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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

Timothy W. Joranko*

In National Farmers Union Insurance Cos. v. Crow Tribe and Iowa Mutual Insurance Co. v. LaPlante, the Supreme Court ruled that defendants in tribal court actions must exhaust available tribal court remedies before proceeding with a parallel action in federal court. At the same time, the Court held that defendants could challenge the tribal court's exercise of jurisdiction over them in federal court after exhausting tribal court remedies. These rulings, among the first in which the high court dealt with the awkward relationship between tribal and federal courts, created a unique form of "two-way street" between courts of separate sovereigns. In one direction, federal courts must refer litigants otherwise properly in federal court to tribal courts for exhaustion. In the other direction, federal courts may review already-litigated cases to determine whether tribal courts have exceeded their jurisdiction.

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3. The author uses "tribal court" as shorthand for the variety of tribal judicial, law-applying, or dispute-resolving forums. Some such forums are not "courts" in the classic meaning of the term. The Supreme Court has recognized, however, that "[n]onjudicial tribal institutions...[are] competent law-applying bodies." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 66 (1978).
5. Iowa Mut., 480 U.S. at 19; National Farmers Union, 471 U.S. at 857.
6. Prior to National Farmers Union and Iowa Mutual, only a handful of decisions dealt with the relationship between federal and tribal courts. For a discussion of those decisions, see infra notes 23-29.
Numerous lower courts already apply this exhaustion doctrine. With the recent addition of the Seventh Circuit, courts in six of the eleven circuits have decided exhaustion cases in the six years since *Iowa Mutual*. With more tribes developing court systems, and commercial activity between Indians and non-Indians increasing as a result of reservation economic development efforts and gaming, *Iowa Mutual* and *National Farmers Union* will continue to grow in importance as a doctrine of federal court jurisprudence.

This Article discusses the relationship between tribal courts and federal courts as it has begun to emerge from the federal circuits, and seeks to provide some direction for how the relationship should continue to develop in a manner consistent with the dictates of federalism and the principles announced in *Iowa Mutual* and *National Farmers Union*. After a brief historical overview of the development of legal relations between tribes and the United States in Part I, this Article focuses on the diverse manner in which federal courts have treated *Iowa Mutual* and *National Farmers Union*. Part II describes the movement of numerous cases from federal courts to tribal courts, analyzing how the various circuits have implemented the requirement that litigants exhaust their tribal court remedies. Part III addresses the movement of the first few cases from tribal courts to federal courts, and analyzes the treatment that federal courts give tri-

8. *See id.* at 812-15 (breach of contract action against Indian manufacturing corporation); *see also* Bank of Okla. v. Muscogee (Creek) Nation, 972 F.2d 1166 (10th Cir. 1992) (interpleader action against Indian tribe and manager of tribe's bingo hall); Stock West Corp. v. Taylor, 964 F.2d 912 (9th Cir. 1992) (legal malpractice and misrepresentation action against reservation attorney); United States ex rel. Kishell v. Turtle Mountain Hous. Auth., 816 F.2d 1273 (8th Cir. 1987) (trespass action against tribal housing authority by tribal member's estate); Tom's Amusement Co. v. Cuthbertson, 816 F. Supp. 403 (W.D.N.C. 1993) (contract dispute between non-Indian supplier of gaming machines and non-Indian operator of gaming establishment located on reservation); Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida, 788 F. Supp. 566 (S.D. Fla. 1992) (motion for preliminary injunction to compel arbitration of management agreement by casino operator).
Tribal court resolution of questions of law and fact after exhaustion has occurred.

This Article concludes that giving fidelity to the Supreme Court’s rulings and the principles governing relationships between Indian tribes and the federal government requires federal courts to apply a clear rule of requiring exhaustion in all cases except when an exception that the Supreme Court has set forth applies. In addition, principles of federalism and the relationship between tribes and the federal government require federal courts to apply tribal courts’ interpretations of tribal law and to adopt tribal courts’ findings of fact, but allow federal courts to review de novo tribal court interpretations of federal law.

I. HISTORICAL ANTECEDENTS: THE PLACEMENT OF INDIAN TRIBES IN THE FEDERAL SYSTEM

Indian nations and their governments pre-existed the arrival of Europeans to the Americas. 10 The first Europeans to come to the Americas dealt with the Indian nations by war and treaty, and considered them separate nations, apart from the European newcomers.11 Prior to and upon gaining independence, the United States continued the practice of entering treaties with Indian nations, a practice that affirmed the separate sovereign status of the Indian nations.12 In its earliest treaties, the United States sometimes provided for a relationship between the judiciaries of the United States and the Indian nations with which it treated, as the 1778 Treaty with the Delawares illustrates:

For the better security of the peace and friendship now entered into by the contracting parties, against all infractions of the same by the citizens of either party, to the prejudice of the other, neither party shall proceed to the infliction of punishments on the citizens of the

10. See generally, RONALD WRIGHT, STOLEN CONTINENTS 85-139 (1992) (discussing the invasions of the Cherokee and the Iroquois and describing the Indian nations as the European settlers found them); JAMES R. WALKER, LAKOTA SOCIETY 23-34 (1992) (discussing the laws, leaders and administration of the Lakota society). Chief Justice John Marshall described Indian nations’ pre-Columbian existence by noting that prior to the arrival of the Europeans, the United States was occupied by, “a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws.” Worcester v. Georgia, 31 U.S. 515, 542 (1832).

