptions allowing Tribal jurisdiction over non-Indians.” *National Farmers Union*, 560 F. Supp. at 216. The court concluded by opining that “[b]ecause Tribal jurisdiction is absent and both parties in the original tort claim are Montana citizens, the State of Montana can protect its interests and assert jurisdiction over the tort claim.” *Id.* at 219.

136. *National Farmers Union*, 736 F.2d at 1320. In *National Farmers Union*, the court held that the appeal was controlled by a recently decided case, *R.J. Williams v. Fort Belknap Housing Authority*, which was described as holding that “a complaint challenging a tribal court’s assertion of jurisdiction over a non-Indian defendant in a civil suit stated no federal claim for relief.” *Id.* at 1322 (citing *R.J. Williams v. Fort Belknap Housing Authority*, 719 F.2d 979, 981-82 (9th Cir. 1983)).

137. *Id.*

138. *Id.* at 1322 n.3. The court rejected, in dicta, the district court’s assumption “that the tribe’s adjudicatory authority must be coextensive with its regulatory authority,” observing that “[c]ases are commonly adjudicated in forums that would lack the authority to regulate the subject matter of the disputes.” *Id.*

resolution in a suit brought in federal court.”¹³⁹ However, relying on “Congress’s manifest purpose to limit the intrusion of federal courts upon tribal adjudication,”¹⁴⁰ the majority found it appropriate to distinguish tribal regulatory and adjudicatory jurisdiction, and held that a tribe’s assumption of adjudicatory jurisdiction does not create a federal common law cause of action.¹⁴¹

Judge Eugene Wright demurred, declaring that “[n]either [*Martinez*] nor the ICRA provide a basis for distinguishing between regulatory and adjudicatory actions by tribes.”¹⁴² In his view, the challenge to the Crow Tribal Court’s assertion of jurisdiction *did* state a federal common law cause of action, but should still be dismissed because the plaintiffs “failed to exhaust tribal remedies,”¹⁴³ just as pre-*Martinez* ICRA claims were on occasion dismissed for failure of federal litigants to first pursue available tribal remedies.¹⁴⁴

Judge Wright’s separate opinion in *National Farmers Union* serves as the point of transition between the ICRA exhaustion doctrine and the tribal exhaustion/abstention doctrine later developed by the Supreme Court. Drawing from the pre-*Martinez* ICRA cases, Judge Wright made three important points. First, he identified, as the bases for an exhaustion requirement, the notion of “comity” and the federal policy (descended from *Williams*) of “protecting and strengthening tribal institutions.”¹⁴⁵ Second, he emphasized that a tribal court normally

139. *Id.* at 1323. The court acknowledged its own line of “authority holding that a complaint challenging tribal abuse of its civil regulatory jurisdiction states a claim arising under federal common law.” *Id.* (citing *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 591 (9th Cir. 1983) and *Cardin v. De La Cruz*, 671 F.2d 363, 365 (9th Cir. 1982)). The court also recognized that “[t]he Supreme Court relied on principles of federal common law to determine whether a tribal court had exceeded its jurisdiction in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978).” *Id.* It distinguished *Oliphant* as concerning tribal criminal jurisdiction and by the fact that it “came to the federal courts by way of a petition for habeas corpus.” *Id.*

140. *National Farmers Union*, 736 F.2d at 1323.

141. *Id.* The *National Farmers Union* majority located a manifestation of congressional intent to limit federal intrusion on tribal court adjudication in *Martinez* and its determination that Congress, when it enacted the ICRA, deliberately limited federal court interference with tribal court proceedings to habeas corpus review. *Id.* (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 67-70 (1977)).

142. *Id.* at 1325 (Wright, J., dissenting in part and concurring in result).

143. *Id.* at 1324 (Wright, J., dissenting in part and concurring in result).

144. See *id.* at 1326 (Wright, J., dissenting in part and concurring in result) (citing pre-*Martinez* circuit cases that imposed exhaustion requirements on plaintiffs seeking to bring ICRA claims in federal court).

145. *Id.* at 1325 (Wright, J., dissenting in part and concurring in result). See *supra* notes 113-14 and accompanying text.

should be the first, but not the last, "arbiter of its own jurisdiction."¹⁴⁶ To support this point, Judge Wright again invoked the ICRA exhaustion doctrine, in which the federal courts were permitted to reach the merits (in this instance the issue of tribal court jurisdiction) after tribal remedies were exhausted.¹⁴⁷ Finally, Judge Wright stressed that his proposed exhaustion requirement, like the ICRA exhaustion rule, is "not inflexible," but should be applied only after "balanc[ing] the need to preserve and strengthen tribal institutions against any immediate need that would exist to adjudicate the plaintiff's alleged federal rights," and only when "the purposes of comity and strengthening tribal institutions" will be served.¹⁴⁸

The Supreme Court, in a unanimous decision authored by Justice Stevens, first held that "[t]he District Court correctly concluded that a federal court may determine under [28 U.S.C.] § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction."¹⁴⁹ The Court

146. *Id.* at 1325. (Wright, J., dissenting in part and concurring in result).

147. Judge Wright did not address whether the federal courts should resolve the underlying substantive claim(s) following exhaustion of tribal remedies on the question of tribal court jurisdiction. This issue, which did not arise in *National Farmers Union* since the sole purpose of the federal suit was to attack the tribal court's jurisdiction, surfaces (in muddled waters) in *Iowa Mutual*. See *Iowa Mutual Insurance Co. v. LaPlante* 480 U.S. 9 (1987).

148. *National Farmers Union*, 736 F.2d at 1326 (Wright, J., dissenting in part and concurring in result) ("[T]he exhaustion approach is flexible and closely tailored to the interests at stake.")

149. *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 853 (1985). The Court made only a passing reference to the Ninth Circuit's distinction between adjudicatory and regulatory jurisdiction. *Id.* at 849 n.3. However, the court did not adopt the distinction, citing cases concerning the extent to which tribes have retained the power to *regulate* the affairs of non-Indians to support the holding that "whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under § 1331." *Id.* at 851 n.12, 852.

Laurie Reynolds has criticized the Supreme Court for failing to recognize the distinction between tribal regulatory and adjudicatory power. See Alleva et al., *supra* note 19, at 544 (stating in a panel discussion that the Ninth Circuit was correct in "concluding that matters of tribal adjudicatory power just simply do not state a federal question."); Reynolds, *supra* note 16, at 1141 ("[T]he Court unnecessarily equated disputes involving tribal legislative jurisdiction with disputes involving tribal court adjudicatory power."). However, since both tribal regulatory and adjudicatory authority are aspects of tribal sovereignty, and since the extent to which sovereignty has been altered, divested, or diminished must be answered by reference to federal law, the fact that adjudicatory jurisdiction may be broader than regulatory jurisdiction does not, as Judge Wright pointed out, "affect the existence of a federal question." *National Farmers Union*, 736 F.2d at 1324. (Wright, J., dissenting in part and concurring in result). See also Alex Tallchief Skibine, *Pluralism, Legitimacy, Sovereignty, and the Importance of Tribal Court Jurisprudence*, 96 COLUM. L. REV. 557, 574 n.63 (1996) (reviewing FRANK

then declared that exhaustion of tribal court remedies "is required before such a claim may be entertained by a federal court."¹⁵⁰ The Supreme Court's articulation of an exhaustion requirement is set forth below:

[T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed. The risks of the kind of "procedural nightmare" that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made. Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.¹⁵¹

POMMERSHEIM, BRAID OF FEATHERS) (1995)) ("It seems hard to distinguish conceptually between these two exercises of legislative power for the purpose of granting federal question jurisdiction in one case and not the other.").

150. *National Farmers Union*, 471 U.S. at 857 (emphasis added). The phrase "such a claim" must be read in conjunction with the preceding sentence, which refers to the "question [of] whether a tribal court has exceeded the lawful limits of its jurisdiction." *Id.*

151. *Id.* at 855-57 (footnotes omitted). The Court, which was apparently influenced by the brief filed by the Crow Tribe, set forth three exceptions to its exhaustion requirement:

We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith," *cf. Juidice v. Vail*, 430 U.S. 327, 338, 97 S.Ct. 1211, 1218, 51 L.Ed.2d 376 (1977), or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

Id. at 856 n.21. See Brief for Crow Respondents at A-3, *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985) (No. 84-320) ("Nor is there any indication that the Tribal Court proceeding was motivated by a desire to harass or was conducted in bad faith or

This laconic statement, outlining in two paragraphs the existence, scope, and application of an "exhaustion of tribal court remedies" requirement, raises perhaps as many questions as it answers. For example, although the exhaustion requirement is discussed primarily in conjunction with challenges to tribal court jurisdiction, at one point the Court suggests that a federal court would benefit by the development of a full record in the tribal court "before either the *merits* or any question concerning appropriate relief is addressed."¹⁵² In addition, some courts have seized the Court's statement that "exhaustion is required"¹⁵³ in support of the view that, unlike the ICRA exhaustion doctrine, the exhaustion requirement in *National Farmers Union* was intended to be inflexible and absolute.¹⁵⁴

D. Iowa Mutual Ins. Co. v. LaPlante

The opportunity to clarify the exhaustion rule set forth in *National Farmers Union* came two years later when the Supreme Court decided

pursuant to a facially and obviously invalid tribal law. Cf. *Juidice v. Vail*, [] 430 U.S. at 338.")

152. *National Farmers Union*, 471 U.S. at 856 (emphasis added). Viewed in context, it is plausible that the reference to "the merits" was intended to mean the merits of the jurisdictional challenge, not the merits of any substantive underlying claim. Of course, the only claim in *National Farmers Union* was the claim that the tribal court lacked jurisdiction. See *supra* note 147.

On the other hand, allowing a federal court to reach the underlying claim following exhaustion of tribal remedies regarding tribal court jurisdiction would be entirely consistent with the exhaustion requirement as applied in the pre-*Martinez* ICRA cases, and would also be in accord with the exhaustion of administrative remedies doctrine that guides court review of agency action. Moreover, the author of *National Farmers Union* does *not* view its exhaustion rule as precluding federal review of *Iowa Mut. Ins. Co. v. LaPlante*, the underlying claim. See *Iowa Mut.*, 480 U.S. at 21 (Stevens, J., concurring in part and dissenting in part) ("In holding [in *National Farmers Union*] that exhaustion of the tribal jurisdictional issue was necessary, we explicitly contemplated later federal-court consideration of the merits of the dispute."). See generally *Alleva et al.*, *supra* note 19, at 543 (including statement by Laurie Reynolds that "*National Farmers Union* expressly refers to post-exhaustion review of the merits of the tribal court decision in the federal courts [whereas] *Iowa Mutual* seems to suggest a more preclusive effect of the tribal court decision.").

153. *National Farmers Union*, 471 U.S. at 857.

154. See *Burlington N. R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991) (quoting the phrase "exhaustion is required before such a claim may be entertained by a federal court" in support of its holding that the Supreme Court, in *National Farmers Union*, "mandated the exhaustion of tribal remedies as a prerequisite to a federal court's exercise of its jurisdiction."). It seems more likely, however, that the Supreme Court was simply restating its disposition of the case—that exhaustion is "required" in light of factual and procedural posture of the instant action—without intending to announce a bright-line rule to be applied in all other situations. See *infra* note 193.

Iowa Mutual Insurance Company v. LaPlante.¹⁵⁵ Unlike the federal action in *National Farmers Union*, the federal suit in *Iowa Mutual* did not attack the existence of tribal court jurisdiction,¹⁵⁶ but instead sought to have the federal court exercise its diversity jurisdiction over a controversy that was already pending in tribal court.¹⁵⁷

The best place to begin in *Iowa Mutual* is with the discussion of whether Congress, in granting the federal courts diversity jurisdiction, also exercised its plenary authority to divest any and all tribal court jurisdiction.¹⁵⁸ The Court held that Congress did not intend the diversity statute to so limit tribal court jurisdiction.¹⁵⁹ Hence, the

155. 480 U.S. 9 (1987). Edward LaPlante, a member of the Blackfeet Tribe, was injured when he lost control of a cattle truck within the boundaries of the Blackfeet Reservation. *Id.* at 11. He and his wife later filed suit in tribal court, seeking relief from his employer, Wellman Ranch, and its individual owners (who are also Blackfeet Indians residing on the Reservation) and, as a separate claim, requesting damages against the insurers of Wellman Ranch and its owners for bad-faith refusal to settle. *Id.* at 11-12. After an initial unsuccessful challenge to the tribal court's jurisdiction and before a decision on the merits on the LaPlantes' claims, Iowa Mutual invoked the diversity jurisdiction of the federal district court under 28 U.S.C. § 1332 and sought a declaration that it had no duty to defend or indemnify the Wellman Ranch or its owners because the injuries sustained by LaPlante fell outside the coverage of the insurance policies. *Id.* at 12-13.

The district court dismissed Iowa Mutual's suit for lack of subject matter jurisdiction, holding that the tribal court must be given an opportunity to determine its jurisdiction in the matter, and noting that the federal court would be able to exercise its diversity jurisdiction only if the tribe decided not to exercise its exclusive jurisdiction. *Id.* at 13. The Ninth Circuit, citing *R.J. Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979 (9th Cir. 1983), and *National Farmers Union*, affirmed in an unpublished opinion. *Iowa Mut. Ins. Co. v. LaPlante*, 774 F.2d 1174 (9th Cir. 1985).

156. The other insurer, Midland Claims, did initiate an action in federal court challenging the tribal court's jurisdiction. In light of *National Farmers Union*, the action was dismissed without prejudice, pending exhaustion of tribal court remedies. *Iowa Mutual*, 480 U.S. at 12 n.2.

157. See *id.* at 20-22 (Stevens, J., concurring in part and dissenting in part).

158. See *id.* at 17-18. Actually, the most logical place to begin is with the question presented: "[w]hether a federal district court has diversity jurisdiction over an action by a citizen of one state against reservation Indians located in another state." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (No. 85-1589) (petition for a Writ of Certiorari at i). As described by the Supreme Court, the Ninth Circuit had held that, in such circumstances, "diversity jurisdiction would be barred as long as the courts of the State in which the federal court sits would not entertain the suit, apparently assuming that the exercise of federal jurisdiction would contravene a substantive state policy." *Iowa Mut.*, 480 U.S. at 20 n.13. Cf. *Poitra v. Demarrias*, 502 F.2d 23 (8th Cir. 1974) (holding that federal diversity jurisdiction could be maintained). The Supreme Court, however, disagreed with the Ninth Circuit that such a substantive state policy existed, and consequently found no bar to the invocation of diversity jurisdiction (other than the tribal exhaustion/abstention doctrine). *Iowa Mutual*, 480 U.S. at 20 n.13.

159. The Court held that "[t]he diversity statute makes no reference to Indians and nothing in the legislative history suggests any intent to render inoperative the established

Court was required to address the question of whether the district court in such circumstances *should* exercise its diversity jurisdiction.

In *Iowa Mutual*, the Court answered this question in the negative, declaring that "the exhaustion rule announced in *National Farmers*

federal policy promoting tribal self-government." *Iowa Mut.*, 480 U.S. at 17 (citation omitted). In support of this holding, the Court made three main points. First, the Court took the somewhat anomalous position that because the statutory language and legislative history of the diversity statute make no mention of tribal courts, and because tribal courts were nonexistent when diversity jurisdiction was first authorized by Congress, the statute could not be read as intending to permit the intrusion on tribal sovereignty that diversity jurisdiction represents.

Reynolds, *supra* note 16, at 1103. See *Iowa Mutual*, 480 U.S. at 17. Next, the Court noted that Congress could have expressed an intent to limit the civil jurisdiction of the tribal courts when it subsequently amended the diversity statute, but did not do so. *Id.* at 17-18.

Finally, the Court observed that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty," and that "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Id.* at 18. Although this statement may have only been intended to underscore the point that Congress needs to provide some kind of affirmative indication that it intends to limit the civil jurisdiction of tribal courts (and not that such jurisdiction exists absent such affirmative divestment), the "presumptively lies" language has become a rallying point for advocates of inherent tribal sovereignty, and has served as a hopeful counterpoint to recent Supreme Court cases that have limited tribal authority over non-members. See generally Joseph William Singer, *Publicity Rights and the Conflict of Laws: Tribal Court Jurisdiction in the Crazy Horse Case*, 41 S.D. L. REV. 1, 30-31 (1996); Skibine, *supra* note 149, at 573-74; Dennis W. Arrow, *Contemporary Tensions in Constitutional Indian Law*, 12 OKLA. CITY U. L. REV. 469, 490-91 (1987); Reynolds, *supra* note 16, at 1128-29. There is some question, however, whether the courts agree with the commentators. See *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 427 n.10, 454 n.5 (1989) (Justices White and Blackmun disagreeing on the import of the "presumptively lies" language); *A-1 Contractors v. Strate*, 76 F.3d 930, 935-36, 944, 946, 949 (8th Cir. 1996), *petition for cert. filed*, 64 U.S.L.W. 3795 (U.S. May 16, 1996) (docketed 95-1872) (*en banc* majority and dissenters disagreeing on the significance of the "presumptively lies" language). See also *Yellowstone County v. Pease* 1171 F.3d 96, 1169 (9th Cir. 1996) (agreeing with the *Strate* majority that *National Farmers Union* and *Iowa Mutual* can be read together with *Montana*); *Wilson v. Marchington*, 934 F. Supp. 1176, 1182-84 (D. Mont. 1995) (refusing to read the "presumptively lies" language as propounding a geographically-based view of a tribe's adjudicatory jurisdiction).

It is worth noting that the three Justices (Rehnquist, Scalia, and Kennedy) who joined Justice White's opinion in *Brendale* that downplayed the significance of the "presumptively lies" language in *Iowa Mutual* are still on the bench. The three Justices (Blackmun, Brennan, and Marshall) who viewed the passage in *Brendale* as a substantive holding supporting tribal civil jurisdiction over non-Indians are no longer with the Court. In *South Dakota v. Bourland*, Justice Thomas (joined by Justices Rehnquist, White, Stevens, O'Connor, Scalia, and Kennedy) made no mention of *Iowa Mutual*, but held that "[g]eneral principles of 'inherent sovereignty' . . . do not enable the [Cheyenne River Sioux] Tribe to regulate non-Indian hunting and fishing" on lands taken by the United States for a dam and reservoir project. *South Dakota v. Bourland*, 508 U.S. 679, 694 (1993).

Union applies here as well,"¹⁶⁰ and holding that "the federal action should be stayed pending further Tribal Court proceedings or dismissed"¹⁶¹ Particular emphasis was again placed on the policy of encouraging tribal self-government:

Regardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a "full opportunity to determine its own jurisdiction." [*National Farmers Union*, 471 U.S. at 857.] In diversity cases, as well as federal-question cases, unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978); see also *Fisher v. District Court*, *supra*, at 388. Adjudication of such matters by any nontribal court also infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law.¹⁶²

The Court's disposition is clear: Iowa Mutual must exhaust available tribal remedies, including appellate remedies, before a federal court may exercise diversity jurisdiction. The task of extrapolating general principles from *Iowa Mutual*, however, is complicated by the fact that the majority incorrectly assumed that the tribal court's jurisdiction was being challenged in the federal action.¹⁶³ For example, the majority's discussion of the role to be played by the federal court after Iowa Mutual had exhausted its tribal remedies assumed that tribal court jurisdiction would be disputed:

If the Tribal Appeals Court upholds the lower court's determination that the tribal courts have jurisdiction, petitioner may challenge that ruling in the District Court. See *National Farmers Union*, *supra*, at 853. Unless a federal court determines that the Tribal Court lacked jurisdiction, however, proper deference to the tribal court system precludes relitigation of issues raised by the

160. *Iowa Mut.*, 480 U.S. at 16.

161. *Id.* at 20 n.14.

162. *Id.* at 16 (internal citation omitted). As noted by Justice Stevens, the "Court seems to assume that the merits of this controversy are governed by 'tribal law.'" *Id.* at 22 n.* (Stevens, J., concurring in part and dissenting in part).

163. Compare *id.* at 19 ("Although petitioner must exhaust available tribal remedies before instituting suit in federal court, the Blackfeet Tribal Courts' determination of tribal jurisdiction is ultimately subject to review."), with Brief for Petitioner at 12, *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (No. 85-1589) ("The ultimate question here is *not* the nature and extent of tribal court jurisdiction, but rather the extent of federal diversity jurisdiction.") (emphasis added).

LaPlantes' bad-faith claim and resolved in the Tribal Courts.¹⁶⁴ Moreover, the Court ended its decision by concluding that the court of appeals "correctly recognized that *National Farmers Union* requires that *the issue of jurisdiction* be resolved by the Tribal Courts in the first instance."¹⁶⁵ Yet, as Justice Stevens pointed out in his dissent, the "controversy concerning the coverage of the insurance policy issued to respondents Wellman Ranch Co. and its owners by petitioner . . . raises no question concerning the jurisdiction of the Blackfeet Tribal Court."¹⁶⁶

Did the Supreme Court intend to hold that, in cases where both federal and tribal court jurisdiction exist, the federal court must decline to exercise its concurrent jurisdiction until the tribal court has decided the case, and that a federal court may only exercise its jurisdiction over the merits if and when it determines that the tribal court lacked jurisdiction? There is neither acknowledgement nor response by the majority to Justice Stevens' compelling dissent, which asserted that "[t]he mere fact that a case involving the same issue is pending in another court has never been considered a sufficient reason to excuse a federal court from performing its duty 'to adjudicate a controversy properly before it.'"¹⁶⁷ On the other hand, no other Justice joined the dissent, and the majority opinion, despite its utilization of the "exhaustion of tribal remedies" phraseology, acknowledged in a footnote that it was imposing a requirement on federal courts comparable to abstention:

Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite. In this respect, the rule is analogous to principles of abstention articulated in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976): even where there is concurrent jurisdiction in both the state and federal courts, deference to state proceedings renders it appropriate for the federal courts to decline jurisdiction *in certain circumstances*. In *Colorado River*, as here, strong federal policy concerns favored

164. *Iowa Mut.*, 480 U.S. at 19. The Court also noted at several points that a tribal court should be given the "first opportunity" and a "full opportunity" to evaluate challenges to its jurisdiction. *Id.* at 16-17.

165. *Id.* at 19 (emphasis added).

166. *Id.* at 22 (Stevens, J., concurring in part and dissenting in part).

167. *Id.* (Stevens, J., concurring in part and dissenting in part) (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959)). Justice Stevens further argued that, by "requir[ing] the federal court to avoid adjudicating the merits of a controversy also pending in tribal court although it could reach those merits if the case instead were pending in state court," the majority was suggesting "that an Indian tribe's judicial system is entitled to a greater degree of deference than the judicial system of a sovereign State." *Id.*

resolution in the nonfederal forum.¹⁶⁸

Thus, in *Iowa Mutual* the exhaustion of tribal remedies requirement that originated in conjunction with the Indian Civil Rights Act, and which was resurrected in *National Farmers Union*, completed its transformation into a tribal exhaustion/abstention doctrine.¹⁶⁹

As in the case of *National Farmers Union*, the Court's decision in *Iowa Mutual* leaves many questions unresolved. For example, should the tribal exhaustion/abstention doctrine apply in cases (unlike *National Farmers Union* and *Iowa Mutual*) where there is no action pending in tribal court at the time federal jurisdiction is invoked? What standard of review should federal courts employ when reviewing a determination by a tribal court of its own jurisdiction? If "unconditional access" to federal courts impermissibly impairs the authority of tribal courts, what about a judicially imposed regime of "conditional" access, such as the conditions set forth in *Colorado River* requiring federal abstention, but only "in certain circumstances"?¹⁷⁰ Finally, did the Supreme Court intend the tribal exhaustion/abstention doctrine to be a preponderant

168. *Id.* at 16 n.8 (emphasis added).