11. See Worcester, 31 U.S. at 546-549; see also In re Heff, 197 U.S. 488, 498 (1904) (“In the early dealings of the Government with the Indian tribes the latter were recognized as possessing some of the attributes of nations . . . .”).

other, otherwise than by securing the offender or offenders by imprison-ment, or any other competent means, till a fair and impartial trial can be had by judges or juries of both parties, as near as can be to the
laws, customs and usages of the contracting parties and natural jus-
tice: The mode of such trials to be hereafter fixed by the wise men of
the United States in Congress assembled, with the assistance of such
deputies of the Delaware nation, as may be appointed to act in concert
with them in adjusting this matter to their mutual liking.\footnote{13}

The United States Constitution reflected the notion that In-
dian nations remained outside the federal system by twice ex-
cluding “Indians not taxed” from apportionment in Congress,\footnote{14}
and by empowering Congress to regulate commerce “with the In-
dian tribes,” thus paralleling Congress’s power over commerce
with foreign nations.\footnote{15} The express text of the Constitution rec-
ognizes the status of Indian tribes as separate sovereigns
outside the federal union.\footnote{16} Indeed, the implicit reference to In-
dian treaties in the Supremacy Clause\footnote{17} admits Indian tribes
among the ranks of those powers capable of making treaties,
reinforcing the separate sovereign status of Indian tribes.\footnote{18}

The United States continued to treat with Indian tribes as
sovereign nations throughout the early and middle nineteenth
century. Some of these treaties, such as the 1868 Treaty with
the Sioux, explicitly provided for jurisprudential relations be-
tween the two sovereigns:

If bad men among the whites, or among other people subject to the
authority of the United States, shall commit any wrong upon the per-

\begin{itemize}
  \item \footnote{13}{Id. at 4.}
  \item \footnote{14}{U.S. CONST. art. I, § 2, cl. 3; id. amend. XIV, § 2.}
  \item \footnote{15}{Id. art. I, § 8, cl. 3. The Supreme Court noted the parallelism between
  the Constitution’s reference to Congress’s power with foreign nations and with
  Indian tribes in United States v. Forty-three Gallons of Whiskey, 93 U.S. 188,
  197 (1876) (“The power to make treaties with the Indian tribes is, as we have
  seen, coextensive with that to make treaties with foreign nations.”).}
  \item \footnote{16}{See supra note 14; see also Robert N. Clinton, Tribal Courts and the
  Federal Union, 26 WILLAMETTE L. REV. 841, 846-847 (1990) (stating that the
  language “Indians not taxed” in the Constitution accurately reflects the polit-
  ical status of the Indian nations as a distinct entity from the federal union, and
  that this status is what the Indian nations wanted).}
  \item \footnote{17}{U.S. CONST. art VI. “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.” Id. (emphasis added).}
  \item \footnote{18}{Worcester v. Georgia, 31 U.S. 515, 559-560 (1832) (“The constitution,
  by declaring treaties already made, as well as those to be made to be the
  supreme law of the land, has adopted and sanctioned the previous treaties with
  the Indian nations, and consequently admits their rank among those powers
  who are capable of making treaties.”).}
\end{itemize}
son or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws.19

In 1871, Congress stopped treating with Indian nations and shortly thereafter began to regulate the affairs of Indian nations, both external and internal, by direct legislation.20 To affirm this direct regulatory relationship between Congress and Indian nations, the Supreme Court developed the “plenary power” doctrine, which vests Congress with virtually unlimited authority to legislate concerning Indian affairs.21 The “plenary power” doctrine produced a sort of “fit” for Indian nations within the federal system—they were placed, albeit without consent, under the direct control of Congress.

The overarching doctrine of “plenary power” did not provide a general relationship between the federal government and the Indian nations beyond justifying the means for Congress to define that relationship through legislation. More particularly, “plenary power” and the placement of Indian nations within the federal system left undefined the relationship of the judicial bodies of the Indian nations to the federal judiciary.22 Congress has never exercised its authority to provide a relationship or further define one.

22. Unfortunately, the “plenary power” doctrine is relatively useless as a guide to defining that relationship. For a detailed discussion of the relationship, see Clinton, supra note 16.
Just as the Supreme Court supplied a basis for Congress's authority over the internal governance of Indian nations when none existed in the constitutional text, it has begun to establish a relationship between the tribal and federal judiciaries in the absence of textual definition. Early on, the Supreme Court recognized two important principles regarding the relationship between federal and tribal courts in *Talton v. Mayes.*

The Court held that the limitations of the United States Constitution do not bind tribal courts exercising inherent sovereign powers because the Constitution was framed to govern the United States—not Indian tribes. Furthermore, the Court held that tribal courts are the final arbiters of tribal law, just as state courts are the final arbiters of state law.

Later, in the wake of the civil rights movement, Congress passed the Indian Civil Rights Act ("ICRA") which selectively imposed limitations on tribal governments similar to those found in the United States Constitution. In *Santa Clara Pueblo v. Martinez,* the Supreme Court held that the primary responsibility for enforcing the ICRA rests with the tribal courts because Congress had expressed no contrary desire. The orders of the tribal courts relative to the ICRA will be reviewed only in habeas corpus cases where Congress has made express provision for review. In the same year, the Supreme Court de-

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23. 163 U.S. 376 (1896). In *Talton,* the petitioner challenged the Cherokee Nation's use of a five-person grand jury to obtain an indictment against him under the Fifth and Fourteenth Amendments and under Cherokee Nation law. *Id.* at 379. The Court ruled that the Nation's exercises of power were not "federal" so as to subject the Nation to the limitations of the Fifth Amendment, nor were they "state power" so as to subject the Nation to the limitations of the Fourteenth Amendment. *Id.* at 381-82. The Court also ruled that the Cherokee Nation court's interpretation of the Nation's laws binds the federal court. *Id.* at 384-85.

24. *Id.* at 384. This holding closely parallels pre-Fourteenth Amendment holdings concerning the effect of the federal Constitution on state governments. See, e.g., *Barron v. Baltimore,* 32 U.S. (7 Pet.) 243 (1833) (holding that the fifth amendment protection against taking private property for public use is a limitation only on the United States government and not on the acts of the states).


28. *Id.* at 70.
decided in *Oliphant v. Suquamish Indian Tribe* that the "overriding" national interest of the United States divested Indian tribes of inherent criminal authority over non-Indians.29

In *National Farmers Union*, however, the Court refused to extend that analysis to civil cases involving non-Indians, ruling instead that civil jurisdiction is divested only by express provision.30 Rather, in *National Farmers Union* and *Iowa Mutual*, the Supreme Court created the exhaustion doctrine, apparently beginning to refine the relationship between courts of the two sovereigns.31

*National Farmers Union* arose out of a motor vehicle accident on state-owned school property on the Crow Indian Reservation in Montana.32 The accident victim, a Crow Tribe member, brought suit in tribal court against the school, seeking money damages in tort.33 The school defaulted on the tribal court action and the tribal court entered a money judgment against the school.34 Upon receiving notice of the judgment, the school's insurer challenged the tribal court's jurisdiction over the suit by filing an action in federal court and seeking an injunction against the tribal court.35

The district court granted the insurer an injunction but the Ninth Circuit reversed.36 The Ninth Circuit ruled that the insurer's claim did not arise under federal law and dismissed the case for lack of subject matter jurisdiction.37 In an unanimous decision, the Supreme Court reversed the Ninth Circuit's jurisdictional ruling, holding that challenges to tribal court jurisdiction arise under federal common law and thus present federal questions.38 The Supreme Court also ruled that the analysis of jurisdictional limitations that federal law places on tribal courts "should be conducted in the first instance in the Tribal Court itself,"39 and that "exhaustion [of tribal court remedies] is re-

33. *Id.*
34. *Id.* at 847-48.
35. *Id.* at 848.
36. *Id.* at 848-49
37. *Id.* at 849.
38. *Id.* at 852.
39. *Id.* at 856.
quired before such a claim may be entertained by a federal court," thereby creating the exhaustion rule.\textsuperscript{40} The Court justified the exhaustion requirement by citing three of the requirement's virtues. First, exhaustion furthers the federal "policy of supporting tribal self-government and self-determination."\textsuperscript{41} Second, exhaustion promotes the "orderly administration of justice."\textsuperscript{42} Finally, exhaustion "provide[s] other courts with the benefit of [tribal courts'] expertise in such [jurisdictional] matters."\textsuperscript{43} At the same time, the Court also created three exceptions to its new exhaustion rule "where an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith,' . . . 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."\textsuperscript{44}

Two years later in \textit{Iowa Mutual}, the Supreme Court applied the exhaustion requirement to a case brought under federal diversity jurisdiction.\textsuperscript{45} \textit{Iowa Mutual}, like \textit{National Farmers Union}, arose out of a motor vehicle accident on a reservation.\textsuperscript{46} An Indian victim brought suit in tribal court against another Indian for damages in tort, and also against the tortfeasor's insurer for "bad faith refusal to settle."\textsuperscript{47} After the tribal trial court ruled that the claims fell within the tribal court's subject matter jurisdiction, but before that issue was appealed to the tribal appellate court, the insurer filed suit in federal court under diversity jurisdiction and sought a declaratory judgment that the accident "fell outside the coverage of the applicable insurance policies."\textsuperscript{48} The insurer did not challenge the tribal court's jurisdiction as part of its federal claims but merely sought to litigate its defense in a parallel federal forum. The district court dismissed the insurer's claim and the Ninth Circuit affirmed on the strength of \textit{National Farmers Union}.\textsuperscript{49}

\begin{thebibliography}{49}
\bibitem{40} \textit{Id.} at 857.
\bibitem{41} \textit{Id.} at 856.
\bibitem{42} \textit{Id.}
\bibitem{43} \textit{Id.} at 857.
\bibitem{44} \textit{Id.} at 856 n.21 (citation omitted). Coincidentally, the first two exceptions are the same exceptions the Court created in \textit{Juidice v. Vail}, 430 U.S. 327, 338 (1977), to the abstention doctrine of \textit{Younger v. Harris}, 401 U.S. 37 (1971).
\bibitem{46} \textit{Id.} at 11.
\bibitem{47} \textit{Id.}
\bibitem{48} \textit{Id.} at 12.
\bibitem{49} \textit{Id.} at 13-14.
\end{thebibliography}
The insurer made two arguments on appeal to the Supreme Court. It sought first to distinguish *National Farmers Union* on the ground that *Iowa Mutual* did not involve a challenge to the tribal court's jurisdiction.\(^5\)\(^0\) Next, the insurer argued that the policies underlying federal diversity jurisdiction, namely, avoidance of local prejudice to distant litigants, favored an exercise of federal jurisdiction.\(^5\)\(^1\) The Supreme Court rejected both contentions.\(^5\)\(^2\) The Court's principle concern was that placing federal courts in "competition" with tribal courts would impair tribal courts' "authority over reservation affairs," thereby frustrating the federal policy supporting tribal self-government.\(^5\)\(^3\) As a result, it found that exhaustion was required "[r]egardless of the basis for [federal court] jurisdiction."\(^5\)\(^4\) The Court found nothing in the federal grant of diversity jurisdiction which overrode the federal policy of supporting tribal sovereignty and no indication that Congress intended to impair tribal authority when it enacted and re-enacted diversity jurisdiction statutes.\(^5\)\(^5\) Finally, it noted that the policy underlying federal diversity jurisdiction—"protection against local bias and incompetence"—was "not among the exceptions to the exhaustion requirement" stated in *National Farmers Union*.\(^5\)\(^6\)

As a result of its analysis, the Supreme Court ruled that the insurer "must exhaust available tribal remedies before instituting suit in federal court."\(^5\)\(^7\) Ultimately, the tribal court's jurisdictional ruling would be subject to federal review.\(^5\)\(^8\) If the federal court determined that the tribal court had jurisdiction, however, the claims could not be relitigated in federal court.\(^5\)\(^9\)

Several aspects of *National Farmers Union* and *Iowa Mutual* are noteworthy. Both federal suits were brought while tribal court actions involving the same parties were already pending.\(^5\)\(^6\) Both cases involved situations in which Indians sued non-Indians in tribal court and the non-Indians counter-sued in
federal court. Moreover, the deference that federal courts accorded tribal courts now exceeds the deference given to state courts in at least one respect. *Iowa Mutual* deprives a litigant of the ability to present a claim properly founded on diversity jurisdiction in the federal forum whenever concurrent tribal court jurisdiction exists over the same issue—a result that, as Justice Stevens pointed out in his separate opinion, would not occur in instances of concurrent state-federal jurisdiction. Finally, one cannot read *Iowa Mutual* and avoid the notion that exhaustion is required, because the Court repeatedly described the exhaustion doctrine in mandatory terms.