169. See *Crawford v. Genuine Parts Co.*, 737 F. Supp. 1121, 1125 (D. Mont. 1990), *rev'd*, 947 F.2d 1405 (9th Cir. 1991). The court stated:

[I]n *Iowa Mutual*, the Court extended the "exhaustion rule" to preclude federal court adjudication of the merits of a controversy pending in a tribal court, regardless of the fact the federal court's jurisdiction was concurrent with the tribal court The Court drew no distinction between the situation where the purpose of the federal action was to directly challenge the tribal court's jurisdiction over a pending case, and the situation where the merits of the controversy were simply placed before the federal court.

Id.

In the pre-*Martinez* cases construing the Indian Civil Rights Act, the federal courts clearly could and did reach the merits of the underlying dispute, albeit in some instances only after tribal remedies were exhausted. After *National Farmers Union*, it was unclear whether federal courts could or should resolve the underlying claims following exhaustion of tribal remedies on the question of tribal court jurisdiction. See *supra* note 147. Following *Iowa Mutual*, it appears that a federal court, despite its concurrent jurisdiction, may *not* reach the merits of the underlying dispute, unless it determines after exhaustion of tribal remedies that the tribal court lacked jurisdiction.

Viewed in this light, the exhaustion requirement of the pre-*Martinez* cases can be recast as a "merits/exhaustion" rule; the exhaustion rule of *National Farmers Union* can be characterized as a "jurisdiction/exhaustion" dictate; and the requirement imposed by *Iowa Mutual* can be described as a "jurisdiction/exhaustion, merits/abstention" rule. See also *supra* note 29.

170. See *Reynolds*, *supra* note 16, at 1106 ("The tenor of Justice Marshall's analysis [in *National Farmers Union*] makes clear that the only alternative to the exhaustion rule considered by the Court was 'unconditional access to the federal forum.'") (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987)).

command that uniquely makes abstention from exercise of federal jurisdiction the rule rather than the exception?

The Supreme Court, since *Iowa Mutual*, has made only a few passing references to the exhaustion/abstention doctrine and has failed to even acknowledge the rule in several decisions where it should arguably apply. Consequently, the difficult task of fleshing out this indeterminate doctrine has fallen primarily on the federal district and appellate courts.

IV. THE DEVELOPMENT OF THE TRIBAL EXHAUSTION/ABSTENTION DOCTRINE AFTER *NATIONAL FARMERS UNION* AND *IOWA MUTUAL*

Although *National Farmers Union* and *Iowa Mutual* left many questions unanswered, in the past ten years the federal courts have struggled primarily with two intertwined issues: the applicability and the flexibility of the tribal exhaustion/abstention doctrine.¹⁷¹ Put another

171. A third important issue concerns the role, if any, to be played by the federal courts after tribal court remedies have been exhausted. To date, there have been relatively few reported cases where federal court jurisdiction was invoked following the exhaustion of tribal court remedies. See *Yellowstone County v. Pease*, 96 F.3d 1169, 1170-72 (9th Cir. 1996); *Arizona Pub. Serv. Co. v. Aspaas*, 77 F.3d 1128, 1129-30 (9th Cir. 1996); *A-1 Contractors v. Strate*, 76 F.3d 930, 945-46 (8th Cir. 1996), *petition for cert. filed*, 64 U.S.L.W. 3795 (U.S. May 16, 1996) (No. 95-1872); *Hinshaw v. Mahler*, 42 F.3d 1178, 1179-80 (9th Cir. 1994); *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 556 (8th Cir. 1993); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1312-13 (9th Cir. 1990); *Twin City Constr. Co. v. Turtle Mountain Band of Chippewa Indians*, 866 F.2d 971, 971 (8th Cir.); *Sanders v. Robinson*, 864 F.2d 630, 631 (9th Cir. 1988); *State v. Hicks*, 944 F. Supp. 1455, 1462 (D. Nev. 1996); *State v. Gilham*, 932 F. Supp. 1215, 1217-18 (D. Mont. 1996); *Wilson v. Marchington*, 934 F. Supp. 1176, 1178 (D. Mont. 1995); *Mustang Fuel Corp. v. Hatch*, 890 F. Supp. 995, 997 (W.D. Okla. 1995), *aff'd sub nom. Mustang Production Co. v. Harrison*, 94 F.3d 1382 (10th Cir. 1996); *Tamiami Partners, Ltd. v. Miccosukee Tribe*, 898 F. Supp. 1549, 1553, 1558-59 (S.D. Fla. 1994), *aff'd in part and dismissed in part*, 63 F.3d 1030 (11th Cir. 1995). In each of these cases, the issue addressed by the federal court was the scope of the tribe's regulatory or adjudicatory jurisdiction, as opposed to the "merits" of the underlying claim. Consequently, cases so far do not support Laurie Reynolds' contention that, in addition to federal review of jurisdictional questions, the "lower federal courts have generally interpreted *National Farmers* and *Iowa Mutual* as allowing expansive review of the merits of a dispute." Reynolds, *supra* note 16, at 1135.

The courts have provided some guidance on the standard of review issue. In *Sanders*, the Ninth Circuit established that a tribal court's "interpretation of tribal law is binding on this court." *Sanders*, 864 F.2d at 633 (emphasis added). See also *Hinshaw*, 42 F.3d at 1180; *City of Timber Lake*, 10 F.3d at 558; *Hicks*, 944 F. Supp. at 1461 (holding that federal courts should defer "to tribal court determinations of tribal law unless they implicate substantial federal questions."). *Prescott v. Little Six, Inc.*, 897 F. Supp. 1217, 1222-23 (D. Minn. 1995); *Smith v. Babbitt*, 875 F. Supp. 1353, 1367 n.13 (D. Minn. 1995).

In *FMC v. Shoshone-Bannock Tribe*, the Ninth Circuit announced that, in reviewing tribal court decisions regarding tribal jurisdiction, "federal courts must show some deference to a tribal court's determination of its own jurisdiction." *Shoshone-Bannock Tribe*, 905 F.2d at 1313.

way, the courts have disagreed on not only when the doctrine should come into play, but also whether, in cases where the doctrine is deemed applicable, federal abstention and exhaustion of tribal remedies are mandatory.

A. Guidance from the Supreme Court

The Supreme Court did provide some direction regarding the applicability of its newly announced doctrine. First of all, in *National Farmers Union*, it described three situations where exhaustion would not be required: "[(1)] where an assertion of tribal jurisdiction is 'motivated by a desire to harass or is conducted in bad faith,' [(2)] where the action is patently violative of express jurisdictional prohibitions, or [(3)] where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction."¹⁷² Thus, the exhaustion requirement is not required in all cases where federal jurisdiction is

The court determined that factual questions would be reviewed under "a deferential, clearly erroneous standard of review," whereas federal legal questions, such as the question of tribal court jurisdiction, are to be reviewed *de novo*. *Id.* at 1313-14. With respect to the "expertise" of the tribal courts, the court of appeals indicated that, while federal review may be "guided by it," federal courts "have no obligation to follow that expertise." *Id.* at 1314. See also *Mustang Prod. Co.*, 94 F.3d at 1384 (adopting the *FMC* analysis); *Aspaas*, 77 F.3d at 1132; *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1300 (8th Cir. 1994) (endorsing, in dicta, the standard of review set forth in *FMC*); *A-1 Contractors*, 76 F.3d at 945 (endorsing *FMC* standard of review in dicta); but see *Vance v. Boyd Miss., Inc.*, 923 F. Supp. 905, 910 n.6 (S.D. Miss. 1996) (holding that a district court can review *de novo* "only the question of whether the tribal court had jurisdiction to hear the case" and may not conduct a *de novo* review of the factual findings of tribal court proceedings in view of *Iowa Mutual's* proscription against relitigation of issues unless tribal jurisdiction is found lacking).

Contrary to the views of Alex Tallchief Skibine, see *infra* note 273, the district court in *Mustang Fuel Corporation* rejected the contention that a tribal court's legal conclusions should be given the same kind of (*Chevron*) deference accorded federal administrative agencies. *Mustang Fuel Corp.*, 890 F. Supp. at 999 ("The Court finds defendants' analogy to be inapposite here.") Instead, the district court determined that the tribal court's ruling would "be helpful in the disposition of [the] case." *Id.* at 1000. On appeal, the Tenth Circuit adopted the Ninth Circuit's analysis in *FMC*. See *Mustang Prod. Co.*, 94 F.3d at 1384.

172. *National Farmers Union*, 471 U.S. at 856 n.21 (citation omitted). See generally Reynolds, *supra* note 16, at 1125-28.

In *Iowa Mutual*, the Supreme Court stated that the "alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement established in *National Farmers Union* and would be contrary to the congressional policy promoting the development of tribal courts." *Iowa Mut.*, 480 U.S. at 19 (citation omitted). The Court then noted that the Indian Civil Rights Act "provides non-Indians with various protections against unfair treatment in the tribal courts," without mentioning that, after *Martinez*, the only way to seek relief against such "unfair treatment" by a tribal court, other than a federal habeas petition, is to bring an ICRA action in tribal court. *Id.*

invoked to avoid or challenge tribal court jurisdiction.¹⁷³

In addition to setting forth instances where the tribal exhaustion/abstention doctrine should *not* be applied, *National Farmers Union* and *Iowa Mutual* provide us with examples in which the doctrine is properly invoked. Because the Court did not establish clear guidelines for deciding when the doctrine applies, the factual underpinnings of these two decisions are particularly significant. In both cases, federal suits "were brought while tribal court actions involving the same parties were already pending," and each case "involved situations in which Indians sued non-Indians in tribal court and the non-Indians counter-sued in federal court."¹⁷⁴ Thus, one court of appeals has remarked that "[t]he policies behind abstention are most strongly implicated when a federal court action is brought *after* a tribal court action has already been filed."¹⁷⁵

Since *Iowa Mutual*, the Supreme Court, through dicta in a case that did not involve an Indian, and by its silence in cases that did concern tribal jurisdiction, has muddled the flexibility and applicability issues. Just two months after deciding *Iowa Mutual*, the Court, in *Granberry v. Greer*,¹⁷⁶ cited both *National Farmers Union* and *Iowa Mutual* in its

173. The *National Farmers Union* "exceptions" have been invoked often, but with little success. See, e.g., *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1539-40 (10th Cir. 1995); *Texaco, Inc. v. Zah*, 5 F.3d 1374, 1376-77 (10th Cir. 1993); *Bank of Okla. v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1170-71 (10th Cir. 1992); *A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411, 1416-17 (9th Cir.); *Little Six, Inc.*, 897 F. Supp. at 1221-23; *AG Organic, Inc. v. John*, 892 F. Supp. 466, 474-78 (W.D.N.Y. 1995); *GNS, Inc. v. Winnebago Tribe*, 866 F. Supp. 1185, 1190-91 (N.D. Iowa 1994); *Atkinson Trading Co. v. Navajo Nation*, 866 F. Supp. 506, 509-11 (D.N.M. 1994). But see *Investment Finance Mgmt. Co. v. Schmit Indus., Inc.*, No. C 86-4234, 1991 WL 635929, at *1 (N.D. Iowa July 3, 1991) (finding that the tribal court acted in bad faith). The contention that an assertion of tribal jurisdiction is "patently violative of express jurisdictional prohibitions" is often recast as an argument that Congress, by enacting a particular federal statute, vested the federal courts with exclusive jurisdiction. See *infra* Part VI.A.

174. *Joranko*, *supra* note 19, at 267-68. See also *Lear and Miller*, *supra* note 19, at 286 ("Both federal actions were brought by non-Indians attempting to avoid pending tribal court proceedings.").

175. *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1537 (10th Cir. 1995) (emphasis added). See also *Alzheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 814 (7th Cir. 1993) ("[T]he two Supreme Court cases dealt only with the situation where a tribal court's jurisdiction over a dispute has been challenged by a later-filed action in federal court."); *Crawford v. Genuine Parts Co.*, 737 F. Supp. 1121, 1125 (D. Mont. 1990), *rev'd*, 947 F.2d 1405 (9th Cir. 1991) ("The paradigm case calling for application of the 'exhaustion rule' is, of course, one like *National Farmers Union*, where the jurisdiction of a tribal court over a controversy pending before that tribunal is directly challenged by way of an action for declaratory judgment in federal court.")

176. 481 U.S. 129 (1987).

discussion of whether the "failure to raise nonexhaustion in the district court constitutes a waiver of that defense in the court of appeals."¹⁷⁷

Granberry, however, was not concerned with Indians or the question of tribal jurisdiction, but rather involved a habeas corpus petition and the effect of a state's failure to raise in federal district court the defense that the petitioner had not exhausted available state remedies. The Supreme Court determined that federal appellate courts in such instances possess discretion to decide whether exhaustion is required or whether "the interests of comity and federalism will be better served by addressing the merits forthwith."¹⁷⁸

Granberry thus has little to do with the tribal exhaustion/abstention doctrine set forth in *National Farmers Union* and *Iowa Mutual*. Yet it is a fount for the view, espoused by numerous federal courts, that the tribal exhaustion/abstention doctrine, when applicable, is mandatory. The connection is found in the Court's discussion of two alternatives to its eventual disposition. Instead of allowing appellate courts to exercise discretion over the matter, the Court noted that it could treat the failure to assert the nonexhaustion defense as a procedural default precluding the state from raising the issue on appeal, or, on the other extreme, it could "treat nonexhaustion as an *inflexible bar* to consideration of the merits of the petition by the federal court, and therefore require that a petition be dismissed when it appears that there has been a failure to exhaust."¹⁷⁹

In support of this statement, the *Granberry* Court, in a unanimous decision authored by the ubiquitous Justice Stevens, cites both *Iowa Mutual* and *National Farmers Union*.¹⁸⁰ Since Stevens dissented in *Iowa Mutual*, however, his characterization of the case as posing an "inflexible bar" to the exercise of federal court jurisdiction prior to exhaustion of tribal remedies may simply be based on *his* view of the reach of the majority decision in *Iowa Mutual*.¹⁸¹ Moreover, by

177. *Id.* at 130.

178. *Id.* at 134.

179. *Id.* at 131 (emphasis added).

180. *Id.* at 131 n.4. *Iowa Mutual* is characterized by Stevens as holding that a "district court may not exercise diversity jurisdiction until remedies in parallel tribal court proceeding[s] have been exhausted," and *National Farmers Union* is described as holding that "comity requires that tribal remedies be exhausted before [a] district court considers [the] issue of tribal court jurisdiction." *Id.*

181. See *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 22 (1987) (Stevens, J., concurring in part dissenting in part) ("Today's opinion . . . requires the federal court to avoid adjudicating the merits of a controversy also pending in tribal court although it could reach those merits if the case instead were pending in state court.") (emphasis added). Whereas in

describing the tribal exhaustion/abstention doctrine as prohibiting the exercise of federal jurisdiction "until remedies in *parallel* tribal court proceeding[s] have been exhausted,"¹⁸² Justice Stevens' reference to *Iowa Mutual* can be read as suggesting only that the doctrine is mandatory ("an inflexible bar") in certain instances where it is applicable (i.e., when there are parallel tribal court proceedings). In any event, a footnote in a habeas corpus case is an unlikely place to look for edification of the tribal exhaustion/abstention doctrine.

Although the Supreme Court has issued over twenty decisions involving Indians and Indian tribes since *Iowa Mutual*,¹⁸³ it has referred to the tribal exhaustion/abstention doctrine in only one instance, *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*,¹⁸⁴ where it was *not* applied.¹⁸⁵ The failure to apply the ex-

Iowa Mutual the other eight Justices did not respond to Stevens' dissent, in *Granberry* the same eight Justices likewise were silent with respect to Stevens' characterization—on behalf of the unanimous Court—of the *Iowa Mutual* holding.

182. *Granberry*, 481 U.S. at 131 n.4 (emphasis added).

183. See *Babbitt v. Youpee*, 65 U.S.L.W. 4069 (Jan. 21, 1997); *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S. Ct. 2214 (1995); *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994); *Hagen v. Utah*, 510 U.S. 399 (1994); *South Dakota v. Bourland*, 508 U.S. 679 (1993); *Lincoln v. Vigil*, 508 U.S. 182 (1993); *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114 (1993); *Negonsott v. Samuels*, 507 U.S. 99 (1993); *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992); *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775 (1991); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991); *Duro v. Reina*, 495 U.S. 676 (1990); *Employment Div. v. Smith*, 494 U.S. 872 (1990); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989); *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838 (1989); *Employment Div. v. Smith*, 485 U.S. 660 (1985); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *Hodel v. Irving*, 481 U.S. 704 (1987); *United States v. Cherokee Nation*, 480 U.S. 700 (1987); *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531 (1987); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

184. *Brendale*, 492 U.S. at 408.

185. *Id.* at 427 n.10, 454-56, 467. In *Brendale*, the Justices debated whether *National Farmers Union* and *Iowa Mutual* should be broadly viewed as reaching the question of whether tribal courts have civil jurisdiction over non-Indians, or narrowly read as "establishing no more than an 'exhaustion rule' permitting tribal courts to determine their jurisdiction, or lack thereof, in the first instance." *Id.* at 454 n.5. See also *id.* at 427 n.10 & *supra* note 159. The applicability of the tribal exhaustion/abstention rule to the facts at hand, however, was not discussed in *Brendale*.

The only Supreme Court decision (other than *Granberry*) that has cited either *National Farmers Union* or *Iowa Mutual* is *California v. Cabazon Band of Mission Indians*, where *Iowa Mutual* is cited in support of the existence of the congressional goal of encouraging tribal self-sufficiency and economic development. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-17 (1987).

haustion/abstention doctrine in *Brendale* and the absence of any reference to the doctrine in *South Dakota v. Bourland*¹⁸⁶ is puzzling. In both *Brendale* and *Bourland*, the scope of tribal regulatory jurisdiction was challenged in federal court without exhausting available tribal remedies.¹⁸⁷ In quite similar cases, the lower federal courts have required federal abstention and exhaustion of tribal remedies.¹⁸⁸ This failure by the Supreme Court to address the applicability of the tribal exhaustion/abstention doctrine—particularly in *Bourland*, where the issue was addressed in the lower court proceedings¹⁸⁹—has added to the confusion regarding the scope and flexibility of *National Farmers Union* and *Iowa Mutual*.¹⁹⁰

186. 508 U.S. 679 (1993).

187. In *Brendale*, the Yakima Nation brought actions in the federal district court challenging the County of Yakima's authority to zone fee lands owned by nonmembers of the Tribe located within the boundaries of the Yakima Reservation. *Brendale*, 492 U.S. at 414-19. In *Bourland*, the State of South Dakota filed suit in federal district court seeking to enjoin the Cheyenne River Sioux Tribe from excluding non-Indians from hunting on non-trust lands within the Cheyenne River Reservation. *Bourland*, 508 U.S. at 685.

188. See, e.g., *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294 (8th Cir. 1994) (challenging tribal taxes imposed on real and personal property within the reservation and on all oil and gas produced within the reservation); *Texaco, Inc. v. Zah*, 5 F.3d 1374 (10th Cir. 1993) (challenging tribal authority to assess severance and business activity taxes on activities occurring outside the reservation); *Burlington N. R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239 (9th Cir. 1991) (challenging tribal ordinance regulating railroads crossing the reservation); *Middlemist v. Secretary of United States Department of Interior*, 824 F. Supp. 940 (D. Mont. 1993), *aff'd without opinion*, 19 F.3d 1318 (9th Cir. 1994) (challenging tribal civil regulatory ordinance designed to protect the quality of reservation aquatic habitat).

189. In its second amended complaint in *Bourland*, the State of South Dakota alleged that "[e]xhaustion of tribal remedies is not mandated in this case" because the actions of the tribe were "patently violative of the express jurisdictional prohibitions . . . plainly motivated by a desire to harass, [and] taken in bad faith." Brief for Petitioner, Joint Appendix, Volume One, at 35-36, *South Dakota v. Bourland*, 508 U.S. 679 (1993) (No. 91-2051). The district court noted that the tribal defendants "raise the specter of *National Farmers Union* . . . for the proposition that scrutiny of the enforcement provisions of the game ordinance rests initially with the tribal court." *South Dakota v. Ducheneaux*, No. CIV. 88-3049, 1990 WL 605077 at *8 (D.S.D. Aug. 21, 1990). Although the district court observed that "*National Farmers* supports this position," it dismissed the claim relating to possible criminal enforcement of the tribal game ordinance on the alternative ground of absence of a justiciable case or controversy. *Id.* The court of appeals did not address the exhaustion/abstention argument. See *South Dakota v. Bourland*, 949 F.2d 984 (8th Cir. 1991).

190. Phillip Lear and Blake Miller have stated that, "[i]n light of *Bourland* and *Brendale*, the conclusion to be drawn is that *National Farmers* and *Iowa Mutual* stand for the narrow proposition that exhaustion in federal questions cases is mandatory if and when the only federal question is the scope of tribal court jurisdiction to hear the case." Lear and Miller, *supra* note 19, at 286. Laurie Reynolds and Judge James Loken of the Eighth Circuit are not as sure. See Reynolds, *supra* note 16, at 1150 (*National Farmers Union*, when coupled with *Brendale*, "leaves the lower federal courts in the quandary of having to decide whether to follow the Supreme Court's stated holding that exhaustion is required in all challenges to tribal

B. The Flexibility Issue

*Crawford v. Genuine Parts Company*¹⁹¹ is the first case to squarely address the relevance of the dicta of *Granberry v. Greer* to the question of whether the tribal exhaustion/abstention doctrine was intended to be mandatory when applicable. The facts in *Crawford* favored retention of federal court jurisdiction: the exhaustion/abstention argument was raised less than thirty days prior to trial and more than two years after the defendants had removed the action from state court, where it was instituted by the Indian litigants, to federal district court.¹⁹² The district court, however, was faced with the question of whether the exhaustion/abstention rule of *National Farmers Union* and *Iowa Mutual* represents, as suggested in *Granberry*, an "inflexible bar" which precludes the exercise of federal jurisdiction in all cases involving Indians until tribal court remedies are exhausted. The court, in denying the motion to dismiss, rejected "this extreme position,"¹⁹³ and the plaintiffs' reliance on the *Granberry* dicta:

These references [in *Granberry*] to *Iowa Mutual* and *National Farmers Union* should not be viewed as dispositive of the precise issue *sub judice*. The Court's holdings in those cases cannot be

jurisdiction or its actual practice, which does not require exhaustion in challenges to the scope of tribal regulatory jurisdiction."); see also *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1302 (8th Cir. 1994) (Loken, J., concurring). Judge Loken describes two ways to interpret the Supreme Court's statements and actions:

Perhaps the Supreme Court did not consider this question because no party raised it. On the other hand, perhaps the Court did consider and reject exhaustion for cases raising *Montana* exception issues, rather than tribal court jurisdiction issues. Though the question is hardly free from doubt, I think the first answer must be correct, particularly because the Court cited *Montana* in developing its exhaustion principles in *National Farmers Union*.