In *National Farmers Union* and *Iowa Mutual*, the Supreme Court began to develop a style of "fit" for tribal courts in the federal system in which tribal courts are not quite apart from the larger system, but not quite within it either. As with other newly-developed doctrines of law, lower courts have begun to apply the exhaustion requirement to new situations, and in doing so, they have further refined it.

II. THE EXHAUSTION REQUIREMENT IN THE LOWER COURTS: A CLEAR RULE IN SEARCH OF CONFUSION?

Various lower courts have applied *National Farmers Union* and *Iowa Mutual* to require that litigants exhaust their tribal court remedies prior to filing in federal court. Several circuits have applied a "bright line" rule requiring parties to exhaust tribal remedies in all cases except those falling plainly within one of the exceptions to exhaustion listed in *National Farmers Union*. Other circuits have applied a "particularized inquiry" of


63. The Court repeatedly notes that litigants are "requir[ed]" or "must" exhaust their remedies, and that federal courts "must stay their hands." 480 U.S. at 16, 19. The Court also describes exhaustion as "required as a matter of comity." *Id.* at 16 n.3 (emphasis added).
the application of the policies underlying *National Farmers Union* and *Iowa Mutual* to given cases. The "bright line" rule is better because it has the advantages of clarity, economy, and ease of application. More importantly, it adheres more closely to the policies at the core of the Supreme Court's decisions.

A. Exhaustion in the Tenth Circuit

Of all the circuits, the Tenth Circuit has most enthusiastically embraced tribal court exhaustion. In every case in which the parties properly raised exhaustion, and even in two in which they did not, the Tenth Circuit required tribal court exhaustion. 64 Thus, the Tenth Circuit has developed a "bright line" rule of requiring exhaustion in all cases but those in which one of the *National Farmers Union* exceptions plainly applies.

The Tenth Circuit first applied *Iowa Mutual* in *Brown v. Washoe Housing Authority*. 65 In this case, a non-Indian construction company sought damages from a tribal housing authority for breach of contract. 66 Unlike *National Farmers Union* and *Iowa Mutual*, no tribal court action was pending between the parties at any time during the federal proceedings. The court considered this irrelevant, ruling that "the considerations of comity relied on in *Iowa Mutual* require [the plaintiff] to exhaust its tribal remedies before a federal court will consider this case." 67

In *Smith v. Moffett*, an Indian brought a civil rights claim in federal court against both tribal and federal officials. 68 The Tenth Circuit expressly rejected three attempts to distinguish *Iowa Mutual*. The court reiterated its belief that the absence of a pending tribal court action "[did] not diminish" the application

64. In one case, the Tenth Circuit decided whether a reservation had been diminished without requiring the litigants to first exhaust tribal court remedies. *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1389 (10th Cir.), cert. denied, 498 U.S. 1012 (1990). The court did so, however, only because the Tribe did not appeal the exhaustion question. *Id.* at 1422. The court made clear that it was leaving open the question whether exhaustion was required before a federal court could decide whether reservation boundaries had been altered, stating that "[r]esolution of this issue can await another day." *Id.* Subsequently, the circuit ruled that courts could raise exhaustion sua sponte, and that exhaustion was required regardless of whether a case arose on a reservation. *See* discussion infra note 73 and accompanying text.

65. 835 F.2d 1327 (10th Cir. 1988).

66. *Id.* at 1327-28.

67. *Id.* at 1328.

68. 947 F.2d 442, 443 (10th Cir. 1991).
of the exhaustion doctrine.\textsuperscript{69} Then, the court refused to distinguish \textit{Iowa Mutual} on the ground that the federal court action involved non-Indian defendants, calling it "immaterial to this analysis."\textsuperscript{70} Finally, the court extended \textit{Iowa Mutual} and \textit{National Farmers Union} to cases in which federal court jurisdiction is founded on 28 U.S.C. § 1343,\textsuperscript{71} because it found "no congressional intent to limit Indian jurisdiction" in § 1343.\textsuperscript{72}

Moreover, the Tenth Circuit in \textit{Smith} ruled that federal courts may raise the issue of tribal court exhaustion sua sponte.\textsuperscript{73} The court reasoned that exhaustion does not stem from the parties’ interest in a tribal forum, but from inter-sovereign concerns as endorsed by congressional and federal policy.\textsuperscript{74} As a result, federal courts should require exhaustion to satisfy institutional concerns, notwithstanding the parties’ lack of interest in proceeding in the tribal forum.\textsuperscript{75}

The Tenth Circuit’s most recent exhaustion decision, \textit{Bank of Oklahoma v. Muscogee (Creek) Nation}, involved an off-reservation bank’s federal interpleader action to determine rights in an account utilized by an Indian tribe and the manager of its bingo establishment.\textsuperscript{76} The Tenth Circuit extended \textit{Iowa Mutual} to require exhaustion in cases in which federal court jurisdiction is based on the interpleader statute.\textsuperscript{77} The court also rejected the bank’s contention that exhaustion was not appropri-
ate because all of the bank's activities took place off the reservation, calling that contention a "jurisdictional argument [that] should first be heard in tribal court." Finally, the court of appeals narrowed the "bad faith" exception set forth in National Farmers Union by directing the parties to litigate the bad faith issue in tribal court in the first instance.

Since 1987, the Tenth Circuit has never denied a request for exhaustion. By so ruling, it has extended the exhaustion requirements of Iowa Mutual and National Farmers Union to apply when no tribal court action is pending between the parties; when federal court jurisdiction is based on grounds besides federal question and diversity, regardless of whether the case "arose" on a reservation; when an Indian plaintiff seeks a federal forum for claims against non-Indians; and sua sponte. The Tenth Circuit has created a bright line rule of requiring exhaustion in virtually every case that does not fall plainly within one of the three exceptions set forth in National Farmers Union. The circuit has resisted creating exceptions to its rule and resisted particularizing its inquiry into matters of degree.

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78. Bank of Okla., 972 F.2d at 1170.
79. See supra note 44 and accompanying text.
80. Bank of Okla., 972 F.2d at 1171.
81. See supra note 44 and accompanying text (discussing the three exceptions).
82. Very shortly before this article went into final print, the Tenth Circuit decided Texaco, Inc. v. Zah, No. 92-2141, 1993 WL 379514 (10th Cir. Sept. 29, 1993), which remained "subject to revision or withdrawal" as of the date of this article.