Id.; see also *Alleva et al.*, *supra* note 19, at 545, 561.

191. 737 F. Supp. 1121 (D. Mont. 1990), *rev'd*, 947 F.2d 1405 (9th Cir. 1991).

192. *Id.* at 1122. The personal injury actions had their genesis in a vehicular accident on a highway within the boundaries of the Blackfeet Reservation. *Id.* The tribal members, who were apparently injured in 1984 or early 1985 and thus prior to the Supreme Court's decision in *National Farmers Union*, filed their actions in state court. *Id.* The actions were later removed to federal court by the non-Indian defendants in early 1987, at about the same time the Supreme Court decided *Iowa Mutual*. *Id.* The Indian litigants then waited two more years, until the eve of trial, to make their belated motion to dismiss for failure to exhaust tribal court remedies. *Id.*

The plaintiffs alleged that the accident was caused by the failure of replacement parts for the vehicle's braking system which were manufactured by the defendants. *Id.* The replacement parts were manufactured, sold, and installed at locations outside the Blackfeet Reservation. *Id.* at 1123.

193. *Id.* at 1126.

divorced from their factual underpinnings. In *Iowa Mutual* parallel tribal court proceedings were pending. In *National Farmers Union*, the jurisdiction of the tribal court was being subjected to a direct challenge over proceedings pending before it in federal court. Granted, nonexhaustion may be inflexible where parallel proceedings are pending. However, this court does not perceive the references as either an express or implied adoption by the Court of an inflexible rule of exhaustion which would serve to preclude the federal courts from exercising jurisdiction, in the first instance, over the merits of any civil dispute having its genesis in a transaction which occurred within an Indian reservation.¹⁹⁴

The Ninth Circuit, however, felt it was required to reject the district court's flexible approach to the exhaustion/abstention doctrine, holding that "[w]hile the district court's reasoning was compelling, we do not perceive room in the Supreme Court's precedents for a decision not to defer."¹⁹⁵ Without referring to the Supreme Court's dicta in *Granberry*, the court of appeals relied on its statement in *Burlington Northern R.R. Co. v. Crow Tribal Council*,¹⁹⁶ that "[t]he requirement of exhaustion of tribal remedies is not discretionary; it is mandatory."¹⁹⁷

Since *Crawford*, the notion that the exhaustion/abstention doctrine is in fact an "inflexible bar" to the exercise of federal court concurrent jurisdiction has become widely credited.¹⁹⁸ Other courts, without

194. *Id.* at 1126-27 n.9.

195. *Crawford v. Genuine Parts Co., Inc.*, 947 F.2d 1405, 1408 (9th Cir. 1991). More precisely, the court held that the exhaustion/abstention doctrine is mandatory when applicable. "[T]his is not a case in which a district court enjoys discretion to proceed [since the] dispute 'arose on the reservation' and the assertion of tribal court jurisdiction did not fall within one of the *National Farmers Union* exceptions." *Id.*

196. 940 F.2d 1239 (9th Cir. 1991).

197. *Id.* at 1245 (quoted in *Crawford*, 947 F.2d at 1407). The Ninth Circuit in *Burlington N. R.R. Co.* likewise did not rely on the dicta in *Granberry* for its conclusion that the tribal exhaustion/abstention doctrine is mandatory when applicable. Instead, it reached the questionable conclusion that the Supreme Court's statement in *National Farmers Union* that "exhaustion is required," meant that the exhaustion requirement was intended to be inflexible and absolute. *Burlington N. R.R. Co.* 940 F.2d at 1245 (citing *National Farmers Union*, 471 U.S. at 857); *See also supra* notes 153-54 and accompanying text.

198. Several courts have cited the *Granberry* "inflexible bar" dicta in support of the view that the tribal exhaustion/abstention rule is mandatory when applicable. *See, e.g.*, *Texaco, Inc. v. Hale*, 81 F.3d 934, 936 (10th Cir. 1996); *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1537 (10th Cir. 1995); *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1300 (8th Cir. 1994); *Texaco, Inc. v. Zah*, 5 F.3d 1374, 1378 (10th Cir. 1993); *Smith v. Moffett*, 947 F.2d 442, 445 (10th Cir. 1991); *Prescott v. Little Six, Inc.*, 897 F. Supp. 1217, 1221 (D. Minn. 1995); *Barker v. Menominee Nation Casino*, 897 F. Supp. 389, 397 (E.D. Wis. 1995); *Kerr-McGee Corp. v. Farley*, 915 F. Supp. 273, 279 (D.N.M. 1995); *Kaul v. Wahquahboshkuk*,

relying on the "inflexible bar" language of *Granberry*, have similarly concluded that federal abstention and exhaustion of tribal remedies is mandatory when applicable.¹⁹⁹

On the other hand, courts that have rejected the notion that the tribal exhaustion/abstention doctrine is a mandatory, inflexible bar, have stressed (1) the particular factual situations of *National Farmers Union* and *Iowa Mutual*; (2) the policy concerns behind the exhaustion/abstention rule; (3) the countervailing "virtually unflagging obligation" to exercise conferred jurisdiction; and (4) the repercussions of mandating federal abstention. For example, in *Alzheimer & Gray v. Sioux Manufacturing Corp.*,²⁰⁰ the district court noted that "[t]he limited circumstances where the Supreme Court has applied the tribal exhaustion rule suggest . . . [a] measured and contextual application of the rule."²⁰¹ On appeal, the Seventh Circuit likewise rejected a bright line test, and focused instead on whether "the application of the tribal exhaustion rule would . . . serve the policies articulated in *Iowa Mutual* and *National Farmers*."²⁰² Individual judges have emphasized the

838 F. Supp. 515, 517 (D. Kan. 1993). *But see* *Vance v. Boyd Miss., Inc.*, 923 F. Supp. 905, 908-13 (S.D. Miss. 1996) (rejecting the argument that the tribal exhaustion rule is an inflexible bar).

199. *See, e.g.*, *Bull v. United States Dept. of Hous. and Urban Dev.*, No. 92-35257, 1994 WL 6653, at *4 (9th Cir. Jan. 10, 1994); *Stock West Corp. v. Taylor*, 942 F.2d 655, 660-61 (9th Cir. 1991); *Burlington N. R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991); *Basil Cook Enter., Inc. v. St. Regis Mohawk Tribe*, 914 F. Supp. 839, 841 (N.D.N.Y. 1996); *Smith v. Babbitt*, 875 F. Supp. 1353, 1367 (D. Minn. 1995); *Bowen v. Doyle*, 880 F. Supp. 99, 123 (W.D. N.Y. 1995); *Langley v. Edwards*, 872 F. Supp. 1531, 1535 (W.D. La. 1995), *aff'd without opinion*, 77 F.3d 479 (5th Cir. 1996); *Espil v. Sells*, 847 F. Supp. 752, 756 (D. Ariz. 1994); *Cropmate Co. v. Indian Resources Int. Inc.*, 840 F. Supp. 744, 745-48 (D. Mont. 1993); *Tohono O'Odham Nation v. Schwartz*, 837 F. Supp. 1024, 1029 (D. Ariz. 1993); *Middlemist v. Secretary of United States Dept. of Interior*, 824 F. Supp. 940, 943-44 (D. Mont. 1993), *aff'd without opinion*, 19 F.3d 1318 (9th Cir. 1994).

200. No. 91 C 3496, 1991 WL 261332 (N.D. Ill. Nov. 15, 1991) (withdrawn from bound volume at the request of the court).

201. *Id.* at *3. *See also* *Vance*, 923 F. Supp. at 908-12 (holding a bright line rule of tribal exhaustion was not contemplated by the Supreme Court in either *Iowa Mutual* or *National Farmers*); *Duncan Energy Co. v. Three Affiliated Tribes*, 812 F. Supp. 1008, 1011-12 (D.N.D. 1992), *rev'd*, 27 F.3d 1294 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 779 (1995) (limiting *National Farmers Union* and *Iowa Mutual* to their facts); *Crawford v. Genuine Parts Co.*, 737 F. Supp. 1121, 1126-27 (D. Mont. 1990), *rev'd*, 947 F.2d 1405 (9th Cir. 1991) (limiting *National Farmers Union* and *Iowa Mutual* to their facts).

202. *Alzheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 814-15 (7th Cir. 1993). *See also* *Pittsburg & Midway Coal Mining Co.*, 52 F.3d at 1537 ("The facts and circumstances of each individual situation will determine whether comity requires abstention in that particular instance."); *Stock West Corp.*, 942 F.2d at 661 ("A federal court must examine the circumstances of the individual case in order to determine if deference is necessary, in light of the purposes of the exhaustion requirement."); *Vance*, 923 F. Supp. at 911 (holding that the

adverse consequences of a mandatory tribal exhaustion/abstention doctrine. Judge James Loken, in his concurring opinion in *Duncan Energy Company v. Three Affiliated Tribes*,²⁰³ found the application of the exhaustion/abstention doctrine when there is no case pending in the tribal court to be a "most serious" problem, since "[r]equiring 'exhaustion' in a forum not chosen by any party looks like a subversion of 'the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.'"²⁰⁴ In a similar fashion, Judge Diarmuid O'Scannlain of the Ninth Circuit has observed that "[a] federal court's decision to defer to the tribal courts does not come without costs, because the party that chose to pursue its cause of action in federal court is deprived of an adjudication by the forum of choice unless the tribal court has no jurisdiction."²⁰⁵ This "nonjurisdictional nonreviewability"²⁰⁶ consequence of mandatory federal abstention is often ignored, or simply misunderstood, by the courts that subscribe to the "inflexible bar" interpretation of *National Farmers Union* and *Iowa Mutual*.²⁰⁷

fact that the purposes behind rule would not be furthered "weigh[ed] heavily in favor of this Court retaining jurisdiction over this action.").

203. *Duncan Energy Co.*, 27 F.3d at 1294.

204. *Id.* at 1302-03 (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

205. *Stock West Corp.*, 942 F.2d at 660. Judge O'Scannlain dissented from the *en banc*'s decision to require abstention, noting again that abstention "deprives the plaintiff of his statutory entitlement to choose a federal court as his forum," as well as adding delay and expense to litigation. *Stock West Corp. v. Taylor*, 964 F.2d 912, 923 (9th Cir. 1992). In his view, "[w]here the tribe has little or no interest in the matter, there is no justification for imposing this cost upon the litigant." *Stock West Corp.*, 942 F.2d at 660.

206. *Arrow*, *supra* note 159, at 491.

207. For example, in *United States v. Tsosie*, the court of appeals held that the "where the United States commences an ejectment and trespass action on behalf of an Indian against another Indian involving land located in Indian country, it is required to exhaust remedies in tribal court prior to initiating an action in district court." *United States v. Tsosie*, 92 F.3d 1037, 1044 (10th Cir. 1996) (emphasis added). The court of appeals thus clearly believed that, after exhaustion of tribal court remedies, the federal government could bring suit in federal court. Yet the court's reference to *Iowa Mutual* does not support its conclusion. The Tenth Circuit cited *Iowa Mutual's* statement that "[a]lthough [appellant] must exhaust available tribal remedies before instituting suit in federal court, the [tribal court's] determination of tribal jurisdiction is ultimately subject to review." *Id.* at 1044 n.13 (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987)) (emphasis added). Thus, if the tribal court does possess concurrent jurisdiction over the dispute, the United States will not be able to initiate an action in district court following exhaustion of tribal court remedies. Moreover, the merits will also be insulated from any federal appellate or *certiorari* review. See *infra* Part V.C.1. See also *Bruce H. Lien Co. v. Three Affiliated Tribes*, 94 F.3d 1412, 1420-22 (8th Cir. 1996) (suggesting that, despite the "nonjurisdictional nonreviewability" directive of *Iowa Mutual*, the tribal court's discussion of its jurisdiction and its determination regarding the legal validity of a casino gambling management contract would be reviewed by the district court following

C. The Applicability Issues

The debate over the scope of the tribal exhaustion/abstention doctrine at its core is a dispute over how broadly one should read the two foundational Supreme Court decisions. Neither *National Farmers Union* nor *Iowa Mutual* addresses the applicability of the tribal exhaustion/abstention doctrine when (1) there is no tribal action pending at the time federal jurisdiction is invoked; (2) the controversy concerns incidents which occurred off the reservation; (3) "resolution of the dispute requires a determination of federal law;"²⁰⁸ and/or (4) the dispute involves the United States or a federal agency. As discussed below, lower federal courts that have employed a flexible "purpose approach" to the tribal exhaustion/abstention doctrine emphasize the presence or absence of these factors, whereas courts that broadly view the doctrine as constituting a mandatory command discount their relevance.

1. Should the Exhaustion/Abstention Doctrine Apply in the Absence of a Pending Tribal Action?

As previously noted,²⁰⁹ the federal suits in both *National Farmers Union* and *Iowa Mutual* were filed while tribal court proceedings involving the same parties were already pending. Moreover, in *Granberry*, Justice Stevens stressed the fact that federal abstention was required in *Iowa Mutual* in light of the "parallel tribal court proceeding."²¹⁰ Consequently, it is not surprising that several courts have cited the absence of a pending tribal action in support of a decision not to apply the tribal exhaustion/abstention doctrine.²¹¹ In *Crawford v.*

exhaustion of tribal remedies); *Duncan Energy Co.*, 27 F.3d at 1302 (Loken, J., concurring) (identifying as "a problem" the fact that a tribal court determination of federal law will be the "last word" in view of the "often ignored but highly significant passage in *Iowa Mutual*" which holds that federal courts are precluded from relitigating nonjurisdictional issues resolved in tribal courts); *State v. Hicks*, 944 F. Supp. 1455, 1469 n.27 (D. Nev. 1996) (noting the uncertainty regarding post exhaustion judicial review and "express[ing] no opinion as to whether it would have jurisdiction to review a tribal court determination of that issue.").

208. *Lear & Miller*, *supra* note 19, at 286.

209. *See supra* notes 174-75 and accompanying text.

210. *Granberry v. Greer*, 481 U.S. 129, 131 n.4 (1987). *See supra* notes 180-81 and accompanying text.

211. *See, e.g., Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 814 (7th Cir. 1993); *Burlington Northern R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 n.2 (9th Cir. 1991); *Ute Dist. Corp. v. Secretary of the Interior*, 934 F. Supp. 1302, 1311 (D. Utah 1996); *Vance v. Boyd Miss., Inc.*, 923 F. Supp. 905, 911 (S.D. Miss. 1996).

Genuine Parts Company,²¹² the district court offered the following explanation for focusing on the presence or absence of parallel tribal proceedings:

The necessity of deferring to tribal courts is certainly less compelling when no party to the federal court proceedings has availed himself of the tribal forum, or, at the very least, timely requested the federal court to afford him the opportunity to do so. Reason alone would dictate that in such a circumstance, the federal court [should] consider whether an insistence on exhaustion of tribal court remedies would prove conducive to either the promotion of tribal self[-]government or the orderly administration of justice; the principal considerations upon which the exhaustion rule is bottomed.²¹³

The Ninth Circuit, however, reached the contrary conclusion, holding that "[w]hether proceedings are actually pending in the appropriate tribal court is irrelevant."²¹⁴ Rather than discussing whether the purposes behind the exhaustion/abstention doctrine would be furthered by its application in the absence of a pending tribal action, the court of appeals subscribed to the view that, because the dispute "arose on the reservation" and the *National Farmers Union* exceptions were inapplicable, "this was not a case in which a district court enjoyed discretion to proceed."²¹⁵ Although lower federal courts are divided on this issue, the majority of courts addressing it have held that the lack of pending tribal action, at least by itself, should not prevent the application of the tribal exhaustion/abstention rule.²¹⁶ Courts favoring application have tended to focus on the "heightened sensitivity to tribal sovereignty present in federal-tribal comity cases,"²¹⁷ and have correspondingly deemphasized the duty of a federal court to exercise the jurisdiction conferred upon it by Congress.²¹⁸

212. 737 F. Supp. 1121 (D. Mont. 1990), *rev'd*, 947 F.2d 1405 (9th Cir. 1991).

213. *Id.* at 1127.

214. *Crawford v. Genuine Parts Co.*, 947 F.2d 1405, 1407 (9th Cir. 1991) (citing *Wellman v. Chevron, U.S.A., Inc.*, 815 F.2d 577 (9th Cir. 1987)).

215. *Id.* at 1408.

216. See, e.g., *United States v. Tsosie*, 92 F.3d 1037, 1041 (10th Cir. 1996); *Texaco, Inc. v. Zah*, 5 F.3d 1374, 1376 (10th Cir. 1993); *United States v. Plainbull*, 957 F.2d 724, 726 (9th Cir. 1992); *Smith v. Moffett*, 947 F.2d 442, 444 (10th Cir. 1991); *United States ex rel. Kishell v. Turtle Mountain Hous. Auth.*, 816 F.2d 1273, 1276 (8th Cir. 1987); *Barker v. Menominee Nation Casino*, 897 F. Supp. 389, 396 n.6 (E.D. Wis. 1995); *Kaul v. Wahquahboshkuk*, 838 F. Supp. 515, 517 (D. Kan. 1993).

217. *Moffett*, 947 F.2d at 445.

218. *But see supra* note 203-04 and accompanying text.

2. Should the Exhaustion/Abstention Doctrine Apply when the Controversy Concerns Incidents Which Occurred Off the Reservation

The Supreme Court in *Iowa Mutual* stressed that unconditional access to federal courts could impair the authority of tribal courts "over reservation affairs."²¹⁹ The lower courts, in applying the exhaustion/abstention doctrine, have struggled with what constitutes a "reservation affair" and, particularly, whether the rule of *National Farmers Union* and *Iowa Mutual* should be applied when the underlying transaction or event occurred outside the reservation's boundaries.

The courts have split into three camps on this point. Several cases in the Ninth Circuit held that, when a dispute is a "reservation affair" and the *National Farmers Union* exceptions are inapplicable, application of the exhaustion/abstention rule is mandatory and hence "there is no discretion not to defer."²²⁰ Under this approach, whether the dispute at issue is a reservation affair is the "determinative inquiry."²²¹

219. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987).

220. *Crawford*, 947 F.2d at 1408. See also *Burlington N. R.R. Co. v. Red Wolf*, 1997 WL 30985 *1, *1-*3 (9th Cir. Jan. 29, 1997); *Stock West Corp. v. Taylor*, 942 F.2d 655, 661 (9th Cir. 1991), *aff'd in part and vacated in part*, 964 F.2d 912 (9th Cir. 1992); *Wellman v. Chevron U.S.A., Inc.*, 815 F.2d 577, 579 (9th Cir. 1987); *Middlemist v. Secretary of United States Dep't of Interior*, 824 F. Supp. 940, 944 (D. Mont. 1993), *aff'd without opinion*, 19 F.3d 1318 (9th Cir. 1994); *Cropmate Co. v. Indian Resources Int'l Inc.*, 840 F. Supp. 744, 747 (D. Mont. 1993). But see *Burlington N. R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 n.2 (9th Cir. 1991) (holding that abstention and exhaustion is not required even though the dispute concerned tribal authority to regulate railroad's activities on the reservation). *Burlington Northern v. Blackfeet Tribe* has been described by the Ninth Circuit as "something of an anomaly." *Stock West Corp.*, 942 F.2d at 663 n.7.

The statement in *Crawford* that federal courts lack the discretion "not to defer" when the dispute in question is a "reservation affair" was quoted with approval by a district court in the Fifth Circuit. See *Langley v. Edwards*, 872 F. Supp. 1531, 1535 (W.D. La. 1995), *aff'd without opinion*, 77 F.3d 479 (5th Cir. 1996) (quotation omitted). But see *Vance v. Boyd Miss. Inc.*, 923 F. Supp. 905, 911 (S.D. Miss. 1996) (rejecting "the bright-line rule of requiring tribal exhaustion" and determining, in "a case involving a dispute between two non-Indians, concerning only issues of federal law, which happened to arise on the Reservation in a business owned by the Tribe but which is managed by a non-Indian corporation," that "tribal exhaustion of remedies is not required.").

221. *Cropmate Co.*, 840 F. Supp. at 747. The question whether particular transactions or occurrences constitute a "reservation affair" is in some cases difficult to answer. In *Stock West Corp. v. Taylor*, the Ninth Circuit, sitting *en banc*, considered whether the district court properly abstained from exercising its diversity jurisdiction over a suit, brought by a non-Indian corporation against a non-Indian attorney, that claimed legal malpractice on the basis of a letter which was both written and delivered off the reservation. *Stock West Corp.*, 964 F.2d at 912 (9th Cir. 1992). Concluding that "the record presents a colorable question whether the alleged malpractice and false representations arose out of a contractual relationship . . . that commenced on tribal lands," the court found that the district court did not abuse its

In contrast, the Seventh Circuit, in *Alzheimer & Gray v. Sioux Manufacturing Corporation*,²²² eschewed reliance on any bright-line test and focused on whether the application of the exhaustion/abstention doctrine would "serve the policies articulated in *Iowa Mutual* and *National Farmers*."²²³ In determining whether the issue in dispute was "truly a reservation affair,"²²⁴ the court of appeals did not limit itself to a geographic inquiry, but stressed that "there has been no direct attack on a tribal court's jurisdiction, there is no case pending in tribal court, and the dispute does not concern a tribal ordinance as much as it does state and federal law."²²⁵ Perhaps most significantly, the court noted that "the tribal entity wished to avoid characterization of the contract as a reservation affair by actively seeking the federal forum."²²⁶

The Tenth Circuit has fashioned an intermediate, "sliding scale"²²⁷ approach to the "reservation affair" issue. In *Texaco, Inc. v. Zah*,²²⁸ the court focused on the policies behind the exhaustion/abstention doctrine, and determined that a fairly rigid rule (similar, but not identical, to the Ninth Circuit's approach) makes the most sense when a case concerns "purely intra-reservation affairs,"²²⁹ whereas a more flexible test (like the Seventh Circuit's approach) works best in other situations:

When the activity at issue arises on the reservation, these policies [behind the exhaustion/abstention rule] almost always dictate that the parties exhaust their tribal remedies before resorting to the federal forum When the dispute involves non-Indian activity occurring outside the reservation, however, the policies behind the tribal exhaustion rule are not so obviously served. Under these circumstances, we must depend upon the district courts to examine assiduously the *National Farmers* factors in determining

discretion in dismissing the federal action as a matter of comity. *Id.* at 919-20. The prior panel decision had concluded that "a non-Indian's breach of an independent duty to another non-Indian, occurring off of the reservation, falls without the nebulous confines of a 'reservation affair' and does not arise on the reservation." *Stock West Corp.*, 942 F.2d at 663 (quotation omitted). See also Reynolds, *supra* note 16, at 1114-16.