The plaintiff in Texaco challenged the Navajo Nation's imposition of a severance tax on non-Indians engaged in pipeline activity outside the Nation's reservation but within "Indian country" and under the Nation's control. Id. at *1; see Buzzard v. Oklahoma Tax Comm'n, 992 F.2d 1073, 1076 (10th Cir. 1993), petition for cert. filed, 62 U.S.L.W. 3321 (U.S. July 27, 1993) (No. 93-616) (defining "Indian country"). The Tenth Circuit found that "National Farmers Union . . . requires that appellants present their jurisdictional challenge to the tribal court before pursuing action in federal district court." Texaco, 1993 WL 379514 at *3. Notwithstanding that conclusion, the panel ruled that because the case involved non-Indian activity outside the reservation, the district court should have engaged in a particularized inquiry regarding the application of the policies underlying National Farmers Union to the case before it. Id. As a result, the panel vacated the district court decision and remanded for a particularized inquiry. Id. at *4. The panel, however, restated its loyalty to the bright line rule for cases arising within reservations: "When the activity at issue arises on the reservation . . . we have characterized the tribal exhaustion rule as 'an inflexible bar to consideration of the merits of the petition by the federal court.'" Id. at *3. In so doing, the panel created a bifurcated rule: the bright line rule will apply to cases arising within reservations and a particularized inquiry will apply to cases arising outside reservations.
The Ninth Circuit, which has considered the most exhaustion cases, has experienced a circular "evolution." The circuit began by aggressively applying the exhaustion requirement and then shifted to a search for exceptions. Most recently, the circuit came full circle when it developed a clear rule requiring exhaustion whenever a "colorable question" of tribal court jurisdiction exists.

The Ninth Circuit's first post-Iowa Mutual exhaustion case was Wellman v. Chevron U.S.A., Inc. Wellman was a diversity case in which an Indian contractor sued a non-Indian corporation for breach of a contract to perform work within a reservation. The Ninth Circuit ruled that exhaustion is required whenever a case arises "in Indian territory" and cited the policy in Texaco is irreconcilable with the Tenth Circuit's earlier decision in Bank of Oklahoma that the exhaustion requirement applies equally to cases involving non-Indian conduct outside the reservation, see supra text accompanying note 78, a conclusion that the Ninth Circuit also reached en banc in Stock West Corp. v. Taylor. Indeed, both Bank of Oklahoma and Stock West II (en banc) presented more compelling cases for avoiding exhaustion because the non-Indian conduct out of which those cases arose was apparently outside "Indian country." Bank of Okla., 972 F.2d at 1170; Stock West II (en banc), 964 F.2d at 919-20. More importantly, the distinction that the panel drew between "reservations" and "Indian country" is plainly contrary to a consistent line of Supreme Court decisions holding that "Indian country" is indistinguishable from reservations for purposes of jurisdiction and tribal sovereignty. See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe, 498 U.S. 505, 511 (1991) (stating that the test for determining whether land is "Indian country" turns only on whether the land was "validly set apart for the use of the Indians"); DeCoteau v. District Court, 420 U.S. 425, 446 (1975) (noting that off-reservation trust lands fall under "tribal and federal jurisdiction"); see also Buzzard, 992 F.2d at 1077 (discussing the ramifications of land being within "Indian country"). In addition, the bifurcated rule will create confusion in cases in which it is difficult to determine where a case "arose." See, e.g., Stock West II (en banc), 964 F.2d at 919 (rejecting this test in a case that arose out of conduct both on and off the reservation). Finally, the particularized inquiry that the Tenth Circuit has suggested has inherent disadvantages that favor use of a bright line rule in all cases. See discussion infra Part II.F.2. One such disadvantage that the reasoning in Texaco exemplifies is that the policy supporting tribal self-determination dictates that tribal forums determine the degree of tribal interest in a case, yet the panel in Texaco implicitly determined—without input from the tribal forum—that the Nation's interest in cases arising within its non-reservation "Indian country" areas is less than its interest in reservation-based cases. Texaco, 1993 WL 379514, at *3. Hopefully, the Tenth Circuit will resolve the conflict between its panel decisions (either by rehearing Texaco en banc or in a later case) in favor of applying the bright line rule in all cases as did the Ninth Circuit in Stock West II (en banc).
against competition between federal and tribal courts as the justification for its ruling. Like the Tenth Circuit, the Ninth Circuit ruled that the absence of a pending tribal court suit is irrelevant to its analysis. Wellman represented a clear statement by the Ninth Circuit that exhaustion is required whenever a case arose in "Indian country."

Within a year, however, the Ninth Circuit began creating exceptions to its clear exhaustion requirement. In *Alaska v. Native Village of Venetie*, the village brought suit in tribal court to enforce a tribal business tax against a local state school district. The school district countersued in federal court, contending that the village did not represent a sovereign Indian tribe with taxation authority but was merely an unorganized aggregation of individual Indians without sovereign status. The federal panel held that no exhaustion was necessary, reasoning that because the exhaustion requirement arose out of considerations of tribal sovereignty and tribal-federal inter-sovereign relations, the village's sovereign status must first be established.

The Ninth Circuit's next two exhaustion decisions, *Stock West, Inc. v. Confederated Tribes of the Colville Reservation* ("Stock West I"), and *Burlington Northern R.R. v. Blackfeet Tribe* ("Burlington Northern I"), present confused analyses of the exhaustion requirement. In *Stock West I*, the Ninth Circuit upheld a district court order requiring exhaustion in a diversity case that presented the same issues as a previously-filed tribal court action. Because *Stock West I*'s procedural posture was virtually indistinguishable from *Iowa Mutual*’s, the exhaustion decision appeared unsurprising. Nonetheless, the Ninth Circuit provided confusing dictum characterizing the exhaustion requirement as a "discretionary exercise of the court’s equity powers," which indicated that exhaustion is not mandatory but rather a matter for district court discretion.