222. 983 F.2d 803 (7th Cir. 1993).

223. *Id.* at 815.

224. *Id.* at 814.

225. *Id.*

226. *Id.* at 815.

227. *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1537 (10th Cir. 1995).

228. 5 F.3d 1374 (10th Cir. 1993).

229. *Id.* at 1378.

whether comity requires the parties to exhaust their tribal remedies before presenting their dispute to the federal courts.²³⁰

Thus, in the Tenth Circuit, "application of the doctrine may differ outside the formal boundaries of a reservation [and the] facts and circumstances of each individual situation will determine whether comity requires abstention in that particular instance."²³¹

3. Should the Exhaustion/Abstention Doctrine Apply when the Resolution of the Underlying Dispute Requires a Determination of Federal Law?

Although the exhaustion rule in *National Farmers Union* "was itself created to allow the tribal court to rule on an issue of federal law (whether the tribal court had jurisdiction over the dispute), some courts nevertheless have held that the federal court need not defer to the tribal court for resolution of federal issues."²³² This issue did not arise in either *National Farmers Union*, which raised only the question of tribal

230. *Id.* With respect to disputes arising on the reservation, the court of appeals supported its strong rule favoring abstention and exhaustion ("almost always") with cites to *Granberry v. Greer* and the Ninth Circuit's decision in *Crawford v. Genuine Parts*. *Id.* With regard to the case-by-case approach to disputes involving non-Indian activity occurring outside the reservation, the Tenth Circuit cited the Seventh Circuit's *Alzheimer & Gray* decision. *Id.*

231. *Pittsburg & Midway Coal*, 52 F.3d at 1537. In *Pittsburg & Midway Coal*, the court concluded that application of the doctrine "would serve the policies articulated in *National Farmers* and *Iowa Mutual*." *Id.* See also *United States v. Tsosie*, 92 F.3d 1037, 1042-43 (10th Cir. 1996). The court in *Tsosie* stated:

We agree with the district court's conclusion that abstention is appropriate under the *National Farmers* factors. Because the dispute here is between two Navajo Indians and involves land located in Navajo Indian country, we believe this case is essentially "a reservation affair" in which exhaustion of a tribal court remedy is almost always required.

Id. See also *Texaco, Inc. v. Hale*, 81 F.3d 934, 937 (10th Cir. 1996) (holding that the district court did not err when, after conducting "a point by point analysis of the *National Farmers* factors," it concluded that abstention was appropriate).

232. *Reynolds*, *supra* note 16, at 1116. A distinction is made between cases where the federal issue is whether a tribal court has exceeded the lawful limits of its jurisdiction, and other cases where a party does not contest a tribal court's jurisdiction, but instead requests a federal court to exercise its jurisdiction over a claim that is based on federal law. See *Skibine*, *supra* note 19, at 197 (noting that, within the issue of whether the exhaustion requirement should apply to cases involving purely questions of federal law, "a sub-issue to be explored is whether exhaustion applies to cases where federal court jurisdiction is premised on a federal question but the federal question is not whether the tribal court has jurisdiction."); *Ute Distribution Corp. v. Secretary of the Interior*, 934 F. Supp. 1302, 1311 (D. Utah 1996) (holding that, whereas the federal question in *National Farmers Union* concerned the limits of tribal court jurisdiction, "the instant case involves a federal question of a completely different nature. Here, the plaintiffs seek a declaratory judgment interpreting and clarifying the provisions of a piece of federal legislation.").

court jurisdiction, or *Iowa Mutual*, where the Supreme Court supported its abstention holding by observing that "tribal courts are best qualified to interpret and apply tribal law."²³³

There is no question that, when the underlying dispute is an "internal" matter that is premised on tribal law, the policy of promoting tribal self-government is at its zenith, and the federal courts have readily applied the tribal exhaustion/abstention rule in such situations.²³⁴ When a case predominately presents issues of federal law, however, the applicability of the doctrine is less clear. Some courts have concluded that "the fact that issues of federal law are involved does not diminish the benefits of exhaustion."²³⁵ Other courts, however, have emphasized, as a factor weighing against abstention and exhaustion, the fact

233. *Iowa Mut.*, 480 U.S. at 16 (emphasis added).

234. See, e.g., *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1300 (8th Cir. 1994), *cert denied*, 115 S.Ct 779 (1995) ("We find [that] this dispute . . . raises questions of tribal law and jurisdiction that should first be presented to the tribal court."); *Burlington N. R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1246 (9th Cir. 1991) ("[A]n initial exercise of tribal jurisdiction not only would bolster tribal self-government, but also would provide any subsequently reviewing federal court with authoritative interpretation of the [tribal] ordinance."); *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 673 (8th Cir. 1986) ("[T]his contract dispute arose on the reservation and raises questions of tribal law interpretation within the province of the tribal court."); *Prescott v. Little Six, Inc.*, 897 F. Supp. 1217, 1223 (D. Minn. 1995) ("This defense is predicated upon issues which implicate tribal law, and as such falls within the expertise of the tribal court."); *Krempel v. Prairie Island Indian Community*, 888 F. Supp. 106, 109 (D. Minn. 1995) ("Because the conduct of tribal employees and the operation of the Casino are issues which clearly implicate tribal law, the tribal court is the proper forum for plaintiff to first raise his claims."); *Bowen v. Doyle*, 880 F. Supp. 99, 125 (W.D.N.Y. 1995) ("The Peacemakers Court is clearly the best qualified to interpret and apply Nation law."); *Smith v. Babbitt*, 875 F. Supp. 1353, 1367 (D. Minn. 1995) (holding that the action "unquestionably raises questions of tribal law."); *Atkinson Trading Co. v. Navajo Nation*, 866 F. Supp. 506, 512 (D.N.M. 1994) ("The Navajo tribal courts would be in the best position, at least in the first instance, to evaluate tribal law in light of existing federal law."); *United States v. Tsosie*, 849 F. Supp. 768, 774 (D.N.M. 1994), *aff'd*, 92 F.3d 1037 (10th Cir. 1996) (stating that exhaustion is required because "[o]therwise, this Court would be asked to consider the application of tribal common law.")

235. *Middlemist v. Secretary of United States Dep't of Interior*, 824 F. Supp. 940, 945 (D. Mont. 1993), *aff'd without opinion*, 19 F.3d 1318 (9th Cir. 1994). See also *United States v. Plainbull*, 957 F.2d 724, 728 (9th Cir. 1992) ("Considerations of comity require the exhaustion of tribal remedies . . . [d]espite the fact that the federal government is seeking to enforce a federal law."); *State v. Hicks*, 944 F. Supp. 1455, 1467 (D. Nev. 1996) ("The presence of federal law issues in the tribal court litigation does not compel the conclusion that tribal court jurisdiction may not lie."); *Tsosie*, 849 F. Supp. at 774 (rejecting the contention that the case presented a federal claim, but noting that, in any event, "a tribal court, presumably, is as competent to interpret federal law as it is state law.")

While tribal courts, like state courts, can interpret federal law, a determination of federal law by a tribal court, unlike a state court, is *not* susceptible to review by the Supreme Court. See *infra* part V.C.1.

that the underlying claim raises issues of federal law.²³⁶

4. Should the Exhaustion/Abstention Doctrine Apply when the Federal Government is a Party to the Litigation?

Only a few courts have directly focused on the applicability of the tribal exhaustion/abstention doctrine in cases where the federal government is a party to the proceeding. In several cases, the exhaustion/abstention requirement was applied to claims brought against tribal and other non-federal defendants, but was neither discussed nor invoked in conjunction with separate claims brought in the same action against the federal government.²³⁷ In other cases where the federal government was a defendant in district court, the tribal exhaustion/abstention rule was held inapplicable because the grant of federal jurisdiction was deemed exclusive.²³⁸ Finally, in a third category of cases where the United States was a defendant, federal courts have required abstention and exhaustion of tribal court remedies, but with the understanding (either express or implied) that the tribal action would only involve the

236. See, e.g., *Alzheimer & Gray v. Sioux Manufacturing Corp.*, 983 F.2d 803, 814 (7th Cir. 1995) ("The dispute does not concern a tribal ordinance as much as it does state and federal law."); *Burlington N. R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 n.2 (9th Cir. 1991) ("The complaint presents issues of federal, not tribal, law; . . . the tribal court possesses no special expertise; and exhaustion would not have assisted the district court in deciding federal law issues."); *Ute Distribution Corp.*, 934 F. Supp. at 1311 ("Plaintiffs seek a declaratory judgment interpreting and clarifying the provisions of a piece of federal legislation."); *Vance v. Boyd Miss., Inc.*, 923 F. Supp 905, 911 (S.D. Miss. 1996) ("The issues in this case do not involve any interpretation of tribal law . . . [but] are purely questions of federal law which should be decided in this Court."); *Myrick v. Devils Lake Sioux Mfg. Corp.*, 718 F. Supp. 753, 755 (D.N.D. 1989) ("The federal claims which form the basis of this lawsuit are properly heard in the federal court.")

237. See, e.g., *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1232-34 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1417 (1996); *Bull v. United States Dep't of Hous. and Urban Dev.*, No. 92-35357, 1994 WL 6653, at *2-5 (9th Cir. Jan. 10, 1994); *Weeks Constr., Inc.*, 797 F.2d at 674-76; *Smith v. Babbitt*, 875 F. Supp. 1353, 1366-71 (D. Minn. 1995); *Snowbird Constr. Co. v. United States*, 666 F. Supp. 1437, 1444-47 (D. Idaho. 1987). See also *Ute Distribution Corp.*, 934 F. Supp. at 1311 (D. Utah 1996) (holding the exhaustion/abstention rule inapplicable and reaching the merits in a case involving federal defendants); *Langley v. Edwards*, 872 F. Supp. 1531, 1535 (W.D. La. 1995), *aff'd without opinion*, 77 F.3d 479 (5th Cir. 1996) (reaching the merits in a case involving a federal defendant and holding only in the alternative that tribal remedies were not exhausted).

238. See, e.g., *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094, 1097-98 (8th Cir. 1989); *Azure v. United States Health and Human Serv.*, 758 F. Supp. 1382, 1388 (D. Mont. 1991). See also *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458, 463 (8th Cir. 1993) (rejecting tribal defendants' exhaustion/abstention argument, in a case brought by an electric utility against tribal and federal officials, because federal law preempted all available tribal remedies, leaving the utility "with nothing to exhaust").

non-federal defendants and not the federal government.²³⁹

Even fewer cases have addressed the applicability of the tribal exhaustion/abstention doctrine when the federal government is the plaintiff in the federal action. In a pair of cases, *United States v. Yakima Tribal Court*²⁴⁰ and *United States v. White Mountain Apache Tribe*,²⁴¹ the Ninth Circuit rejected the tribes' contention that the United States was required to exhaust tribal court remedies before filing a federal action to enjoin tribal court interference with the performance by federal employees of official duties: "There is no point in requiring exhaustion in the present case because tribal court jurisdiction is clearly foreclosed by the sovereign immunity of the United States."²⁴²

On the other hand, the exhaustion/abstention doctrine was deemed to apply, and the federal government was instructed to pursue available tribal remedies, in two of the many instances where the United States has exercised its enforcement discretion and instituted actions involving Indians in federal court.²⁴³ The first time this exercise occurred was in

239. See, e.g., *Superior Oil Co. v. United States*, 798 F.2d 1324, 1328-29 (10th Cir. 1986); *Vizenor v. Babbitt*, 927 F. Supp. 1193, 1203-05; *Middlemist v. Secretary of United States Dep't of Interior*, 824 F. Supp. 940, 946 (D. Mont. 1993), *aff'd without opinion*, 19 F.3d 1318 (9th Cir. 1994).

In *Vizenor*, tribal members filed an action seeking an order requiring the federal government to appoint an independent trustee to oversee operations of the tribe. *Vizenor*, 927 F. Supp. at 1203-05. The federal defendants moved to dismiss on several grounds, including the failure to comply with the exhaustion/abstention requirement. *Id.* Although the district court agreed the doctrine was applicable, it was evident that the tribal action would *not* involve the federal defendants, but would be between the tribal dissidents and the tribal leaders. See *id.* at 1205 n.11. In *Middlemist*, the holding that tribal court remedies must be exhausted expressly contemplated that the subsequent tribal action would involve only the tribal defendants and not the federal defendants. *Middlemist*, 824 F. Supp. at 946 ("The issues concerning the Federal Defendants in this case are the same basic issues underlying the rest of the action and could be presented in Tribal Court without the Federal Defendants.")

240. 806 F.2d 853 (9th Cir. 1986).

241. 784 F.2d 917 (9th Cir. 1986).

242. *White Mountain Apache Tribe*, 784 F.2d at 920 n.10. The court of appeals in *Yakima Tribal* held that exhaustion was "pointless" for the same reason. *Yakima Tribal*, 806 F.2d at 861.

243. In many civil cases in the last ten years, where the United States brought actions involving Indians in federal district court, the tribal exhaustion/abstention doctrine was *not* applied. See, e.g., *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544 (9th Cir. 1994) (involving an action by the United States brought on behalf of the Kalispel Indians against utility, seeking damages and injunctive relief from flooding of reservation land due to dam construction); *Equal Employment Opportunity Comm. v. Fond du Lac Heavy Equip. and Constr. Co.*, 986 F.2d 246 (8th Cir. 1993) (involving an EEOC claim discrimination claim under the Age Discrimination in Employment Act against construction company and Indian tribe); *United States v. Thompson*, 941 F.2d 1074 (10th Cir. 1991) (involving a claim by the United States, as trustee for Pueblo of Santo Domingo, to quiet title to approximately 24,000 acres

United States v. Plainbull,²⁴⁴ where the Ninth Circuit affirmed the district court's decision to abstain pending exhaustion of tribal court remedies despite the fact that (1) the plaintiff was the United States; (2) the dispute required resolution of federal law; and (3) there was no concurrent action pending in the tribal courts.²⁴⁵

The second instance, *United States v. Tsosie*,²⁴⁶ was an action by the United States on its own behalf and on behalf of a Navajo tribal member against another Navajo tribal member for ejectment and damages for trespass on allotted land located outside the Navajo Reservation. Despite the fact that all parties opposed abstention and despite the absence of any pending tribal court proceeding, the district court determined *sua sponte* that exhaustion of tribal remedies was required. In contrast to *Plainbull*, however, the court stressed the fact that "[p]laintiffs did *not* bring this action under federal statute, but rather, under common law theories of trespass and ejectment."²⁴⁷ The court further found that if the tribal exhaustion/abstention doctrine was not applied, "this Court would be asked to consider the application of tribal common law."²⁴⁸ The Tenth Circuit, deeming the case "analogous to

of land that were part of a seventeenth century Spanish land grant to the Pueblo); *United States v. Brown*, 824 F. Supp. 124 (S.D. Ohio 1993) (involving a petition to enforce IRS summons served upon Indian requiring production of documents and testimony as part of an investigation into possible tax liability); *United States v. Imperial Irrigation Dist.*, 799 F. Supp. 1052 (S.D. Cal. 1992) (involving a claim by the United States and Torres-Martinez Band of Mission Indians against California water districts alleging trespass resulting from the flooding of tribal lands for a period of time from 1924 through 1992); *United States v. Weyerhaeuser Co.*, 765 F. Supp. 643 (D. Ore. 1991) (involving an action on behalf of heirs of the original Indian allottee to regain title to property allegedly transferred in violation of restricted fee title); *United States v. Morris*, 754 F. Supp. 185 (D.N.M. 1991) (involving an application for writ of garnishment against the Navajo Nation in support of an restitution order against a debtor whose husband was employed by the Nation).

244. 957 F.2d 724 (9th Cir. 1992). See *infra* Part II.

245. 957 F.2d at 728.

246. 849 F. Supp. 768 (D.N.M. 1994), *aff'd*, 92 F.3d 1037 (10th Cir. 1996).

247. *Id.* at 773 (emphasis added).

248. *Id.* at 774. The United States, in its brief on appeal, disputed the court's characterization of the action and decision to dismiss pending exhaustion of tribal remedies:

Not only does the United States have a paramount right to bring suits in its own courts, but abstention is particularly inappropriate where the United States files a suit to protect a federal interest (the right of an Indian to his federally-granted allotment) under a statute, 28 U.S.C. 1345, that specifically grants jurisdiction to federal courts, even in cases involving Indians Properly considered, this case involves two bifurcated issues. The first question, whether the trust patent is valid—which is determinative of whether a trespass has occurred—is a question of federal law. That question is one which should properly be determined in a federal court. If the trust patent is found to be valid, a second issue relating to the appropriate remedy

Plainbull,²⁴⁹ held that "[t]he United States' decision to bring this suit on behalf of [the allottee] does not alter the fact that this is essentially a dispute between Indians over certain rights to land in Indian country" and "agree[d] with the district court's conclusion that abstention is appropriate under the *National Farmers* factors."²⁵⁰

V. CATEGORIZATION OF THE TRIBAL EXHAUSTION/ABSTENTION DOCTRINE: CONFUSION REGARDING APPROPRIATE ANALOGIES

Although courts and commentators have attempted to buttress the tribal exhaustion/abstention doctrine by drawing analogies to other judicial doctrines that affect the exercise of federal jurisdiction, the utility of this exercise has been diminished by an inability to reach a consensus on the appropriate analogy or model. The reason for such disagreement can be traced to the Supreme Court, which characterized its new rule in *National Farmers Union* as requiring "[e]xhaustion of tribal court remedies,"²⁵¹ yet which also employed the words "comity" and "abstention" in *Iowa Mutual* to describe the doctrine.²⁵²

A better understanding of the degree of correlation between the tribal exhaustion/abstention doctrine and similar judicial doctrines developed outside the federal-tribal context would assist courts in resolving the key interrelated issues of when the *National Farmers Union* rule should apply and whether it constitutes a mandatory "inflexible bar" when applicable. Argument by analogy from non-Indian to Indian law, however, is particularly fraught with difficulty,²⁵³ and ultimately breaks down because the judicial/administrative, state/state, nation/nation, and federal/state models cannot be duplicated in the unique federal-tribal

emerges. On the issue of fashioning an appropriate remedy, where tribal custom may be implicated, the district court could in an appropriate case consult the tribal court. Opening Brief for the United States, Appellant, at 6-7, *United States v. Tsosie*, 92 F.3d 1037 (10th Cir. 1996) (No. 94-2144).

249. *Tsosie*, 92 F.3d at 1043.

250. *Id.* at 1042-43. The court of appeals was "not persuaded" by the government's contention "that the policy behind tribal court exhaustion does not apply because tribal law and custom are irrelevant in this case and, in any event, have been preempted by Congress." *Id.* at 1043-44.

251. *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 857 (1989).

252. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16 n.8 (1987).

253. See Philip P. Frickey, *Context and Legitimacy in Federal Indian Law*, 94 MICH. L. REV. 1973, 1974 (1996) (reviewing FRANK POMMERSHEIM, *BRAID OF FEATHERS* (1995)); Robert Laurence, *The Bothersome Need for Asymmetry in any Federally Dictated Rule of Recognition for the Enforcement of Money Judgments Across Indian Reservation Boundaries*, 27 CONN. L. REV. 979, 992 (1995); Robert Laurence, *Questions Posed*, 71 N.D. L. REV. 589, 598-99 (1995).

setting.

A. *The Analogy to the Doctrine of Exhaustion of Administrative Remedies*

The chief proponent of the exhaustion of administrative remedies analogy is Alex Skibine, who contends that there is a strong affinity "between the reasons given in federal Indian law for the exhaustion of tribal remedies and the reasons given in administrative law for the exhaustion of administrative remedies."²⁵⁴ Although Skibine is careful not to equate tribal courts with administrative agencies,²⁵⁵ he contends that

[a]n analysis of the exhaustion doctrine as it exists in the field of administrative law, however, reveals that the policies which have driven the courts to mandate exhaustion of administrative remedies are essentially similar to the ones that have guided the courts to require exhaustion of tribal court remedies. It is therefore logical to conclude that the doctrine of exhaustion of tribal remedies should follow the same principles which have been applied to the doctrine of exhaustion of administrative remedies.²⁵⁶

There are parallels between the tribal exhaustion/abstention doctrine developed in *National Farmers Union* and *Iowa Mutual* and the well-established rule requiring exhaustion of administrative remedies prior to judicial review of agency action. However, the two doctrines differ in fundamental respects. In terms of their animating purposes, the reasons why a federal court should first await the results of administrative agency decisionmaking vary considerably from the reasons why a federal court should yield to concurrent tribal court jurisdiction. In terms of application, the most striking result of a comparative analysis of the two doctrines is that the judicially imposed doctrine of exhaustion of administrative remedies is *not* mandatory when applicable, and hence *not*

254. Skibine, *supra* note 19, at 204.

255. In *Colliflower v. Garland* and *Settler v. Yakima Tribal Court*, the Ninth Circuit held, for purposes of the applicability of the writ of habeas corpus, that the tribal courts in question were so pervasively regulated by the federal government that they were in effect federal instrumentalities. *Colliflower v. Garland*, 342 F.2d 369, 378-79 (9th Cir. 1965); *Settler v. Yakima Tribal Court*, 419 F.2d 486, 488-89 (9th Cir. 1969). See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 n.7 (1978). The notion of tribal courts as adjuncts of the federal government, however, was rejected by the Supreme Court in *United States v. Wheeler*. *United States v. Wheeler*, 435 U.S. 313, 319-32 (1978). See also WUNDER, *supra* note 116, at 134; Laurence, *supra* note 253, at 992 n.44.

256. Skibine, *supra* note 19, at 204.

an "inflexible bar" to the immediate exercise of federal court jurisdiction.

1. A Comparison of the Reasons Behind the Two Doctrines

The Supreme Court has noted that "[t]he doctrine of exhaustion of administrative remedies is one among related doctrines—including abstention, finality, and ripeness—that govern the *timing* of federal-court decisionmaking."²⁵⁷ Exhaustion of administrative remedies serves four primary purposes:

- (1) It carries out the legislative purpose in granting authority to an agency by discouraging frequent and deliberate flouting of administrative procedures;
- (2) it protects agency autonomy by allowing the agency the opportunity in the first instance to apply its expertise and correct its own errors;
- (3) it aids judicial review by allowing the parties and the agency to develop the facts of the case in the agency proceeding; and
- (4) it promotes judicial economy by avoiding needless repetition of administrative and judicial factfinding, perhaps avoiding the necessity of any judicial involvement.²⁵⁸

In comparison, the Court in *National Farmers Union* stated that exhaustion of tribal court remedies would (1) promote tribal self-government and self-determination; (2) advance the orderly administration of justice in the federal courts by allowing the tribal courts to first develop a full record; and (3) provide the federal courts with the benefit of the tribal courts' expertise.²⁵⁹ The Tenth Circuit, in *Pittsburg & Midway Coal Mining Company v. Watchman*,²⁶⁰ observed that the last

257. *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (emphasis added). In contrast, other administrative law doctrines focus on the *availability* of judicial review. See 5 U.S.C. § 701(a) (1994). Section 701(a) precludes review under the Administrative Procedure Act to the extent that (1) statutes (expressly or implicitly) preclude judicial review; or (2) the agency action is committed to agency discretion by law). *Id.* See generally ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW § 12.5-12.6 at 361-84 (1993). As discussed below, the tribal exhaustion/abstention doctrine, after *Iowa Mutual*, concerns both timing and availability of judicial review by federal courts.