*Burlington Northern I* involved a federal court challenge to a tribal right-of-way tax by a railroad with tracks passing

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85. *Id.* at 579.
86. *Id.* at 578.
87. 856 F.2d 1384, 1386 (9th Cir. 1988).
88. *Id.* at 1386.
89. *Id.* at 1388.
90. 873 F.2d 1221 (9th Cir. 1989).
91. 924 F.2d 899 (9th Cir. 1991), cert. denied, 112 S. Ct. 3013 (1992).
92. *Stock West I*, 873 F.2d at 1227.
93. *Id.* at 1229.
The district court upheld a refusal to require exhaustion, relying on its *dictum* in *Stock West I*:

[The district court did not abuse its discretion by reaching the merits. *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1229 (9th Cir. 1989) (prudential exhaustion subject to abuse of discretion standard). The complaint presents issues of federal, not tribal, law; no proceeding is pending in any tribal court; the tribal court possesses no special expertise; and exhaustion would not have assisted the district court in deciding federal law issues. *Cf. National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 857, 105 S. Ct. 2447, 2454, 85 L. Ed. 2d 818 (1985).95]

The court ruled in favor of the tribe's power to regulate railroads, so the exhaustion decision was of little import to the parties before it. Indeed, given that the court dismissed some tribal parties and granted summary judgment in favor of the rest,96 the exhaustion decision could be characterized as dictum. What is inescapable, however, is that with *Burlington Northern I*, the Ninth Circuit deemed exhaustion "prudential" and allowed a circumstantial evaluation based on the particularized application of the policies underlying *National Farmers Union* to prevail.97

Four months later, a different panel of the Ninth Circuit decided *Burlington Northern R.R. v. Crow Tribal Council* ("*Burlington Northern II*"), a case involving nearly identical issues and procedural posture as *Burlington Northern I*.98 After an unconvincing attempt to harmonize its ruling with *Stock West I* and *Burlington Northern I*, the *Burlington Northern II* panel concluded that "[t]he requirement of exhaustion of tribal remedies is not discretionary; it is mandatory. The district court had no discretion to relieve [the plaintiff] from exhausting tribal remedies prior to proceeding in federal court,"99 and that "[t]he exhaustion requirement thus functions as a prerequisite to a federal court's exercise of its jurisdiction."100 The *Burlington Northern II* panel rejected references to the very factors listed as potentially determinative to avoiding exhaustion in *Burlington Northern I*.101 Unlike the prior decision within the same circuit, this panel found that the presence or absence of a pending tribal

94. *Burlington Northern I*, 924 F.2d at 901.
95. Id. at 901 n.2.
96. Id. at 900.
97. *See supra* text accompanying note 95.
98. 940 F.2d 1239, 1241-42 (9th Cir. 1991).
99. Id. at 1245.
100. Id. at 1245 n.3.
101. *See supra* text accompanying note 95.
court action presented a “distinction [that] falls of its own weight.”\textsuperscript{102} The Ninth Circuit sought to make another exception to the mandatory exhaustion rule in \textit{Stock West, Inc. v. Taylor (Stock West II)}.\textsuperscript{103} In \textit{Stock West II}, a non-Indian corporation brought a diversity action against a non-Indian tribal attorney for legal malpractice.\textsuperscript{104} The case arose out of an opinion letter that the tribal attorney gave the corporation relating to contracts between the non-Indian corporation and tribal corporations.\textsuperscript{105} The attorney researched and drafted the opinion letter on the reservation but delivered it to the non-Indian corporation off the reservation.\textsuperscript{106} The panel ruled that exhaustion was unnecessary because the tribal attorney was not an Indian and because the case “arose” at the off-reservation site of the letter’s delivery, thus categorizing the case as not “a reservation affair.”\textsuperscript{107}

The Ninth Circuit’s next opinion, \textit{Crawford v. Genuine Parts Co.}, involved a products liability action originally filed by Indian plaintiffs in Montana state court.\textsuperscript{108} After the defendants removed the action to federal court, the plaintiffs requested that the district court “transfer the cases to the Blackfeet tribal court,” five years after originally filing the action in state court.\textsuperscript{109} On appeal, the Ninth Circuit summarized its precedent prior to \textit{Crawford} by noting that the existence of tribal court proceedings is “irrelevant”\textsuperscript{110} and that “exhaustion of tribal remedies is not discretionary; it is mandatory.”\textsuperscript{111} The panel ruled that the parties must exhaust tribal remedies unless one of the three exceptions set forth in \textit{National Farmers Union}\textsuperscript{112} or the “non-reservation affair” exception set forth in \textit{Stock West II} applied.\textsuperscript{113} The court ordered the parties to exhaust their tribal remedies because the accident occurred on the reservation, thus making it a “reservation affair,”\textsuperscript{114} and because the delay

\begin{itemize}
\item \textsuperscript{102} \textit{Burlington Northern II}, 940 F.2d at 1246.
\item \textsuperscript{103} 942 F.2d 655 (9th Cir. 1991).
\item \textsuperscript{104} \textit{Id.} at 658.
\item \textsuperscript{105} \textit{Id.}
\item \textsuperscript{106} \textit{Id.} at 662.
\item \textsuperscript{107} \textit{Id.} at 661.
\item \textsuperscript{108} 947 F.2d 1405, 1406 (9th Cir. 1991), \textit{cert. denied}, 112 S. Ct. 1174 (1992).
\item \textsuperscript{109} \textit{Id.} at 1406-07.
\item \textsuperscript{110} \textit{Id.} at 1407.
\item \textsuperscript{111} \textit{Id.}
\item \textsuperscript{112} \textit{See supra} note 44 and accompanying text.
\item \textsuperscript{113} \textit{See supra} note 107 and accompanying text.
\item \textsuperscript{114} 947 F.2d at 1408.
\end{itemize}
in requesting the transfer did not constitute "bad faith" under *National Farmers Union*.\(^\text{115}\)

The Ninth Circuit's next exhaustion case, *United States v. Plainbull*, involved an action by the United States to collect fines for illegal grazing on trust land held by the federal government for the benefit of the tribe.\(^\text{116}\) Federal jurisdiction was based on 28 U.S.C. § 1355, which reads: "The 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 . . . ."\(^\text{117}\) Notwithstanding § 1355's apparent grant of exclusive jurisdiction to federal courts, the *Plainbull* court upheld an order dismissing the case on exhaustion grounds.\(^\text{118}\) The court ruled that § 1355's grant of federal jurisdiction is exclusive of state courts only, because the statutory language is not sufficiently directed at tribal sovereignty to overcome the presumption of tribal court jurisdiction over reservation affairs.\(^\text{119}\) Despite the case's outcome, *Plainbull* presents a troubling turn for the Ninth Circuit. Because the panel reverted to describing exhaustion as "discretionary,"\(^\text{120}\) the court left in doubt once again whether the Ninth Circuit considered exhaustion mandatory or discretionary.

Perhaps to resolve these doubts, the Ninth Circuit decided to review *Stock West II* en banc to resolve the scope of the exhaustion requirement within the circuit.\(^\text{121}\) At first, the en banc opinion appears to revert to the "discretionary" analysis found in *Stock West I* and *Burlington Northern I*, describing the question presented as "whether the district court abused its discretion"\(^\text{122}\) and stating that the "decision to abstain 'involves a discretionary exercise of a court's equity powers.'"\(^\text{123}\) The Ninth Circuit concluded, however, that the lower court properly required exhaustion "because colorable questions are presented in this civil action regarding whether the Colville Tribal Courts have concurrent jurisdiction over alleged tortious conduct that may have

\(^{115}\) Id.

\(^{116}\) 957 F.2d 724, 725 (9th Cir. 1992).


\(^{118}\) 957 F.2d at 726-27.

\(^{119}\) Id. at 726-28.

\(^{120}\) See, e.g., id. at 726 (framing the question so it would "determine whether the district court abused its discretion by electing to abstain") (emphasis added).

\(^{121}\) *Stock West Co. v. Taylor*, 964 F.2d 912 (9th Cir. 1992) (en banc).

\(^{122}\) Id. at 913-14.

\(^{123}\) Id. at 917 (quoting *Bagget v. Bullitt*, 377 U.S. 360, 375 (1964)).
commenced on the reservation. Under such circumstances, the district court is required to abstain.\footnote{124}

Stock West II (en banc) is an important decision for the Circuit because it established a clear rule that requires exhaustion whenever a "colorable" assertion that a tribal court could have jurisdiction over a claim exists. Stock West II (en banc) also is important because it established a separate basis for tribal court exhaustion. The tribal attorney raised tribal sovereign immunity as a defense and relied on provisions in the Colville Tribal Code which extend immunity to tribal officials.\footnote{125} The Ninth Circuit ruled that "[b]ecause the question whether a defendant is entitled to the protection of sovereign immunity requires an interpretation of tribal law under the facts set forth in the present record, the Colville Tribal Courts must decide that question in the first instance."\footnote{126} In other words, the Ninth Circuit developed a form of Pullman abstention,\footnote{127} requiring tribal law questions to be decided first by tribal courts.

In summary, the Ninth Circuit has travelled full circle from its open acceptance of the exhaustion doctrine in Wellman, to its search for exceptions in Native Village of Venetie, Stock West I, Burlington Northern I, and Stock West II, to its renewed determination in Stock West II (en banc) to make exhaustion mandatory and not subject to exceptions based on the degree of tribal or reservation relation to the case. Like the Tenth Circuit, the Ninth Circuit has now considered the existence of a pending tribal court action irrelevant, extended exhaustion beyond federal question and diversity cases, rejected a rule requiring courts to analyze the particular degree of nexus between the case and the reservation or the tribe's interest in the dispute, and considered the tribal membership of the parties irrelevant.

\footnote{124} Id. at 920 (emphasis added). By "colorable questions," the Ninth Circuit meant that "on the record before us, the assertion of tribal court jurisdiction is plausible and appears to have a valid or genuine basis." Id. at 919. Of course, this appears to be no more than a restatement of National Farmers Union's "patently violative" of jurisdictional prohibitions exception. See supra note 44 and accompanying text.

\footnote{125} Stock West II (en banc), 964 F.2d at 920.

\footnote{126} Id.

\footnote{127} A Pullman abstention requires federal courts, faced with a constitutional issue that might be resolved or avoided by an interpretation of state law, to abstain and allow state courts to interpret state law in the first instance. See Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). Stock West II similarly provides that when a case can be resolved by an interpretation of tribal law, the case should be referred to tribal court for that interpretation, at least in the first instance. Stock West, Inc. v. Taylor, 942 F.2d 655 (9th Cir. 1991).
C. Exhaustion in the Eighth Circuit

Like the Tenth and Ninth Circuits, the Eighth Circuit has ruled that the prior existence of a tribal court action is not a prerequisite for exhaustion. Unlike the Tenth and Ninth Circuits, however, the Eighth Circuit has not resolved many exhaustion issues so clearly. Perhaps as a result of this lack of authority, district courts within the Eighth Circuit are now carving out exceptions to the exhaustion requirement. Most notably, the Eighth Circuit seems close to developing its own exception to the exhaustion requirement when it finds that statutes of general application limit tribal court jurisdiction.

1. Court of Appeals Decisions

The Eighth Circuit decided *Weeks Construction, Inc. v. Oglala Sioux Housing Authority* prior to the Supreme Court's decision in *Iowa Mutual*.128 *Weeks Construction* was a diversity action filed by a non-Indian contractor against a tribal housing authority for breach of a contract to perform construction work on the reservation.129 The Eighth Circuit declined to reach the issue of whether diversity jurisdiction existed,130 finding that exercising federal diversity jurisdiction over a dispute that "arose on the reservation and raises questions of tribal law interpretation"131 would "impinge on the tribe's right to self-government"132 and undermine the authority of tribal courts.133 Anticipating *Iowa Mutual*'s desire to avoid competition between federal and tribal courts, the Eighth Circuit ruled that abstention was proper.134

Shortly after *Iowa Mutual*, the Eighth Circuit decided *United States ex rel. Kishell v. Turtle Mountain Housing Authority*.135 In *Kishell*, the Eighth Circuit applied *Iowa Mutual* to a case in which no tribal court action was pending, finding "that the policy of initially deferring to the tribal court is equally applicable" in such cases.136 The Eighth Circuit found exhaustion