258. BERNARD SCHWARTZ, ADMINISTRATIVE LAW 542 (3d ed. 1991) (citing *Andrade v. Lauer*, 729 F.2d 1475, 1484 (D.C. Cir. 1984)). See also *McCarthy*, 503 U.S. at 145 (holding that exhaustion "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency."); *McKart v. United States*, 395 U.S. 185, 193-95 (1969) (summarizing functions of exhaustion of administrative remedies doctrine); Kevin W. Reese, *Administrative Remedies Must be Exhausted Absent Circumstances Supporting an Exception to Exhaustion Doctrine*, 47 S.C. L. REV. 17, 19-20 (1995).

259. *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 857 (1989). See also *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987) ("[T]ribal courts are best qualified to interpret and apply tribal law.").

260. 52 F.3d 1531 (10th Cir. 1995).

two of the aforementioned reasons behind the tribal exhaustion/abstention rule "are similar to those advanced in support of the identical exhaustion requirement of administrative law."²⁶¹ Alex Skibine further contends that the policy of promoting tribal self-government is similar to the policy of preserving the autonomy of administrative agencies.²⁶²

As previously noted, the tribal exhaustion/abstention doctrine was suggested by Judge Wright of the Ninth Circuit, adopted and modified by the Supreme Court in *National Farmers Union*, and expanded in *Iowa Mutual*.²⁶³ The rule envisioned by Judge Wright (drawn from the pre-*Martinez* ICRA cases) was closely patterned after the doctrine of exhaustion of administrative remedies. The rule of *National Farmers Union* and *Iowa Mutual*, in contrast, differs from its administrative law counterpart in two significant ways: (1) it is no longer a doctrine solely concerned with the timing of federal judicial review; and (2) it applies to disputes and questions of law over which the tribal courts can claim no special expertise.

With respect to the first point, a rudimentary tenet of the doctrine of exhaustion of administrative remedies is that it *postpones*, but does not necessarily *preclude*, judicial review of the dispute.²⁶⁴ After *Iowa Mutual*, the same cannot be said of the tribal exhaustion/abstention rule: for all issues other than the limits of the tribal court's jurisdiction, application of the tribal exhaustion/abstention doctrine does not simply delay judicial review by federal courts; it instead prevents such federal review.²⁶⁵ Thus, except in the paradigm situation of *National Farmers Union*—where the dispute centers on the tribal court's jurisdiction—the term "exhaustion" is a misnomer and the similarities to the doctrine of exhaustion of administrative remedies vanish.

This critical flaw in the analogy between exhaustion of administrative

261. *Id.* at 1537 n.5 (citing *McKart v. United States*, 395 U.S. 185, 193-95 (1969); 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 15.2 (3d ed. 1994)).

262. Skibine, *supra* note 19, at 204-05; Alleva et al., *supra* note 19, at 546-47 (statement of Alex Skibine).

263. See *supra* Part III.

264. See JOHN N. REESE, ADMINISTRATIVE LAW: PRINCIPLES AND PRACTICE 660 (1995) ("Judicial review at an appropriate time is not cut off by application of the doctrine. It is only delayed.")

265. See *Iowa Mut.*, 480 U.S. at 19 ("Unless a federal court determines that the Tribal Court lacked jurisdiction, however, proper deference to the tribal court system precludes relitigation of issues raised by the LaPlantes' bad-faith claim and resolved in the Tribal Courts."). See also *supra* notes 205-07 and accompanying text.

remedies and the rule of *National Farmers Union* and *Iowa Mutual* is illustrated by returning to the facts of *United States v. Plainbull*.²⁶⁶ The government's suit against the Plainbills presented two questions of federal law: (1) whether federal grazing regulations may be enforced when the tribe in question has rejected the application of the Indian Reorganization Act; and (2) whether the trespass prohibition in 25 U.S.C. § 179 applies to unpermitted use of tribal lands by tribal members. The Ninth Circuit concluded that the Crow Tribal Courts should "get the *first* opportunity to resolve this case."²⁶⁷ However, in stark contrast to the doctrine of exhaustion of administrative remedies, if it is determined that there is concurrent tribal court jurisdiction over the matter, then the Crow Tribal Courts will constitute the *only* opportunity for judicial resolution. While "removal" of the merits of a dispute from a federal to a tribal setting may be justified with reference to the goals of protecting tribal court autonomy and furthering tribal self-government, such action should not be equated with the exhaustion requirement developed to guide the relationship between courts and agencies.

The second deficiency in the proposed analogy pertains to the divergent nature of the expertise possessed by tribal courts and administrative agencies. As explained by the Supreme Court, the exhaustion of administrative remedies doctrine recognizes the notion, grounded

in deference to Congress' delegation of authority to coordinate branches of Government, that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer. Exhaustion concerns apply with particular force when the action under review involves exercise of the agency's discretionary power or when the agency proceedings in question allow the agency to apply its special expertise.²⁶⁸

In contrast, the Court's references in *National Farmers Union* and *Iowa Mutual* to the expertise of tribal courts are limited to two subject areas: the issue of tribal court jurisdiction and questions of tribal law.²⁶⁹

266. 957 F.2d 729 (9th Cir. 1992). See also *supra* Part II.

267. *Plainbull*, 957 F.2d at 728 (emphasis added).

268. *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992).

269. *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 857 (1989) ("Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review."); *Iowa Mut.*, 480 U.S. at 16 ("[T]ribal courts are best qualified to interpret and apply tribal law.").

While tribal courts are empowered and able to adjudicate other matters (such as statutory interpretation issues involving federal law), they cannot claim any particular expertise, and consequently the administrative law analogy loses relevance.²⁷⁰ Thus, the administrative law analogy lends support to the related contentions of Alex Skibine that (1) "tribal courts should be perceived as the experts in determining their own jurisdiction, especially if the jurisdictional questions are determined by reference to what is necessary to tribal self-government or vital to self-determination,"²⁷¹ and that (2) "jurisdictional determinations made by tribal courts should enjoy at least the same kind of deference that is given decisions of administrative tribunals."²⁷² The analogy, however, does not support Skibine's further assertion that exhaustion of tribal court remedies should be mandatorily applied in other circumstances, such as when the federal question at issue is not the existence of tribal court jurisdiction.²⁷³

270. See Alleva et al., *supra* note 19, at 551 (statement of Phillip Lear). Mr. Lear states: Where [the] parallels break down, however, is that in the agency arena it's the agency who has drafted the regulation, it's the agency who has been empowered by statute to regulate a certain province, a certain area of endeavor, and it's the agency that has its own quasi-judicial system to deal with the interpretation of its own laws.

Id. See also Reynolds, *supra* note 16, at 1139. Reynolds states:

[A]llowing the tribal court to take "first crack" at issues that involve no question of tribal law serves no policy of the exhaustion doctrine Though interpretation of state and federal law is certainly within the purview of tribal court jurisdiction, the tribal court can claim no particular or unique expertise in these areas.

Id.

271. Skibine, *supra* note 19, at 193-94.

272. *Id.* at 193.

273. See *id.* at 201-08. Likewise, Skibine's reliance on the deferential standard of review announced in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, appears misplaced when applied to questions that are not within the special expertise of tribal courts. *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."). See also Laurence, *The Bothersome Need for Asymmetry*, *supra* note 253, at 991-92 & n.44 (describing Skibine's thesis as "boldly optimistic" and observing that "perhaps the federal courts need not show tribal courts the same deference in their constructions of federal law for exactly the reason that Congress did not create them for the purpose of interpreting Congress's own laws, as it did with the EPA."). The district court, in *Mustang Fuel Corp. v. Hatch*, squarely rejected the position advocated by Skibine:

Defendants assert that tribal courts have special expertise in Indian law and are best suited to determine what was intended by treaties and agreements made by their tribal leaders. Lacking legal authority for this argument, however, defendants do not articulate a standard of review based on Indian law precedents but instead refer by analogy to cases involving decisions by federal administrative agencies.

The Court finds defendants' analogy to be inapposite here. The tribal court,

2. A Comparison of the Flexibility and Application of the Two Doctrines

To the extent that the exhaustion of administrative remedies doctrine is a useful analogy, it actually undercuts the generally accepted views regarding the flexibility and applicability of the tribal exhaustion/abstention rule. The doctrine of exhaustion of administrative remedies is not mandatory (unless required by statute); it is often deemed inapplicable when the question presented is solely one of law, and is to be applied only after due consideration of a federal court's strict duty to exercise the jurisdiction conferred upon it by Congress.

The administrative law exhaustion doctrine is "subject to pragmatically based exceptions [and is not applied when] considerations of individual justice, efficiency, or wise judicial administration support the need for judicial review in the absence of exhaustion."²⁷⁴ Thus, except

unlike an administrative agency, is part of a tribal government with a vested interest in the outcome of this case; millions of tax dollars now lie in escrow pending entry of judgment. Moreover, while tribal courts undoubtedly have expertise in many matters, including application of tribal laws and precedents, the issue presented in this case requires examination of federal precedents and historical events involving the federal government as well as the Tribes.

Mustang Fuel Corp. v. Hatch, 890 F. Supp. 995, 999-1000 (W.D. Okla. 1995). The Tenth Circuit, on appeal, also rejected (implicitly) the argument for *Chevron*-like deference, holding instead that a tribal court's conclusions of law regarding jurisdictional issues would be reviewed *de novo* in federal district court. Mustang Prod. Co. v. Harrison, 94 F.3d 1382, 1384 (10th Cir. 1996). See also *supra* note 171.

274. DAVIS & PIERCE, *supra* note 261, § 15.2, at 307-8 (3d ed. 1994). The exceptions to the exhaustion requirement in administrative law include the three exceptions to the tribal exhaustion/abstention doctrine set forth in *National Farmers Union*: (1) the assertion of jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) the action is patently violative of express jurisdictional prohibitions; and (3) exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction. *National Farmers Union*, 471 U.S. at 856 n.21. See also *supra* note 151.

The "patently violative of express jurisdictional prohibitions" exception has a counterpart in administrative law: the case of *Leedom v. Kyne*. *Leedom v. Kyne*, 358 U.S. 184 (1958). Alex Skibine has noted that "the question that remains to be answered after *National Farmers Union* is how express the jurisdictional prohibition has to be before that exception to the exhaustion requirement can be invoked." Skibine, *supra* note 19, at 203. In *Leedom*, an exception to the requirement of exhausting available administrative remedies was recognized in cases where the unlawful action at issue was contrary to a specific statutory prohibition that was "clear and mandatory." *Leedom*, 358 U.S. at 188. See also *Gracey v. Local Union No. 1340, AFL-CIO*, 868 F.2d 671, 674 n.1 (4th Cir. 1989) ("If an agency acts in clear derogation of its statutory authority, a court need not wait for the underlying proceedings to conclude to intervene."); *General Finance Corp. v. FTC*, 700 F.2d 366, 370 (7th Cir. 1983) (holding that the agency must be "flouting a clear legislative directive.").

At first glance, *Leedom* and *National Farmers Union* appear to be incompatible. In

when statutorily mandated, "sound judicial discretion governs"²⁷⁵ and the exhaustion of administrative remedies doctrine is *not* an inflexible bar to the exercise of federal court jurisdiction.²⁷⁶

The applicability of the administrative law exhaustion doctrine is also impacted by the nature of the question presented: "where the issue is legal, perhaps a matter of construing statutory language, the courts are more confident of their skills and not as likely to require exhaustion."²⁷⁷ For example, in *McKart v. United States*,²⁷⁸ the Supreme Court did not require exhaustion of administrative remedies in part because the question presented was "solely one of statutory interpreta-

Leedom, nonexhaustion of administrative remedies is permitted because the allegation is that the agency is acting without jurisdiction, whereas in *National Farmers Union* exhaustion is required because the allegation is that the tribal court is acting without jurisdiction. However, under both doctrines, exhaustion is typically required when the issue of jurisdiction is raised; the exceptions only apply when the assertion of jurisdiction is "in clear derogation" of delegated authority or "patently violative of express jurisdictional prohibitions." See DAVIS & PIERCE, *supra* note 261, § 15.4, at 330 (stating that *Leedom* "establishes the need for a preliminary inquiry into the merits as a part of the process of deciding the exhaustion issue."). The problem, however, is that courts often engage in extensive, rather than preliminary, judicial review of the merits prior to exhaustion to see if the "clear derogation" or "patently violative" exception applies. Compare *Reservation Tel. Coop. v. Three Affiliated Tribes*, 76 F.3d 181, 184-86 (8th Cir. 1996) (engaging in detailed analysis of the merits before determining that "patently violative" exception does not apply), with *Champion Int'l. Corp. v. EPA*, 850 F.2d 182, 185-90 (4th Cir. 1988) (determining after comprehensive review that the agency had not clearly exceeded its delegated authority). See generally *Espil v. Sells*, 847 F. Supp. 752, 758 n.3 (D. Ariz. 1994) (arguing that the principles behind the tribal exhaustion/abstention rule are undermined when the court proceeds to determine whether the "patently violative" exception applies).

275. *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992).

276. See also DAVIS & PIERCE, *supra* note 261, § 15.3, at 318. In *Darby v. Cisneros*, the Court noted that "[w]hether courts are free to impose an exhaustion requirement as a matter of judicial discretion depends, at least in part, on whether Congress has provided otherwise," and specifically held that "[c]ourts are not free to impose an exhaustion requirement as a rule of judicial administration where the agency action has already become 'final' under § 10(c) [of the Administrative Procedure Act, 5 U.S.C. § 704]." *Darby v. Cisneros*, 509 U.S. 137, 138, 154 (1993).

277. *AMAN & MAYTON*, *supra* note 257, at 407. See also SCHWARTZ, *supra* note 258, at 557 (discussing a line of cases holding that "exhaustion is not required when the question presented is solely one of law"); DAVIS & PIERCE, *supra* note 261, § 15.2, at 310 ("[S]ome of the purposes served by the exhaustion requirement are not implicated when the question requires only statutory interpretation, as opposed to expert evaluation of facts or exercise of discretion."); REESE, *supra* note 264, at 21. Reese states that

Direct judicial action also may be taken when a controversy between an agency and an individual involves only questions of law rather than questions of fact. When questions of fact are not in dispute, a court can resolve the issue without relying on agency expertise or risking encroachment on the agency's autonomy.

Id.

278. 395 U.S. 185 (1969).

tion.”²⁷⁹ Thus, when the Ninth Circuit in *Plainbull* deemed the presence of issues of federal law as “immaterial”²⁸⁰ to the applicability *vel non* of the tribal exhaustion/abstention doctrine, the court was deviating from—not adhering to—the model of the administrative law exhaustion doctrine.

Finally, the Supreme Court has rejected the notion of the exhaustion of administrative remedies doctrine as a preponderant rule, and has counseled that its invocation must be weighed against the countervailing duty of federal courts to exercise the jurisdiction conferred them by Congress:

Notwithstanding these substantial institutional interests [behind the administrative law exhaustion doctrine], federal courts are vested with a “virtually unflagging obligation” to exercise the jurisdiction given them. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-818, 96 S.Ct. 1236, 1246-1247, 47 L.Ed.2d 483 (1976). “We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.” *Cohens v. Virginia*, 6 Wheat. 264, 404, 5 L.Ed. 257 (1821). Accordingly, this Court has declined to require exhaustion in some circumstances even where administrative and judicial interests would counsel otherwise. In determining whether exhaustion is required, federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion.²⁸¹

The analogy to the administrative law model thus suggests—consistent with Judge Wright’s view of the tribal exhaustion/abstention rule, but contrary to the prevailing view of *National Farmers Union* and *Iowa*

279. *Id.* at 197-98. *But see id.* at 205 (White, J., concurring with the result) (“I cannot agree with the Court’s conclusion that petitioner’s failure to exhaust appellate remedies within the system can be disregarded on the broader ground that only a question of law is involved. Questions of law have not, in the past, been thought to be immune from exhaustion requirements.”).

While acknowledging that cases exist where “the fact that the issues to be resolved were purely questions of law has influenced the Supreme Court not to require exhaustion of administrative remedies,” Alex Skibine contends that “since providing federal courts with the expertise of administrative agencies is only one of the reasons for exhaustion, exhaustion is generally required unless the question of law at issue involves a clear statutory or constitutional violation.” Skibine, *supra* note 19, at 205-06. As evidenced by *McKart*, however, the discretion to excuse nonexhaustion is not limited to *Leedom*-like situations where there is an assertion of “disregard of some specific and unambiguous statutory directive or command.” *Griffith v. FLRA*, 842 F.2d 487, 493 (D.C. Cir. 1988).

280. *United States v. Plainbull*, 957 F.2d 724, 728 (4th Cir. 1992).

281. *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992).

Mutual—that a balancing test is in order²⁸² and that “[a]pplication of this balancing principle is ‘intensely practical.’”²⁸³

B. *The Analogy to the Notion of Comity*

The Supreme Court declared in *Iowa Mutual* that “the exhaustion rule enunciated in *National Farmers Union* . . . is required as a matter of comity, not as a jurisdictional prerequisite.”²⁸⁴ In subsequent cases and commentary, the malleable comity doctrine has been invoked by both proponents and opponents in the debate over whether the tribal exhaustion/abstention doctrine should be applied as an inflexible and preponderant rule.

Comity is “a broadly-used term, often encompassing concepts such as courtesy, reciprocity, morality, and utility.”²⁸⁵ Comity operates in a government-to-government setting: “[t]hrough comity a sovereign recognizes the acts, decrees, laws, or judgments of another sovereign, primarily as a matter of courtesy rather than strictly as one of right.”²⁸⁶ On the international level, “[c]omity has been characterized as the voluntary recognition and enforcement of foreign laws in which the rights of individuals are determined.”²⁸⁷ On the national level, “the full faith and credit clause obviates the need for comity between the states,”²⁸⁸ however, with respect to federal/state relations, the Supreme Court, in

282. See *id.* (“[A]dministrative remedies need not be pursued if the litigant’s interests in immediate judicial review outweigh the government’s interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further.”) (quoting *West v. Bergland*, 611 F.2d 710, 715 (8th Cir. 1979)).

283. *Id.* (quoting *Bowen v. City of New York*, 476 U.S. 467, 484 (1986)).

284. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 n.8 (1987).

285. *Lear & Miller*, *supra* note 19, at 292.

286. Gordon K. Wright, Note, *Recognition of Tribal Decisions in State Courts*, 37 STAN. L. REV. 1397, 1410 (1985). See also Slade, *supra* note 19, at 533 (“The ‘comity’ concept contemplates a jurisprudence that identifies the interests of competing sovereigns and seeks a resolution that harmonizes legitimate interest of all concerned governments in the controversy.”).

287. Jon J. Jensen, *Fredericks v. Eide-Kirschmann Ford: The Vehicle to Enforcing Tribal Court Civil Judgments*, 68 N.D. L. REV. 675, 681 (1992). See also Arrow, *supra* note 159, at 489 n.107 (stating that comity “is traditionally extended to the judgments of foreign nations which are not repugnant to the public policy of the forum state.”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 (1986) (defining comity as “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws.”). See generally *Hilton v. Guyot*, 159 U.S. 113 (1895).

288. Wright, *supra* note 286, at 1410. See U.S. CONST. art. IV, § 1.

the abstention case of *Younger v. Harris*,²⁸⁹ employed the word "comity" to describe "a proper respect for state functions."²⁹⁰ Finally, on a state/tribal level, "[s]ome states recognize tribal court judgments using a comity rationale because Indian tribes do not clearly stand as states or territories and therefore do not unambiguously qualify for full faith and credit."²⁹¹

The comity doctrine, which "is extended as a matter of courtesy rather than of right,"²⁹² does *not* support the view that the tribal exhaustion/abstention rule should be inflexibly applied. In fact, when first invoked by Judge Wright, the comity-based tribal exhaustion rule was expressly deemed to be "flexible and closely tailored to the interests at stake."²⁹³ Phillip Lear and Blake Miller have thus criticized courts for invoking the doctrine of comity as justification for mandating federal abstention and exhaustion of tribal remedies.²⁹⁴ In their view, "[t]he mandatory exhaustion rule is inconsistent with well recognized international legal principles of concurrent jurisdiction" which provide that "the court of concurrent jurisdiction that first exercises its jurisdiction should

289. 401 U.S. 37 (1971).

290. *Id.* at 44. See also REDISH, *supra* note 6, at 344. The *Younger* court defined "comity" as:

a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Younger, 401 U.S. at 44.

291. Wright, *supra* note 286, at 1410. See generally Laurence, *The Bothersome Need for Asymmetry*, *supra* note 253; Richard E. Ransom et al., *Recognizing and Enforcing State and Tribal Judgments: A Roundtable Discussion of Law, Policy, and Practice*, 18 AM. INDIAN. L. REV. 239 (1993); Jensen, *supra* note 287; John T. Moshier, Comment, *Conflicts Between State and Tribal Law: The Application of Full Faith and Credit Legislation to Indian Tribes*, 81 ARIZ. ST. L.J. 801 (1981).

292. Arrow, *supra* note 159, at 489 n.107.

293. National Farmers Union Ins. Cos. v. Crow Tribe, 736 F.2d 1320, 1329 (9th Cir. 1984), *rev'd*, 471 U.S. 845 (1985) (Wright, J., dissenting in part and concurring in the result). Judge Wright's suggested approach was the antithesis of an inflexible, preponderant rule:

To determine whether exhaustion is appropriate in a given case, we must first determine whether (1) meaningful tribal remedies exist, and (2) exhaustion will serve the purposes of comity and strengthening tribal institutions. Finally, the court must balance the need to preserve and strengthen tribal institutions against any immediate need that would exist to adjudicate the plaintiff's alleged federal rights.

Id. See also Janis v. Wilson, 521 F.2d 724, 727 (8th Cir. 1975) ("Exhaustion is required as a matter of comity in furtherance of the federal policy to preserve the unique sovereign and cultural identity of the Indian people. But it is not an inflexible requirement blind to the facts of each case.").

294. Lear & Miller, *supra* note 19, at 292-93.

be allowed to finalize the case.²⁹⁵ Hence, under the comity analogy, the absence of a pending tribal action should weigh *against* application of the exhaustion/abstention requirement.²⁹⁶

Nevertheless, the tribal exhaustion/abstention rule of *National Farmers Union* and *Iowa Mutual* has been invoked "as a matter of comity irrespective of the existence of pending proceedings . . . in order to protect and defer to the sovereignty of another forum."²⁹⁷ For example, the Tenth Circuit, in *Smith v. Moffett*,²⁹⁸ invoked the doctrine of comity to justify the application of the tribal exhaustion/abstention requirement despite the absence of a pending tribal action:

The fact that Smith apparently has not yet presented his case to a tribal court does not diminish the comity considerations present in this case As in cases raising comity concerns regarding federal-state jurisdiction, comity concerns in federal-tribal civil jurisdiction arise out of mutual respect between sovereigns. In the realm of federal-tribal jurisdiction, however, Congress has expressed an additional interest in promoting the development of tribal sovereignty The congressional concern with promoting tribal sovereignty adds another dimension to federal-tribal comity²⁹⁹

The *Moffett* decision, by broadening the notion of comity in the federal-tribal sphere to encompass congressional concern with promoting tribal sovereignty, implicitly acknowledges that "normal" comity concerns do not support the "inflexible bar" construction of *National Farmers Union* and *Iowa Mutual*. Therefore, the question is not whether the comity doctrine provides analogous support for an inflexible and preponderant tribal exhaustion/abstention rule (it does not), but instead whether "the heightened sensitivity to tribal sovereignty present in federal-tribal

295. *Id.* at 292.

296. Ironically, this aspect of the comity doctrine was noted in the converse situation by the Navajo Nation Supreme Court in *Pela v. Peabody Coal Co.*, where it was held that, because there was no pending proceeding in federal court, the Navajo Nation court did not have to decline jurisdiction as a matter of comity. *Pela v. Peabody Coal Co.*, 17 Indian Law Rptr. 6132, 6135 (Nav. Sup. Ct., Sept. 28, 1990) (No. A-CV-18-89). *See id.* ("[I]f this action had been brought in federal court before plaintiff brought it in Navajo court . . . there would be a stronger argument that the Navajo Nation court should terminate its proceedings based on comity.").

297. *Alleva et al.*, *supra* note 19, at 558 (statement of Robert Clinton) (comparing the tribal exhaustion/abstention rule to the habeas corpus exhaustion rule).

298. 947 F.2d 442 (10th Cir. 1991).

299. *Id.* at 444-45. *See also* *Kerr-McGee Corp. v. Farley*, 915 F. Supp. 273, 276 (D.N.M. 1995) (noting that "this circuit has distinguished between federal-state jurisdiction and federal-tribal jurisdiction.").

comity cases"³⁰⁰ should mandate federal abstention and exhaustion of tribal remedies in all applicable cases. While the strong federal policy of supporting tribal self-government should cause federal courts to abstain in most cases involving Indians and Indian tribes, neither *National Farmers Union* nor *Iowa Mutual* go so far as to categorically state that there are no circumstances in which the policy of promoting tribal self-government should yield to the likewise strong and competing federal policy of having the federal courts exercise the jurisdiction that is conferred upon them by Congress.

C. *The Analogy to the Doctrine of Abstention*

Although there are several judicially crafted abstention doctrines which authorize federal courts to decline to exercise conferred jurisdiction,³⁰¹ the tribal exhaustion/abstention rule of *National Farmers Union* and *Iowa Mutual* has most often been compared to the abstention and deferral doctrines announced by the Supreme Court in *Younger v. Harris*³⁰² and *Colorado River Water Conservation District v. United States*.³⁰³ The basic tenets of the *Younger* and *Colorado River* doc-

300. *Moffett*, 947 F.2d at 445.

301. See *supra* note 7 (summarizing the *Pullman*, *Thibodaux*, *Burford*, *Younger*, and *Colorado River* abstention doctrines). See also REDISH, *supra* note 6, at 281-304; Lee and Wilkins, *supra* note 7, at 335-61.

302. 401 U.S. 37 (1971).

303. 424 U.S. 800 (1976). The tribal exhaustion/abstention rule has also been analogized, albeit less frequently, to the abstention doctrine set forth in *Railroad Comm'n of Texas v. Pullman Co.*, which has been described as the principle that "the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them." *Harrison v. NAACP*, 360 U.S. 167, 176 (1959) (citing *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941)). See *Atkinson Trading Co. v. Navajo Nation*, 866 F. Supp. 506, 512 and n.9 (D.N.M. 1994) (holding that the tribal court "would be in the best position . . . to evaluate tribal law in light of existing federal law" and citing *Pullman* as an example where a federal court will abstain when an uninterpreted statute of another sovereign is challenged under federal law); Joranko, *supra* note 19, at 277 (declaring that the Ninth Circuit, by "requiring tribal law questions to be decided first by tribal courts," has "developed a form of *Pullman* abstention."). The tribal exhaustion/abstention rule, however, is much broader in scope than the *Pullman* abstention doctrine, and applies even when tribal law is not at issue.

Robert Clinton has offered yet another alternative, suggesting that the "closest analogy is habeas corpus exhaustion," because "the habeas corpus exhaustion rule, like the exhaustion rule of *National Farmers Union* and *Iowa Mutual Insurance*, is invoked as a matter of comity irrespective of the existence of pending proceedings in the state courts in order to protect and defer to the sovereignty of another forum." Alleve et al., *supra* note 19, at 558 (panel discussion). This, of course, assumes that the tribal exhaustion/abstention rule should be applied even when there is no pending tribal court action, an issue that the Supreme Court did not address in *National Farmers Union* and *Iowa Mutual*.

trines are discussed below, with a focus on their pertinence and whether these rules in fact lend support to the prevailing view of the tribal exhaustion/abstention rule as a preponderant and inflexible command.

1. *Younger* and the Tribal Exhaustion/Abstention Rule

Despite the failure of the Supreme Court to directly refer to the *Younger* abstention doctrine in either *National Farmers Union* or *Iowa Mutual*,³⁰⁴ it has been suggested that the tribal exhaustion/abstention requirement "mirrors the abstention rationale developed in *Younger v. Harris*."³⁰⁵

The Supreme Court has described its *Younger* decision as holding that "a federal court should not enjoin a state criminal prosecution begun prior to the institution of the federal [court] suit except in very unusual situations, where necessary to prevent immediate irreparable injury."³⁰⁶ The doctrine "has now been extended to civil proceedings and is intended to restrain federal courts from hearing constitutional challenges to state action in which federal action is regarded as an intrusion on the right of a state to enforce its own laws in its own courts."³⁰⁷ Although *Younger* is grounded in part on principles of equity,³⁰⁸ the Court made clear that its result was

reinforced by an even more vital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of

304. In *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856 n.21 (1985), the Supreme Court did invoke *Juidice v. Vail*, 430 U.S. 327 (1977), which is a *Younger* abstention case. See Slade, *supra* note 19, at 529.

305. Julie A. Pace, Comment, *Enforcement of Tribal Law in Federal Court: Affirmation of Indian Sovereignty Or a Step Backward Towards Assimilation?* 24 ARIZ. ST. L.J. 435, 463 n.235 (1992). See also Dennis W. Arrow, *Federal Question Doctrines and American Indian Law*, 14 OKLA. CITY U. L. REV. 263, 345 n.507 (1989) (describing the holding in *National Farmers Union* as "analogous to the 'abstention' holding of *Younger v. Harris*"); Arrow, *supra* note 159, at 488. Judith Resnik, *Rereading "The Federal Courts": Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 VAND. L. REV. 1021, 1053 n.142 (1994) (proposing that, in a law school course on Federal Courts jurisprudence, *Iowa Mutual* "could be read with . . . *Younger v. Harris*"); Slade, *supra* note 19, at 528-30 (characterizing *National Farmers Union* as a *Younger* abstention case);

306. Samuels v. Mackell, 401 U.S. 66, 69 (1971).

307. John B. Oakley, *Proceedings of the Western Regional Conference on State-Federal Judicial Relationships*, 155 F.R.D. 233, 335 (1993).

308. See Samuels, 401 U.S. at 43-44 (One reason "for this longstanding public policy against federal court interference with state court proceedings" is "the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.").

separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism."³⁰⁹

Proponents of the *Younger* analogy stress the parallel between the Supreme Court's "respect for state functions" and the "policy of supporting tribal self-government and self-determination"³¹⁰ which girds the tribal exhaustion/abstention rule of *National Farmers Union* and *Iowa Mutual*. The efficacy of the analogy, however, depends on the degree to which tribes can be equated with states for purposes of determining the appropriate allocation of judicial power between tribal and federal courts. As discussed below, because the tribal-federal relationship is so fundamentally different from the state-federal relationship, the *Younger* notion of "Our Federalism" is ultimately of little assistance in delineating the parameters of the tribal exhaustion/abstention doctrine.

Kevin Worthen has observed that "one should not assume that principles that apply in the federal-state relationship automatically apply in the federal-tribal relationship because the former relationship is premised on the constitutionally-based theory of consent, while the latter is not."³¹¹ In particular, tribes differ from states in three elemental (and interrelated) respects: (1) Indian tribes "did not take part in the Constitutional Convention and did not join in the federation of powers;"³¹² (2) tribal courts, unlike state courts, are arguably unconstrained by the Supremacy Clause;³¹³ and (3) there is (at present) no possibility of Supreme Court review of tribal court decisions—even when tribal courts construe (or invalidate) federal statutes.

The first point is perhaps the most fundamental. In his order granting a stay of the mandate pending consideration of the petition for certiorari in *National Farmers Union*, Justice Rehnquist opined that

309. *Id.* at 44.

310. *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856 (1985).

311. Worthen, *supra* note 126, at 67 n.5. Worthen was agreeing with Judith Resnik's assertion that "thinking about the states may not be helpful to conversations about the tribes and the federal government." Resnik, *supra* note 23, at 680.

312. Resnik, *supra* note 23, at 691.

313. U.S. CONST. art. VI, cl. 2.

"only the National and State Governments exercise *true* sovereignty" ³¹⁴ While that statement may be debated (what is true sovereignty?), it is beyond question that Indian tribes "are neither States of the Union nor foreign nations." ³¹⁵ Indian tribes were not part of—and did not consent to—the Constitutional Convention, and hence "their existence and role in the federal union is difficult to explain and reconcile with western notions of governmental legitimacy upon which American democracy rests." ³¹⁶

The second point of difference—that the Supremacy Clause constrains state courts but not tribal courts—is far less certain. The

314. 468 U.S. 1315, 1318 (Rehnquist, 1984) (emphasis added).

315. Skibine, *supra* note 149, at 558. The status of Indian tribes in the United States was, of course, the central question in the foundational case of *Cherokee Nation v. Georgia*, where the Supreme Court held that the Cherokee Nation is not a foreign nation, but rather should be characterized as a "domestic dependent nation." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). See also *supra* note 88.

316. Clinton, *supra* note 21, at 843. Robert Clinton's excellent article explores in great detail "the legal relationship between functioning tribal governments, and in particular tribal courts, and the rest of the federal union." *Id.* He notes that federalism is based in part on the political theory of John Locke, who "generally viewed consent of the governed through the constitutional social contract as the fountainhead of governmental legitimacy." *Id.* at 844. Clinton goes on to examine in depth the consequences of the basic fact that, "[i]n Lockean social compact terms, Indian tribes never entered into or consented to any constitutional social contract by which they agreed to be governed by federal or state authority, rather than by tribal sovereignty." *Id.* at 847. See also Wallace, *supra* note 78, at 150 ("Although the Tenth Amendment is relatively specific in determining the dimensions of the federal-state relationship; the Constitution is decidedly less specific in identifying the nature of federal-tribal interaction."); Alleva et al., *supra* note 19, at 564 (statement of Frank Pommersheim) ("[W]hen you're talking about the relationship of tribal courts to federal courts, of tribal government to federal government, you don't have the Tenth Amendment to act as a constitutional benchmark"); Resnik, *supra* note 23, at 690-701 (describing the Indian tribes' relationship to the United States); Skibine, *supra* note 149, at 561-62. Skibine states:

Indian tribes have never truly been legally "incorporated" into the United States constitutional system of justice. Although all Indians became citizens in 1924, Indian tribes and the Indians as members of Indian tribes still do not have any protectable political rights under the Constitution; there is no constitutional foundation assigning a role or place to the Indian tribes within the constitutional framework.

Id.

In *Blatchford v. Native Village of Noatak*, the Supreme Court rejected the contention that the states waived their immunity from suit by Indian tribes when they (the states) adopted the Constitution. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781-82 (1991). The Court observed that "it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties." *Id.* at 782. The court stated "[w]hat makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no . . . mutuality with either foreign sovereigns or Indian tribes." *Id.* See also *Montana v. Gilham*, 932 F. Supp. 1215, 1222-23 (D. Mont. 1996) (applying *Blatchford* and holding that the State of Montana had not impliedly waived its sovereign immunity with respect to tort actions commenced in tribal court).

Supremacy Clause states in its entirety:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges *in every State* shall be bound thereby, any Thing in the Constitution or Laws of *any State* to the Contrary notwithstanding.³¹⁷

While, on one hand, the framers referred only to the "Laws of any *State*" and made no mention of the laws of Indian tribes, on the other hand the constitutional binding of "the Judges *in every State*" to the supreme law of the United States can be read to include tribal judges as well as state judges.³¹⁸ Although federal courts have suggested that tribal courts are obliged to conform their decisions to applicable federal law,³¹⁹ tribal

317. U.S. CONST. art. VI, cl. 2 (emphasis added).

318. See generally Clinton, *supra* note 21, at 916 n.179 ("By its express terms, the supremacy clause does not appear to directly apply to Indian tribes."); Worthen, *supra* note 126, at 118 (setting forth the argument that the supremacy clause does apply to Indian tribes, "even though it does not mention them and even though no specific evidence exists to show that the framers contemplated that the clause would apply to tribal governments," because "the first clause provides a more sweeping rule that is not limited to any particular governmental body.").

It is interesting to note that, although the Supremacy Clause presently states that judges in every state shall be bound "by supreme federal law, in an earlier version it stated instead that the judiciaries of the several States shall be bound by supreme federal law." See S. Candice Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause*, 24 CONN. L. REV. 829, 871 (1992) (setting forth the historic origins of the Supremacy Clause). It is highly doubtful that the emendation was for the purpose of bringing tribes and tribal courts within the scope of the Clause. *Id.* "This subtle change could have evidenced an intention to bind all judges . . . [b]ut the putative change in scope evidently was never raised for Convention discussion, and it could easily have been merely a transcription error in the midst of the Committee's multiple drafts." *Id.*

319. See *National Farmers Union Ins. Cos. v. Crow Tribe*, 468 U.S. 1315, 1318 (1984) (Rehnquist, J.) ("I cannot believe that Indian tribal courts are . . . free to exercise their jurisdiction in a manner prohibited by the decisions of this Court."); *Santa Clara v. Martinez*, 436 U.S. 49, 65 (1978) (noting that the Indian Civil Rights Act changed the law that tribal forums "are obliged to apply"); *Yellowstone County v. Pease*, 96 F.3d 1169 1173, (9th Cir. 1996) ("[T]ribal judges, like state judges, are expected to comply with binding pronouncements of the federal courts."). Some tribal courts have acknowledged that tribal law must not conflict with federal law. See *Conoco, Inc. v. Ponca Tax Comm.*, 21 Indian Law Rptr. 6119, 6121 (Ponca Tribal Tax Court, Sep. 28, 1994) (No. CIV-92-101) ("We are cognizant here that although this tribal court is ruling on its own jurisdiction, it is deciding an issue of federal law, and is constrained to follow the leading precedents of the United States Supreme Court."); *Biakeddy v. Biakeddy*, 18 Indian Law Rptr. 6111, 6112 (Navajo Nation Supreme Court, May 5, 1991) (No. A-CV-43-90) ("The courts of the Navajo Nation must conform their decisions to applicable federal law. 7 Nav. T.C. § 204(a)"). It is unclear whether the tribal court's holding in *Biakeddy* is predicated in any way on the Supremacy Clause or is dependent entirely on the Navajo statute.

courts have in a few instances rejected the notion of a supreme and controlling federal law.³²⁰

The federal abstention doctrines, including the *Younger* notion of "Our Federalism," depend not only on the applicability of the Supremacy Clause, but also on the availability of Supreme Court review of state court decisions construing federal rights.³²¹ There is, in contrast, no provision in Title 28 of the United States Code for Supreme Court review (or federal review of any kind) of tribal court decisions, even when tribal courts construe or invalidate federal statutes.³²² It is

320. See, e.g., *In re Estate of Jumbo*, 17 Indian Law Rptr. 6042, 6043 (Navajo Nation Supreme Court, Feb. 23, 1990) (No. A-CV-22-88) ("While the supremacy clause does not control our case, *Talton v. Mayes*, 163 U.S. 376 (1896); *United States v. Wheeler*, 435 U.S. 313 . . . (1978), federal decisions are helpful on determining Congress' intent.") In *Satiacum v. Reagan*, the tribal court declared that it was not bound by the decisions of the United States Supreme Court that limit tribal sovereignty, stating that "[t]he Puyallup Nation . . . must reject these federal holdings, and the concomitant doctrine of plenary power, as a matter of tribal law." *Satiacum v. Reagan*, 10 Indian Law Rptr. 6009, 6011 (Puyallup Tribal Court, Sep. 17, 1982) (No. 81-1136).

321. See *Younger*, 401 U.S. at 57 n.* (Brennan, J., concurring) (supporting federal abstention in favor of state court proceedings by noting that the state decision was subject to review "in this Court"). See also *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983) ("State courts, as much as federal courts, have a solemn obligation to follow federal law [and] any state court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny."); *Mendez v. Heller*, 530 F.2d 457, 461 n.2 (2d Cir. 1976) (Oakes, J., concurring) (stating that Supreme Court review "assures that ultimate federal review is available and, of course, the state courts are bound to apply the United States Constitution as the supreme law of the land.").

322. See *Worthen*, *supra* note 126, at 85 ("[T]here is no general statutory authority for federal court review of tribal court decisions, not even by the Supreme Court."); *Resnik*, *supra* note 23, at 733; *Taylor*, *supra* note 20, at 268-69 ("There is no recorded instance of a writ of certiorari being brought to the Supreme Court from a tribal appellate decision."); *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1302 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 779 (1995) (Loken, J., concurring) ("I know of no statute giving the district and circuit courts jurisdiction to review tribal court decisions."); *State v. Flammond*, 621 P.2d 471, 474 (Mont. 1980) ("It appears that there is no appeal from a tribal court ruling to the federal court system."). Thus, while the Supreme Court held in *National Farmers Union* that a federal court has federal question jurisdiction to determine the limits of tribal court jurisdiction, it is incorrect to state that federal courts may assert appellate jurisdiction vis-a-vis tribal court decisions. See, e.g., *Vance v. Boyd Miss., Inc.*, 923 F. Supp. 905, 912 (S.D. Miss. 1996) (stating, incorrectly, that a tribal court decision can be appealed to a federal district court); *Krempel v. Prairie Island Indian Community*, 888 F. Supp. 106, 108 (D. Minn. 1995). See generally *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506, 509-10 (7th Cir. 1996) (describing the principle, established in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia v. Feldman*, 460 U.S. 462 (1983), that the inferior federal courts generally do not have the power to exercise appellate review over state court decisions).

Congress has considered the possibility of federal review of tribal court decisions. The 1934 Indian Reorganization Act contained an unenacted provision creating a federal court

because the aforementioned "notions of federalism are not applicable to the federal-tribal relationship as they are to the federal/state relationship,"³²³ that the proposed analogy between the *Younger* abstention doctrine and the tribal exhaustion/abstention rule must fail.

In any event, the *Younger* rule does not support those who view the tribal exhaustion/abstention doctrine as an inflexible bar. First of all, whether a state action is pending is a factor to consider in determining whether federal abstention is appropriate under *Younger*.³²⁴ More importantly, while the Supreme Court in *Younger* determined that federal abstention may be appropriate in particular circumstances due to "a proper respect for state functions,"³²⁵ it also was careful to hold that the "Our Federalism" notion "does not mean blind deference to 'States' Rights"³²⁶ and is not to be inflexibly applied.

which would have exercised appellate jurisdiction over tribal courts. See Taylor, *supra* note 20, at 273. The 1968 Indian Civil Rights Act initially provided for appeals from tribal courts to federal district courts. See WUNDER, *supra* note 116, at 138. This notion reappeared in legislative efforts in the late 1980s and early 1990s to amend the ICRA and provide for direct federal review. See, e.g., *Federal Court Review of Tribal Courts Rulings In Actions Arising Under Indian Civil Rights Act, Hearing Before the Select Committee on Indian Affairs United States Senate*, 102d Cong. (1991). See also Arrow, *supra* note 75, at 52-53; Vicki J. Limas, *Employment Suits Against Indian Tribes: Balancing Sovereign Rights and Civil Rights*, 70 DENV. U. L. REV. 359, 387-89 (1993); Resnik, *supra* note 23, at 738-42; Valencia-Weber, *supra* note 93, at 239 n.42. In addition, some commentators have argued for federal review of tribal court decisions. See Reynolds, *supra* note 16, at 1153-56 (urging Congress to provide for Supreme Court review of tribal court decisions by writ of certiorari); Clinton, *supra* note 21, at 893 (same); Wright, *supra* note 286, at 1421-23 (proposing a federal Court of Indian Appeals); while others oppose the concept. See Clinton, *supra* note 21, at 877 ("To federally legislate an extensive system of direct review for tribal actions . . . would violate many fundamental American principles of popular sovereignty based on the consent of the governed."); M. Allen Core, Note, *Tribal Sovereignty: Federal Court Review of Tribal Court Decisions—Judicial Intrusion Into Tribal Sovereignty*, 13 AM. INDIAN L. REV. 175 (1988). The failure of Congress to take action, of course, may moot the debate. See Laurence, *supra* note 126, at 431 n.88 ("I judge the chance that Congress would ever add to the Supreme Court's workload by allowing certiorari to be sought from several hundred tribal courts to be approximately zero.").

323. Alleva et al., *supra* note 19, at 547 (statement of Alex Skibine).

324. See John B. Oakley, *Proceedings of the Western Regional Conference on State-Federal Judicial Relationships*, 155 F.R.D. 233, 335-36 (1993). Consequently, Lynn Slade contends that the *Younger* analogy supports the (minority) view that the tribal exhaustion/abstention rule should only apply when there is a tribal action pending at the time federal jurisdiction is invoked. See Slade, *supra* note 19, at 531. See also Reynolds, *supra* note 16, at 1151 n.312 (citing *Younger* and observing that "general principles of abstention would restrain the federal courts from taking jurisdiction to hear cases that would interfere inappropriately with ongoing tribal court proceedings.").

325. *Younger*, 401 U.S. at 44.

326. *Id.* The presence of issues of federal law also counsels against *Younger* abstention. In *Fort Belknap Indian Community v. Mazurek*, the State of Montana argued that the district

2. *Colorado River* and the Tribal Exhaustion/Abstention Rule

The Supreme Court in *Colorado River* addressed the question of "whether a federal court may stay or dismiss an action on the sole ground that there is a similar action pending in state court in which the controversy between the parties can be resolved."³²⁷ The Court held that, although the refusal to exercise jurisdiction could not be supported under the traditional abstention doctrines, a federal court could defer to a parallel state action in exceptional circumstances.³²⁸ The Court stressed, however, that "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them" meant that dismissal of a federal suit due to the presence of a concurrent state proceeding would be appropriate only in "limited" and "exceptional" situations.³²⁹

The argument for analogizing the tribal exhaustion/abstention rule to the *Colorado River* doctrine is bolstered by two facts. First, the Supreme Court itself stated, in *Iowa Mutual*, that the tribal exhaustion/abstention rule "is analogous to principles of abstention articulated in *Colorado River* . . . [and that i]n *Colorado River*, as here, strong federal policy

court should have abstained from exercising its jurisdiction over the Indian Community's suit for a declaration that Montana lacked jurisdiction to prosecute Indians in state court for violations of state liquor laws. *Fort Belknap Indian Community v. Mazurek*, 43 F.3d 428 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 49 (1995). The Court of Appeals disagreed, and held that, "[b]ecause the jurisdictional question is paramount and federal, *Younger* abstention would not be appropriate here." *Id.* at 432. *See also* *Bowen v. Doyle*, 880 F. Supp. 99, 130 (W.D.N.Y. 1995) ("Here, abstention is inappropriate as the critical issue whether the State Court has authority to enter orders directing how an Indian tribe may govern itself is a federal question, and New York has no interest in the subject matter of the underlying controversy.").

327. CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* § 52, at 315 (4th ed. 1983).

328. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813-21 (1976). *See generally* REDISH, *supra* note 6, at 298-304; Lee & Wilkins, *supra* note 7, at 356-61. In deciding whether to defer to parallel state proceedings, *Colorado River* directs the federal court to consider the following factors:

1. Which court first assumed jurisdiction over the property in dispute (the "jurisdiction over the res" factor)
2. The convenience or inconvenience of the federal forum.
3. The desirability of avoiding piecemeal litigation
4. The order in which jurisdiction was obtained by the concurrent forums (the "priority" factor)
5. The law that provides the rule of decision on the merits (the "choice of law" factor) [and]
6. The adequacy or inadequacy of state law proceedings in protecting the defendant's rights.

John B. Oakley, *Proceedings of the Western Regional Conference on State-Federal Judicial Relationships*, 155 F.R.D. 233, 337 (1993).

329. *Colorado River*, 424 U.S. at 817-18.

concerns favored resolution in the nonfederal forum.³³⁰ Second, the *Colorado River* doctrine—unlike the other abstention doctrines—is not based entirely on inapposite principles of federalism.³³¹ The doctrine, however, is justified in part by the availability of Supreme Court review of state court decisions construing federal law.³³²

As in the case of the doctrine of exhaustion of administrative remedies, the notion of comity, and the *Younger* abstention doctrine, the proponents of the view that the tribal exhaustion/abstention rule mandates federal abstention (when applicable) find little support in the *Colorado River* abstention doctrine for their proposed extension of *National Farmers Union* and *Iowa Mutual*. The Supreme Court has expressly stated that “*Colorado River* . . . does not require that a federal . . . suit must always be dismissed or stayed in deference to a concurrent and adequate comprehensive state adjudication.”³³³ Rather than an unbending rule of abstention, the *Colorado River* rule only comes into play when there is a parallel state action,³³⁴ applies only in “exceptional circumstances,”³³⁵ and takes into consideration whether there is a federal question being litigated.³³⁶

330. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 n.8 (1987). See also *Kaul v. Wahquahboshkuk*, 838 F. Supp. 515, 517 (D. Kan. 1993) (holding that the tribal exhaustion/abstention rule “functions as a matter of comity in much the same way as the abstention principles enunciated in *Colorado River* . . .”). But see *Alleva et al.*, *supra* note 19, at 559 (statement of Robert Clinton) (“*Colorado River Water Conservation District* was cited only to establish the principle of comity and for nothing more.”).

331. See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (“[T]his case falls within none of the abstention categories, [and is] unrelated to considerations of proper constitutional adjudication and regard for federal-state relations.”). See also *REDISH*, *supra* note 6, at 300 (“*Colorado River* abstention is premised largely on considerations of docket control.”); *Lee & Wilkins*, *supra* note 7, at 356-57 (“*Colorado River* abstention is founded upon notions of judicial economy.”).

332. See *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983). *San Carlos Apache Tribe* is a follow-up case to *Colorado River* wherein the Court justifies federal court deference to state adjudication of federal Indian water rights by emphasizing the possibility of Supreme Court review of the state court action. *Id.*

333. *Id.* at 569.

334. *Colorado River*, 424 U.S. at 818 (discussing “the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding.”). See also *Slade*, *supra* note 19, at 531 (if *Colorado River* was applied to Indian country cases, it would “require in the first instance, as was the case in *National Farmers Union* and *Iowa Mutual*, the pendency of concurrent actions in federal and tribal court.”).

335. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 19 (1983).

336. *Id.* at 23 (finding that the existence of a federal question weighs heavily against abstention). See also *Slade*, *supra* note 19, at 537 (“The factor recognized under the *Colorado River* doctrine by *Moses H. Cone*, that is, the extent to which federal question jurisdiction underlies a controversy, may weigh heavily against abstention in Indian cases.”).

D. Summation and Transition

It has been shown that *National Farmers Union* and *Iowa Mutual* do not command that the tribal exhaustion/abstention doctrine be applied as an inflexible and preponderant rule. Likewise, the preceding discussion demonstrates that the "inflexible bar" characterization is not supported by drawing analogies to other judicial doctrines that affect the exercise of federal jurisdiction, such as the doctrine of exhaustion of administrative remedies, the notion of comity, and the various abstention doctrines. Instead, the contention that the tribal exhaustion/abstention rule is (or should be) a mandatory command must ultimately rest on the three policy concerns identified in *National Farmers Union* and *Iowa Mutual*: supporting tribal self-government; promoting the orderly administration of justice; and obtaining the benefit of tribal expertise. Indian abstention cases, as Robert Clinton has suggested, can be viewed "as a unique category which one need not pigeonhole into state abstention analogies"³³⁷ Nevertheless, the question remains: is it necessary that federal abstention and exhaustion of tribal remedies be inflexibly mandated? Abstention will in most circumstances further the goal of promoting tribal self-government, but abstention in all applicable circumstances may (as discussed below) actually undermine this objective. Moreover, the principle of statutory interpretation—that it may frustrate rather than effectuate legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law³³⁸—is a useful referent when addressing the appropriate limits of the tribal exhaustion/abstention rule. The policy of promoting tribal self-government cannot be viewed in a vacuum; it must be weighed and

In *Vance v. Boyd Miss., Inc.*, the district court applied the *Colorado River* doctrine to determine whether federal abstention and exhaustion of tribal court remedies was required. *Vance v. Boyd Miss., Inc.*, 923 F. Supp. 905 (S.D. Miss. 1996). The court held that, "[b]ased on a careful application of the *Colorado River/Moses H. Cone* factors, the Court finds that the circumstances in this case do not rise to the level of 'exceptional' such that they outweigh the presumption in favor of the exercise of jurisdiction." *Id.* at 913. The court stressed that "this is a case involving a dispute between two non-Indians, concerning only issues of federal law, which happened to arise on the Reservation in a business owned by the Tribe but which is managed by a non-Indian corporation." *Id.* at 911.

337. *Alleva et al.*, *supra* note 19, at 559 (panel discussion). Alex Skibine stated that "in *Colorado River*, the Court was only concerned about judicial economy. In *National Farmers* and *Iowa Mutual*, however, the Court was also concerned about promoting tribal self-government by preserving the tribal court's authority over reservation affairs." *Id.* at 548-49.

338. *Rodriguez v. United States*, 480 U.S. 522, 526 (1987).

applied with regard to competing and conflicting objectives.³³⁹ In the matter at hand, the most obvious competing norm is the “virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.”³⁴⁰ In addition, other factors, such as the preserving the status of federal courts “as the fundamental protectors of both federal rights and federal governmental interests,”³⁴¹ should be considered before elevating the tribal exhaustion/abstention rule to preponderant status.

This Article now returns to *United States v. Plainbull* for the purpose of reassessing the scope of the tribal exhaustion/abstention doctrine in light of *Plainbull*'s specific scenario—the enforcement of federal law by the federal government in cases involving Indians. This curious case of disappearing federal jurisdiction over federal enforcement of federal law is a useful vehicle for demonstrating that, while the policy concerns underlying the tribal exhaustion/abstention doctrine, particularly the federal policy of supporting tribal self-government, should cause federal courts to abstain in most cases involving Indians and Indian tribes, the doctrine of *National Farmers Union* and *Iowa Mutual* should not be deemed a mandatory and inflexible rule.

VI. REASSESSMENT OF THE TRIBAL EXHAUSTION/ABSTENTION DOCTRINE: *PLAINBULL* AND THE CURIOUS CASE OF DISAPPEARING FEDERAL JURISDICTION OVER FEDERAL ENFORCEMENT OF FEDERAL LAW

The federal government's appeal in *Plainbull* from the district court's invocation of the tribal exhaustion/abstention doctrine raised both applicability and flexibility issues. The government first contended that the doctrine was not applicable because any action in tribal court—in view of the federal court's exclusive jurisdiction over the dispute—would be “patently violative of express jurisdictional prohibitions.”³⁴² Alter-

339. See generally Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken A Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199, 246-57 (1996) (noting, in the context of statutory interpretation, that a liberal construction may actually upset a legislatively crafted compromise, cause conflict with the other goals of the statute, undermine extrastatutory goals and meta-principles, or unintentionally frustrate—instead of effectuate—the underlying statutory objectives).

340. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976).

341. REDISH, *supra* note 6, at 1. It is the stated premise of Martin Redish's text “that the integrity of the Article III federal courts as the primary adjudicators of federal law should be both recognized and preserved.” *Id.*

342. *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856 n.21 (1985).

natively, the United States contended that the doctrine should not be inflexibly applied to preclude the federal government from enforcing federal law in federal court. The Ninth Circuit rejected both arguments.

A. *Plainbull* and the Question of Exclusive Federal Jurisdiction

The exhaustion/abstention rule of *National Farmers Union* and *Iowa Mutual* comes into play, of course, only when there is a colorable claim of concurrent tribal court jurisdiction. The government argued in *Plainbull* that the jurisdictional statute in question, 28 U.S.C. § 1355, precluded concurrent jurisdiction in tribal courts.³⁴³ The Ninth Circuit, however, held that Congress “did not exercise [its] power, when it drafted section 1355, to preclude concurrent jurisdiction in the tribal court.”³⁴⁴ In support of its holding, the court of appeals ignored the history of the jurisdictional grant and instead focused exclusively on the current statutory text:

[W]e read the plain language of section 1355 as suggesting that the district court was not obligated to hear the case. Section 1355 only grants the district court original jurisdiction “exclusive of the courts of the States,” not exclusive of all other courts that would otherwise have had jurisdiction. Since a tribal court is not a state court, we hold that it does not fall within the exclusive jurisdiction provision of section 1355.³⁴⁵

Plainbull raises the issue of how express Congress must be in setting forth jurisdictional prohibitions to the assertion of tribal court jurisdiction. In many instances, there is no question that the jurisdiction conferred by Congress on federal courts is exclusive.³⁴⁶ Likewise,

343. As previously noted, 28 U.S.C. § 1335 provides that federal district courts shall have original jurisdiction, exclusive of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title.

28 U.S.C. § 1335 (1994). See also *supra* Part II.

344. *United States v. Plainbull*, 957 F.2d 724, 727 (9th Cir. 1992).

345. *Id.* at 726.

346. See, e.g., 28 U.S.C. § 1251(a) (1994) (“The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.”); 28 U.S.C. § 1334(a) (1994) (granting district courts “original and exclusive jurisdiction” over certain bankruptcy issues); 28 U.S.C. § 1364(a) (1994) (granting district courts “original and exclusive jurisdiction” over civil actions against insurers of members of diplomatic missions and their families). Several statutes regulating Indian affairs also contain unequivocal grants of exclusive federal jurisdiction. See, e.g., 25 U.S.C. § 737(c) (1994) (“[T]he courts of the United States shall have exclusive jurisdiction” over violations of rules governing the gaming activities of the Alabama and Coushatta Indian Tribes of Texas.”); 25 U.S.C. § 1300g-6(c) (1994) (providing a similar

Congress often makes clear that a particular jurisdictional grant is *not* exclusive.³⁴⁷ In some jurisdictional grants, however, congressional intent is less clear and the courts have employed various interpretive approaches in determining whether the grant of federal jurisdiction should be deemed to be exclusive.³⁴⁸ In *Iowa Mutual*, for example, the

provision with respect to gaming activities of the Ysleta Del Sur Pueblo); 25 U.S.C. § 1756(b) (1994) (providing a grant of exclusive jurisdiction to United States District Court for the District of Connecticut over any action challenging the constitutionality of Connecticut Indian Land Claims Settlement Act).

"Congress undoubtedly has the power to limit tribal court jurisdiction." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987). Therefore, if Congress has provided that a claim must be brought exclusively in the federal courts, the "considerations of comity" do not enter the picture. Thus, in *Blue Legs v. United States Bureau of Indian Affairs*, the Eighth Circuit held that exhaustion of tribal remedies was *not* required before a suit could be brought in federal district court under the Resource Conservation and Recovery Act because Congress "place[d] exclusive jurisdiction in federal courts for suits brought pursuant to [42 U.S.C. §] 6972(a)(1) of the Resource Conservation and Recovery Act." *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094, 1097-98 (8th Cir. 1989) (emphasis added). See also *Azure v. United States Health and Human Services*, 758 F. Supp. 1382, 1388 (D. Mont. 1991) (holding that the doctrine of comity does not require a district court to refrain from exercising jurisdiction over the government's third-party complaint against the driver of a vehicle involved in an accident on the Blackfeet Reservation since "[j]urisdiction of the claim advanced by [the passenger] under the Federal Torts Claims Act is vested [exclusively] in this court pursuant to 28 U.S.C. § 1346."); *Myrick v. Devils Lake Sioux Mfg. Corp.*, 718 F. Supp. 753, 754 (D.N.D. 1989) (noting, in refusing to dismiss an action on comity grounds, that at least one circuit has held that Title VII claims are within the federal court's exclusive jurisdiction); *Lower Brule Constr. Co. v. Sheesley's Plumbing & Heating Co., Inc.*, 84 B.R. 638, 641-42 (D.S.D. 1988) (holding that the tribal exhaustion/abstention rule does not apply to adversary proceedings in bankruptcy since "[i]ndian tribal courts have neither exclusive nor concurrent jurisdiction to hear bankruptcy proceedings").

347. See, e.g., 28 U.S.C. § 1334(b) (1994) (specifying circumstances where, in matters related to bankruptcy, district courts shall have "original but not exclusive jurisdiction"); 28 U.S.C. § 1352 (1994) (providing that, except in certain situations, "district courts shall have original jurisdiction, concurrent with State courts, of any action on a bond executed under any law of the United States."); 25 U.S.C. § 3106(c) (1994) (providing that Indian tribes that meet certain conditions "shall have concurrent civil jurisdiction" to enforce the statute's provisions relating to forest trespass); 25 U.S.C. § 3713(c) (1994) (providing a similar conditional express grant of concurrent civil jurisdiction relating to the enforcement of a prohibition against trespass on Indian agricultural lands).

348. See generally Michael E. Solimine, *Rethinking Exclusive Federal Jurisdiction*, 52 U. PITT. L. REV. 383 (1991). In *Gulf Offshore Co. v. Mobil Oil Corp.*, the Supreme Court reiterated its presumption in favor of concurrent state court jurisdiction developed in earlier cases, but stated that "the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981) (citing *Clafin v. Houseman*, 93 U.S. 130 (1876)). See also *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820 (1990) (holding that federal courts do not have exclusive jurisdiction over civil actions brought under Title VII of the Civil Rights Act of 1964); *Tafflin v. Levitt*, 493 U.S. 455 (1990) (state courts have concurrent

Supreme Court stressed the absence of affirmative signals of congressional intent in rejecting the contention that the federal diversity statute, 28 U.S.C. § 1332, precludes concurrent tribal court jurisdiction.³⁴⁹

Whether a grant by Congress of jurisdiction "exclusive of the states" should be deemed a grant of exclusive federal jurisdiction is a difficult interpretive issue. While most courts and commentators have equated the phrase "jurisdiction exclusive of the states" with exclusive federal jurisdiction,³⁵⁰ it appears that the possibility of concurrent *tribal* jurisdiction was never considered by such authorities. On the other hand, it is not clear that the presumption of concurrent state jurisdiction should be extended to tribal courts, since the presumption rests in large part on notions of federalism that have little or no application in federal-tribal jurisdictional disputes.³⁵¹ Different interpretive approaches—such

jurisdiction under ERISA).

349. 480 U.S. at 17-18. See also *Smith v. Moffett*, 947 F.2d 442, 444 (10th Cir. 1991) ("[W]e find no congressional intent to limit Indian jurisdiction in 28 U.S.C. § 1343.")

350. See, e.g., *Tafflin*, 493 U.S. at 471 (Scalia, J., concurring) ("In the standard fields of exclusive federal jurisdiction, the governing statutes specifically recite that suit may be brought 'only' in federal court, that the jurisdiction of the federal courts shall be 'exclusive,' or indeed that the jurisdiction of the federal courts shall be 'exclusive of the courts of the States.'") (quotations omitted); *Cinema Patents Co. v. Columbia Pictures Corp.*, 62 F.2d 310, 312-13 (9th Cir. 1932) (interpreting "exclusive of the courts of the states" in 28 U.S.C. § 1338(a) to confer exclusive patent jurisdiction on federal district courts); Solimine, *supra* note 348, at 386-87 (citing several statutes that grant federal courts "jurisdiction exclusive of the states" as examples where Congress "explicitly stated" that the cause of action "may only be filed in a federal court.").

Moreover, the leading commentators on federal jurisdiction all state that district court jurisdiction over penalty suits under 28 U.S.C. § 1355 is exclusive. See 13B CHARLES ALLAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* 2d § 3578 (1984) (28 U.S.C. § 1355 provides for exclusive jurisdiction in the district courts); HART & WECHSLER'S, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1080 (3d ed. 1988) ("The jurisdiction survives today . . . and, like its predecessor in 1789, is exclusive."); 1A MOORE'S *FEDERAL PRACTICE* ¶ 0.201 (2d ed. 1991) (stating that Congress "conferred exclusive jurisdiction upon the district courts over . . . suits to recover any fine, penalty, or forfeiture" under an Act of Congress").

351. See THE FEDERALIST No. 82 at 516 (Alexander Hamilton) (Howard Mumford Jones ed. 1961).

When . . . we consider the state governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive, that the state courts would have a concurrent jurisdiction in all cases arising under the laws of the union, where it was not expressly prohibited.

Id. (quoted in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981)). The presumption of federal-state concurrent jurisdiction is buttressed by (1) the fact that the framers of the Constitution clearly envisioned the prospect of concurrent federal-state jurisdiction; (2) the possibility of Supreme Court review of state court decisions interpreting federal statutes; and (3) the fact that state courts are bound to follow and apply federal law under the Supremacy Clause. See Solimine, *supra* note 348, at 403-04. See also *Tafflin*, 493

as textualism, intentionalism, dynamism, and purposivism—also yield conflicting results.³⁵²

In light of the federal government's current policy of promoting tribal self-government and tribal courts, it is appropriate to borrow the presumption of concurrent jurisdiction—despite its grounding in federalism—and apply it in cases of congressional silence.³⁵³ For the same reasons, the phrase "jurisdiction exclusive of the states" is *by itself* an insufficient indicator of congressional intent to vest exclusive jurisdiction in federal courts (as opposed to divesting state courts—and only state courts—of concurrent jurisdiction).

Nevertheless, the Ninth Circuit clearly erred in concluding that Congress failed to exercise its power to preclude concurrent tribal court jurisdiction when it "drafted" 28 U.S.C. § 1355. Section 1355 is "directly traceable to the Judiciary Act of 1789."³⁵⁴ Section 9 of the 1789 Act conferred on district courts "*exclusive original cognizance* of . . . all suits for penalties . . . incurred, under the laws of the United States."³⁵⁵ Thus, when Congress drafted the predecessor to 28 U.S.C. § 1355, it

U.S. at 469 (White, J., concurring) (noting that, in cases of state court concurrent jurisdiction over federal causes of action, "we have the authority to reduce the risk of, and to set aside, incorrect interpretations."). As noted above, the aforementioned principles of federalism do not apply at least with equal force to the federal-tribal relationship. See *supra* notes 311-15 and accompanying text.

352. See Watson, *supra* note 339, at 210-22 (surveying the various theories of statutory interpretation). The Ninth Circuit in *Plainbull* invoked the textualist-based "plain language" rule to conclude that "exclusive of the states" does not divest tribal courts of concurrent jurisdiction. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1554 (1987). A blend of intentionalism and pragmatic interpretation, however, points in the opposite direction, since Congress passed the jurisdictional grant in an era when tribal courts were virtually non-existent. *Id.* A proponent of dynamic interpretation, in rejoinder, would assert that the statute should be construed "in light of [its] current as well as historical context." *Id.*

353. For example, in *United States v. Tsosie*, the district court held that 25 U.S.C. § 345, which says that "district courts are given jurisdiction to try and determine any action . . . involving the right of any person . . . to any allotment," did not by its plain language grant district courts jurisdiction "which is exclusive of all other courts that would have otherwise had jurisdiction." *United States v. Tsosie*, 849 F. Supp. 768, 773 (D.N.M. 1994), *aff'd*, 92 F.3d 1037 (10th Cir. 1996). See also *Kerr-McGee Corp. v. Farley*, 915 F. Supp. 273, 277 (D.N.M. 1995) ("Interpreting silence [regarding concurrent tribal jurisdiction in federal jurisdictional grants] in favor of Indians is consistent with the trust relationship existing between the federal government and the tribes."); *AG Organic, Inc. v. John*, 892 F. Supp. 466, 475 (W.D.N.Y. 1995) (holding that, because the federal jurisdictional statute at issue does not expressly prohibit the tribal courts from exercising jurisdiction, "this court must presume that tribal sovereign power remains intact.").

354. 13B Wright, et al., *supra* note 350, at § 3578.

355. Judiciary Act of 1789, Ch. 20, 1 Stat. 76-77 (emphasis added).

acted to affirmatively preclude concurrent jurisdiction in all other courts.³⁵⁶ The change in the wording of this law occurred when the statutes at large were revised in 1874. Thus, while the 1789 Act granted district courts "exclusive original cognizance of" penalty suits, 28 U.S.C. § 1355 now states that "district courts shall have original jurisdiction, exclusive of the courts of the States."

The Ninth Circuit did not expressly consider the 1789 Judiciary Act, wherein Congress—in one of its most important enactments—plainly conferred exclusive jurisdiction on district courts over penalty suits. It is extremely implausible that subsequent Congresses intended to *strip* district courts of their exclusive jurisdiction (as to courts other than "courts of the States") when they rephrased the 1789 Act.³⁵⁷ The words "exclusive of the courts of the several states" in the 1874 revision were not used to amend and restrict the grant of exclusive jurisdiction in the 1789 Judiciary Act.³⁵⁸ Rather, Congress equated the phrase "jurisdiction exclusive of the courts of the several states" with "exclusive" federal jurisdiction.³⁵⁹

356. In *Ketland v. The Cassius*, the Supreme Court held that, since this part of section nine of the 1789 Judiciary Act conferred exclusive jurisdiction on district courts, a federal circuit court could not maintain an action for forfeiture:

The 9th section of the act declares that "the district court shall have exclusive original cognizance of all suits for penalties and forfeitures, incurred under the laws of the United States." *The exclusion is expressed in strong and unqualified terms; nor can it, by any reasonable interpretation, be restricted to a mere exclusion of the state courts.*

Ketland v. The Cassius, 1 L.E. 418, 419 (1796) (quoting Section 9 of the Judiciary Act of 1789, Ch. 20 Stat. 76-77) (emphasis added). The Supreme Court has repeatedly held that the penalty suit jurisdiction granted district courts in the 1789 Act is exclusive. See *Lees v. United States*, 150 U.S. 476, 478 (1893); *United States v. Mooney*, 116 U.S. 104, 105 (1885); *Claflin v. Houseman*, 93 U.S. 130, 139 (1876); *Gelston v. Hoyt*, 16 U.S. 211, 216 (1818).

357. See *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 625-26 (1979) (Powell, J., concurring) (no changes were intended by the 1874 revision); 2 CONG. REC. 1210 (Feb. 2, 1874) ("We do not propose to alter the law one jot or tittle.") (Statement of Rep. Poland).

358. See *McDonald v. Hovey*, 110 U.S. 619, 629 (1884) ("[A] different interpretation is not to be given to [the revised statutes] without some substantial change of phraseology some change other than what may have been necessary to abbreviate the form of the law."); 3M v. Browner, 17 F.3d 1453, 1458 (D.C. Cir. 1994) (stating that changes in phraseology "did not render the new statute different in substance from the old.").

359. In *Foxgord v. Hischemoeller*, the Ninth Circuit looked at the 1789 Act to determine the scope of 28 U.S.C. § 1351(1), which provides that "district courts . . . shall have [original] jurisdiction, exclusively of the courts of the States, of all [civil actions and proceedings] against—(1) consuls or vice consuls [of foreign states]" *Foxgord v. Hischemoeller*, 820 F.2d 1030, 1034 (9th Cir. 1987) (citing 28 U.S.C. § 1351(1)). This section, like 28 U.S.C. § 1355, was derived from section 9 of the 1789 Judiciary Act, however, the original grant of jurisdiction to district courts over suits against consuls was "exclusiv[e] of the courts of the several States" Judiciary Act of 1789, Ch. 20, 1 Stat. 77. In direct contrast to *Plainbull*,

B. Plainbull and the Question of Whether the Tribal Exhaustion/Abstention Rule Should be Deemed an Inflexible Bar

Because the Ninth Circuit in *Plainbull* rejected the contention that Congress had, in 28 U.S.C. § 1355, conferred exclusive jurisdiction to the federal district court to hear the federal government's action to enforce federal law, the court of appeals proceeded to address the issue of whether, pursuant to the tribal exhaustion/abstention rule of *National Farmers Union* and *Iowa Mutual*, the district court properly dismissed the United States' suit on abstention grounds. Stressing the "judicial policy of encouraging tribal self-government," the court held "that abstention, in this case, was appropriate."³⁶⁰

In determining that abstention was appropriate, the *Plainbull* court was required to distinguish, discount, ignore, or reject the relevance of the following factors: (1) the absence of a pending tribal action; (2) the fact that resolution of the underlying dispute turned on interpretation of federal law; (3) the virtually unflagging obligation of federal courts to exercise conferred jurisdiction; (4) the unavailability of federal court review of nonjurisdictional tribal court determinations; (5) the trust obligation of the United States towards Indian tribes; and (6) the federal government's special right of access to federal courts for enforcement of federal legislation. What makes *Plainbull* a particularly useful vehicle for a reassessment of the tribal exhaustion/abstention rule is this strong alignment of "anti-abstention" factors. To return once again to the observation of Mark Jarboe, "[t]he significance of a decision like *Plainbull* should not be underestimated . . . [because a] stronger case for federal court jurisdiction could hardly be imagined . . ."³⁶¹ As briefly discussed below, the facts of *Plainbull* call into question the outer limits of the exhaustion/abstention rule of *National Farmers Union* and *Iowa Mutual* and, in particular, the appropriateness of the rule's characterization as an inflexible bar to the exercise of federal jurisdiction.

1. General Factors in *Plainbull* Favoring Retention of Federal Jurisdiction

The first four factors favoring retention of federal jurisdiction in *Plainbull* are: (1) the absence of a pending tribal action; (2) the fact that

the court of appeals in *Foxgord* opined that such language "gives federal courts exclusive jurisdiction" *Foxgord*, 820 F.2d at 1031.

360. *United States v. Plainbull*, 957 F.2d 724, 727 (9th Cir. 1992).

361. Jarboe, *supra* note 22, at 441.

resolution of the underlying dispute turns on interpretation of federal law; (3) the virtually unflagging obligation of federal courts to exercise conferred jurisdiction; (4) and the unavailability of federal court review of nonjurisdictional tribal court determinations, have already been discussed in detail in this Article.³⁶² Consequently, only a few case-specific observations are in order. As an initial matter, the absence of a pending tribal action is especially compelling in *Plainbull* since (1) the federal suit was instituted on behalf of, and with the knowledge of, the Crow Tribe;³⁶³ and (2) the pendency of the federal suit in no way precluded the Crow Tribe from asserting its regulatory authority by applying *tribal* grazing laws in an enforcement action in tribal court against tribal members.³⁶⁴

Even more significant, however, is the fact that the Ninth Circuit thrice erred when it stated that "[t]he fact that the Government is attempting to enforce federal law is immaterial [because t]he alleged trespass was to tribal land and considerations of comity require that the tribal courts get the first opportunity to resolve this case."³⁶⁵ First of all, the presence of federal law issues is a highly material factor when courts decide whether to require exhaustion or abstention.³⁶⁶ Second, considerations of comity, whether restricted to the traditional notions of comity or expanded to encompass the *Younger* and *Colorado River* abstention rules, support retention, rather than require relinquishment, of federal jurisdiction when federal rights are at issue and the federal action is filed first.³⁶⁷

362. See *supra* Part IV.C.1 (the absence of a pending tribal action); Part IV.C.3 (the fact that resolution of the underlying dispute turns on interpretation of federal law); Part IV.B. (the virtually unflagging obligation of federal courts to exercise conferred jurisdiction); and Part V.C.1 (the unavailability of federal court review of nonjurisdictional tribal court determinations).

363. See *supra* note 480.

364. The jurisdiction granted federal district courts over actions to recover penalties incurred under federal law does not preclude Indian tribes from bringing actions in tribal court to enforce tribal law. See *generally* *United States v. Wheeler*, 435 U.S. 313 (1978) (holding that, because the United States and Indian tribes are "dual sovereigns," the Double Jeopardy Clause does not bar criminal prosecution under federal law following the conviction in tribal court of a lesser included tribal offense arising out of the same incident).

365. *Plainbull*, 957 F.2d at 728.

366. See, e.g., *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26 (1983) ("[T]he presence of federal-law issues must always be a major consideration weighing against surrender [of federal court jurisdiction.];" *McKart v. United States*, 395 U.S. 185, 197-98 (1969) (declining to require exhaustion of administrative remedies in part because the question presented was "solely one of statutory interpretation.").

367. See *supra* Part V.

Finally, the Ninth Circuit in *Plainbull* either ignored or misunderstood the significance of the “nonjurisdictional nonreviewability” language of *Iowa Mutual*: once it is determined that concurrent tribal court jurisdiction exists,³⁶⁸ the Crow Tribal Courts will get—by operation of the exhaustion/abstention rule—not the “first” opportunity, but rather the *only* opportunity to interpret and apply the federal statutes at issue.³⁶⁹ Thus, if the federal government was required to bring its enforcement action against the Plainbolls in Crow Tribal Court, the Crow Tribal Court(s) could determine—as did the federal district court in *Plainbull*—that the Interior Department’s grazing regulations are inapplicable to non-IRA tribes such as the Crow Tribe and that the trespass prohibition in 25 U.S.C. § 179 does not apply to activities of tribal members on their own reservation. The fundamental difference is that the federal government would be unable to seek federal review of an adverse tribal court determination—even if it conflicted with other tribal court decisions or other federal court decisions, including decisions of the Ninth Circuit (in which the Crow Tribe Reservation is located) and decisions of the United States Supreme Court.

2. Special Factors in *Plainbull* Favoring Retention of Federal Jurisdiction

Dismissal of the federal government’s suit in *Plainbull* also implicated an additional question of exceptional importance: the right of the United States to choose to enforce federal laws in federal courts. The federal government is responsible for enforcing federal law, and is also concerned—consistent with its general trust relationship with tribes—with misuse of Indian grazing resources.³⁷⁰ As noted by the Tenth Circuit, “the United States as a plaintiff seeking to establish rights which have a national and sovereign character is . . . a factor which militates strongly

368. The United States contended in *Plainbull* that 28 U.S.C. § 1355 conferred exclusive jurisdiction upon the federal district court to entertain the penalty action relating to violations of federal grazing trespass laws and regulations. The government did not otherwise contest the jurisdiction of the tribal court; hence, if 28 U.S.C. § 1355 was not a grant of exclusive federal jurisdiction, then the issue was not whether the Crow Tribal Courts *could* entertain the action, but rather whether they *should* entertain the action instead of the federal district court.

369. See *supra* notes 201-03 and accompanying text.

370. The United States’ stewardship of Indian grazing resources is an often litigated issue in federal courts. See, e.g., *Masayesva v. Zah*, 65 F.3d 1445 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1569 (1996); *Cherokee Nation of Okla. v. United States*, 21 Cl. Ct. 565, 577 (1990); *Navajo Tribe of Indians v. United States*, 9 Cl. Ct. 336, 399-407 (1986).

against the applicability of abstention."³⁷¹

The cases which have discussed the "special" right of access of the federal government to federal courts have been concerned, not surprisingly, with the interplay between state and federal courts. For example, the Supreme Court has held that "[f]or the Federal Government and its agencies, the federal courts are the forum of choice. For them, as *Leiter* indicates, access to the federal courts is 'preferable in the context of healthy federal-state relations.'"³⁷² To be sure, as evidenced by *Colorado River*, the United States does not have an absolute right to sue in a federal forum.³⁷³ When the question has arisen in the federal-state context, however, the Supreme Court has stressed that "the decision of the state court of any federal question which may be presented . . . may be reviewed by this Court and thus all the questions which the Government seeks to raise in these suits may be appropriately and finally decided."³⁷⁴

This justification for permitting a non-federal forum to adjudicate

371. *United States v. Akin*, 504 F.2d 115, 122 (10th Cir. 1974), *rev'd sub nom.*, *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). Although *Akin* was reversed on other grounds in *Colorado River*, the special status of the United States in federal court was noted by the Supreme Court in dicta. See *Colorado River*, 424 U.S. at 816-17 n.23 (holding that, in light of the holding that wise judicial administration favored dismissal of the parallel federal suit, it was "unnecessary to consider when, if at all, abstention would be appropriate where the Federal Government seeks to invoke federal jurisdiction.") (emphasis added).

372. *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 147 (1971) (quoting *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 226 (1957)). See also *In re Debs*, 158 U.S. 564, 584 (1895) ("Every government, intrusted by the very terms of its being, with powers and duties to be exercised and discharged, . . . has a right to apply for the general welfare, to its own courts for any proper assistance in the exercise of the one and the discharge of the other."); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 853 F. Supp. 1118, 1132 (D. Minn. 1994) (accepting the Band's contention that "[a]bstention is inappropriate because the United States is suing to enforce federally protected rights."); *United States v. Pennsylvania Dept. of Env'tl Resources*, 923 F.2d 1071 (3rd Cir. 1991) (district court abused its discretion by dismissing a suit brought by the United States under Declaratory Judgment Act concerning whether it was required to comply with state administrative order); *United States v. Composite State Bd. of Med. Examiners*, 656 F.2d 131 (5th Cir. 1981) (abstention is inappropriate when the United States is seeking to assert a federal interest against a state interest). See generally REDISH, *supra* note 6, at 1 ("The federal courts stand as the fundamental protectors of both federal rights and federal governmental interests.").

373. See also *United States v. Bank of New York & Trust Co.*, 296 U.S. 463, 479 (1936). Both *Colorado River* and *Bank of New York*, however, were essentially *in rem* proceedings, and in both cases there were pending state actions.

374. *Bank of New York*, 296 U.S. at 479; see also *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983) ("Any state court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny.").

federal law issues presented by the federal government, of course, does not apply in the federal-tribal context. Again, there is no provision in Title 28 of the United States Code for Supreme Court review of tribal court decisions, even when tribal courts construe, or invalidate, federal law.³⁷⁵ The consequence of applying the tribal exhaustion/abstention rule in *Plainbull* is that the Crow Tribal Court becomes the sole and final arbiter of the applicability of 25 U.S.C. § 179 and the federal government's ability to manage the grazing resource under 25 C.F.R. Part 166.³⁷⁶

VII. CONCLUSION

Plainbull was correctly decided only if one accepts that the promotion of tribal self-government and tribal courts is a preponderant objective that necessitates that the tribal exhaustion/abstention rule be inflexibly applied. Such a conclusion is neither compelled by the language of *National Farmers Union* and *Iowa Mutual*,³⁷⁷ nor supported by resort to analogous exhaustion, comity, and abstention doctrines. The alternative reading of *National Farmers Union* and *Iowa Mutual* is that federal courts should closely examine the "circumstances of the action before a decision to defer is made."³⁷⁸ A necessary consequence of this alternative reading is that federal-tribal concurrent jurisdiction will again be truly concurrent, with tribal courts in some instances asserting jurisdiction over suits which could be heard in federal court and *vice versa*.

It is doubtful that the "inflexible bar" interpretation of *National Farmers Union* and *Iowa Mutual* will be endorsed by the current

375. As noted by Lynn Slade, "[i]n 1824, Chief Justice Marshall described Supreme Court review of federal issues on appeal from a state court after the case has been shaped by fact findings of an unsympathetic state court, as an 'insecure remedy' for federal rights." Slade, *supra* note 19, at 537 (quoting *Osborn v. Bank of the United States*, 22 U.S. 738, 822 (1824)). In the case of the tribal exhaustion/abstention rule, this "insecure remedy" is a nonexistent remedy.

376. This assumes, of course, that the United States will elect to bring its enforcement action in tribal court. In fact, the federal government, as a matter of enforcement discretion, did not pursue the *Plainbulls* in Crow Tribal Court.

377. See Alleva et al., *supra* note 19, at 550. Phillip Lear states:

I think the Eighth, Ninth, and Tenth Circuits need a remedial course in reading and comprehension, because I do not feel that the theses we see in the circuit cases and the district court cases, particularly in the Tenth Circuit where Mr. Slade and I practice, follow from the conclusions drawn in *Iowa Mutual*.

Id.

378. *Stock West Corp. v. Taylor*, 942 F.2d 655, 661 (9th Cir. 1991), *aff'd in part and vacated in part*, 964 F.2d 912 (9th Cir. 1992).

Supreme Court.³⁷⁹ In any event, tribal courts should be wary of the "affirmative action" aspects of an inflexible tribal exhaustion/abstention rule.³⁸⁰ An inflexible and preponderant tribal exhaustion/abstention rule is not necessary to effectuate the goal of promoting tribal courts and

379. The composition of the Court was the same for *National Farmers Union* and *Iowa Mutual* with the exception of the replacement of Chief Justice Burger with Justice Scalia. Five of the *Iowa Mutual* Justices are no longer with the Court: Marshall, Brennan, Blackmun, Powell, and White. Of these Justices, the first three were fairly consistent in their support of tribal courts and tribal sovereignty. The same cannot be said of the four *Iowa Mutual* Justices (Rehnquist, Stevens, O'Connor, and Scalia) still on the bench. Predictions regarding the remaining five active Justices (Souter, Kennedy, Thomas, Breyer, and Ginsburg) are more hazardous, however, both Kennedy and Thomas have authored opinions restricting tribal sovereignty. See *South Dakota v. Bourland*, 508 U.S. 679 (1993) (Thomas, J.); *Duro v. Reina*, 495 U.S. 676 (1990) (Kennedy, J.). The only current Justice who has actually written on the tribal exhaustion/abstention rule is Justice Stevens, who authored *National Farmers Union* and dissented from *Iowa Mutual*.

380. Phillip Lear and Blake Miller have equated the "inflexible bar" view of the tribal exhaustion/abstention rule with the concept of "affirmative action" typically associated with civil rights legislation:

As worthy as sovereignty and self-determination policies may be, *National Farmers* and *Iowa Mutual* do not mandate exhaustion of tribal court remedies. Bright-line tests result from tortured reading of the seminal cases by federal district and appellate courts. In point of fact, the exhaustion doctrine being developed by the federal courts is protectionist. Ironically, protectionist attitudes favoring mandatory exhaustion of tribal court remedies diminish rather than enhance tribal court sovereignty and debase any notion of equal dignity of courts Requiring the federal judiciary to decline to exercise its jurisdiction in all cases when a tribal court has a colorable basis for jurisdiction is nothing less than affirmative action for tribal courts.

Lear & Miller, *supra* note 19, at 278-79. Lear and Miller contend that a more flexible application of the exhaustion/abstention rule (based on international comity principles of concurrent jurisdiction) is "less deprecating than the mandatory exhaustion rule" and "give[s] proper respect to tribal courts as independent sovereign courts" rather than "assum[ing] that tribal courts are somehow inferior or weaker and require greater protection." *Id.* at 295.

Another problem with an inflexible exhaustion/abstention rule is the potential for backlash. One consequence of "disappearing federal jurisdiction" as to the merits of disputes over which federal courts have concurrent jurisdiction with tribal courts is that federal courts may respond by taking a more aggressive stance on the limits of tribal court jurisdiction; *i.e.*, more federal courts will be inclined to circumscribe tribal court jurisdiction in order to get to the underlying merits. See Deloria et al., *supra* note 19, at 320 (statement of Robert Laurence) (noting that a "maximum abstention doctrine" could leave "vulnerable" the existence and extent of tribal civil adjudicatory jurisdiction over non-Indians); Reynolds, *supra* note 16, at 1121 ("The cases suggest that a court's willingness to order exhaustion of tribal remedies often hinges upon its interpretation of the permissible scope of subsequent federal court review.").

Finally, pushing the federal government into tribal court may lead to the unintended result of no enforcement of federal law at all. If the government has enforcement discretion, and is not otherwise constrained by its trust obligation, it may elect as in the *Plainbull* litigation to discontinue its enforcement actions. See *supra* note 376.

self-government. In the "easy cases" the various factors line up in favor of either abstention (as in the paradigm cases of *National Farmers Union* and *Iowa Mutual*) or retention of federal jurisdiction (*Plainbull*). In the remaining cases, the courts will be required to determine when the important policy concerns underlying the tribal exhaustion/abstention doctrine—particularly the federal policy of supporting tribal self-government—should yield to the competing (and likewise important) federal policy of requiring federal courts to exercise the jurisdiction that is conferred upon them by Congress.³⁸¹

381. In many cases the apposite factors will send mixed signals. For example, if the dispute is between private parties, the tribal action was filed first, and the underlying issue involves a question of federal law, the federal district court in determining whether to abstain would weigh the "pro-abstention" factors (the policy of promoting tribal courts and tribal self-government and the fact that the tribal action was filed first) against the "anti-abstention" factors (the federal court's duty to exercise conferred jurisdiction, the predominance of federal law issues, and the fact of nonjurisdictional nonreviewability). A decision to abstain in such circumstances would likely not constitute an abuse of discretion.

When the federal government is the plaintiff, an additional "anti-abstention" factor comes into play. But the federal government may not be entitled to litigate in federal court in all instances. For example, in *United States v. Tsosie*, the court of appeals held that the federal district court properly applied the tribal exhaustion/abstention rule when it abstained from hearing the United States' trespass and ejectment action. In support of its determination, the court of appeals rejected the government's argument that the United States "enjoys a special right of access to its own courts." *United States v. Tsosie*, 92 F.3d 1037, 1040 (10th Cir. 1996). The court, however, misperceived the nature of the government's contention: it erroneously equated the "special access" argument with the entirely separate question of whether Congress, when it provided in 28 U.S.C. § 1345 that district courts "shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States," intended to confer to district courts exclusive jurisdiction. The court correctly concluded that the language of 28 U.S.C. § 1345 cannot be read as conferring exclusive federal jurisdiction. *Id.* at 1041-42. The government's *actual* argument, however, was that the district court should not abstain from exercising its *concurrent* jurisdiction in light of the special right of the United States to access to its own courts—a special right that the Tenth Circuit itself acknowledged in *United States v. Akin*. See *United States v. Akin*, 504 F.2d 115, 122 (10th Cir. 1974); see also *supra* note 371 and accompanying text.

One distinction between *Tsosie* and *Plainbull* is the fact that the Tenth Circuit, in *Tsosie*, stressed that the resolution of the underlying dispute turned on the interpretation of tribal, not federal, law. See *Tsosie*, 92 F.3d at 1044 (describing *Tsosie's* counterclaim as "assert[ing] . . . an aboriginal occupancy right which implicates 'Navajo custom, tradition, history, culture and common law'" (quoting *Tsosie*, 849 F. Supp. at 774)). The United States, on the other hand, contends that the determinative issue—whether the trust patent at issue is valid—presents a question of federal law. See *supra* note 248. The presence of tribal law weighs in favor of abstention, whereas the presence of federal law issues and right of the federal government to enforce federal law in federal court are factors which favor the exercise of conferred federal jurisdiction.

Although the United States did not seek Supreme Court review of either *Plainbull* and *Tsosie*, it did recently set forth its position regarding the scope of the tribal exhaustion/abstention rule in its brief as *amicus curiae* in *A-1 Contractors v. Strate*. *A-1 Contractors*

v. *Strate*, 76 F.3d 930 (8th Cir. 1996), *petition for cert. filed*, 64 U.S.L.W. 3795 (U.S. May 16, 1996) (No. 95-1872). The issue in *Strate* is whether a tribal court has jurisdiction to adjudicate a tort suit brought by a non-Indian plaintiff against a non-Indian contractor, hired to do tribal business on the reservation, arising out of an accident that occurred on tribal lands. The United States, while asserting that tribal jurisdiction does not exist in such circumstances, did not embrace the "inflexible bar" interpretation of *National Farmers Union* and *Iowa Mutual*:

In the case of an ordinary private civil dispute that does not itself challenge the exercise of power by the tribal government—and where there is not already a case pending in the tribal court arising out of the same dispute—we do not believe that *National Farmers Union* or *Iowa Mutual* displaces the usual rule that a plaintiff may select the forum in which the suit will be filed. By contrast, where a private plaintiff challenges an exercise of taxing or regulatory authority by the tribe itself, we believe that the plaintiff ordinarily must first present its objections to the tribal administrative agency and then to the tribal court. *See, e.g., Middlemist v. Babbitt*, 19 F.3d 1318 (9th Cir.), *cert. denied*, 115 S. Ct. 420 (1994). *Where the United States is the plaintiff, we do not believe that prior resort to tribal forums is necessary even in that situation.*

Brief for the United States as Amicus Curiae Supporting Respondents at 17 n.10, *Strate*, 76 F.3d at 930 (emphasis added).