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129. *Id.* at 670.
130. *Id.* at 672-74.
131. *Id.* at 673.
132. *Id.* at 674.
133. *Id.* at 673-4.
134. *Id.*
135. 816 F.2d 1273 (8th Cir. 1987).
136. *Id.* at 1276.
"especially appropriate"\textsuperscript{137} because \textit{Kishell} involved a dispute between a tribe member and a tribal agency that was conducting "quasi-governmental activities on land situated entirely within the reservation's borders."\textsuperscript{138} The court found that such a situation is a "purely internal tribal controversy, which the tribal court is uniquely situated to resolve."\textsuperscript{139}

The Eighth Circuit's adherence to a mandatory exhaustion rule, however, soon wavered. In \textit{Greywater v. Joshua}, the court refused to extend the exhaustion doctrine to challenges of tribal court criminal actions brought under the ICRA's grant of federal habeas corpus jurisdiction.\textsuperscript{140} Relying on the Supreme Court's holding in \textit{Oliphant v. Suquamish Indian Tribe},\textsuperscript{141} and a lengthy discussion in \textit{National Farmers Union} concerning the differences between tribal civil and criminal jurisdiction,\textsuperscript{142} the Eighth Circuit ruled that exhaustion was not required "in a criminal case where the ultimate sentence may exceed one year imprisonment."\textsuperscript{143}

Again in \textit{Blue Legs v. United States Bureau of Indian Affairs},\textsuperscript{144} the Eighth Circuit did not require exhaustion in a case brought by a tribal member against his tribe and federal government agencies under the Resource Conservation and Recovery Act ("RCRA").\textsuperscript{145} Relying on the language in § 6972 of RCRA, that "[a]ny action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred,"\textsuperscript{146} the Eighth Circuit concluded that federal courts provide an exclusive forum for suits brought under the statute.\textsuperscript{147}

The Eighth Circuit failed, however, to articulate why the tribal court should not have been given the first opportunity to determine whether § 6972 limited tribal court jurisdiction, as contemplated by \textit{National Farmers Union}. Perhaps § 6972

\begin{thebibliography}{99}
\bibitem{137} Id.
\bibitem{138} Id.
\bibitem{139} Id.
\bibitem{140} 846 F.2d 486, 488 (8th Cir. 1988). Specifically, 25 U.S.C. § 1303 provides that "[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."
\bibitem{141} \textit{Greywater}, 846 F.2d at 488 (citing 435 U.S. 191 (1978)).
\bibitem{142} Id. at 488-89.
\bibitem{143} Id. at 488.
\bibitem{144} 867 F.2d 1094 (8th Cir. 1989).
\bibitem{145} Id. at 1097-98; see also 42 U.S.C. §§ 6901-87 (1988 & Supp. III 1991).
\bibitem{146} 42 U.S.C. § 6972(a).
\bibitem{147} \textit{Blue Legs}, 867 F.2d at 1098.
\end{thebibliography}
amounts to an "express jurisdictional limitation" of which tribal court jurisdiction would be "patently violative" within the meaning of the National Farmers Union exception.\textsuperscript{148} The court in Blue Legs, however, did not apply that logic in its decision.

The Eighth Circuit's next exhaustion decision, \textit{DeMent v. Oglala Sioux Tribal Court}, involved a non-Indian's federal habeas corpus challenge of tribal court custody orders involving his child who resided on the reservation.\textsuperscript{149} The Eighth Circuit required exhaustion,\textsuperscript{150} an unsurprising result given that \textit{DeMent} involved a direct challenge to a tribal court's exercise of jurisdiction over a pending case,\textsuperscript{151} which placed the case squarely under \textit{National Farmers Union}. \textit{DeMent} makes clear, however, that \textit{Greywater} did not create an exception to exhaustion for all habeas cases, but rather that the ruling rests entirely on the civil-criminal distinction.\textsuperscript{152}

The following year, the Eighth Circuit decided \textit{Twin City Construction Co. v. Turtle Mountain Band of Chippewa Indians}.\textsuperscript{153} \textit{Turtle Mountain} represents a tortured procedural case that began when an Indian filed a contract claim against a non-Indian corporation in tribal court.\textsuperscript{154} After the tribal court determined that it had jurisdiction over the defendant corporation, the defendant brought suit in federal court relying on \textit{National Farmers Union} to test the tribal court's jurisdictional ruling.\textsuperscript{155} The district court found that the tribe's own code prohibited the tribal court from exercising jurisdiction,\textsuperscript{156} overruling the tribal court's interpretation of its own tribal law. On appeal, a divided Eighth Circuit panel reversed, ruling that tribal courts' interpretations of tribal law bind federal courts and that tribal court jurisdiction was acceptable as a matter of federal law.\textsuperscript{157} The dissent argued that both tribal and federal law barred tribal court jurisdiction.\textsuperscript{158} On en banc rehearing, the Eighth Circuit

\begin{itemize}
  \item \textsuperscript{148} See supra note 44 and accompanying text.
  \item \textsuperscript{149} 874 F.2d 510, 511-12 (8th Cir. 1989).
  \item \textsuperscript{150} Id. at 516-17.
  \item \textsuperscript{151} Id.
  \item \textsuperscript{152} Id. at 515.
  \item \textsuperscript{153} 911 F.2d 137 (8th Cir. 1990).
  \item \textsuperscript{154} Id. at 138.
  \item \textsuperscript{155} Id.
  \item \textsuperscript{156} Id.
  \item \textsuperscript{157} Id. For a description of the original panel decision and dissent in \textit{Turtle Mountain}, see S. Caroline Malone, \textit{Tribal Power Over Non-Indians: Tribal Courts at a Civil Crossroads}; Twin City Construction Company v. Turtle Mountain Band of Chippewa Indians," 42 ARK. L. REV. 1027, 1047-1051 (1989).
  \item \textsuperscript{158} Malone, supra note 157, at 1048-1050.
\end{itemize}
affirmed the district court's ruling by an equally divided panel without issuing an opinion. The split decision and absence of an opinion in *Turtle Mountain* left litigants without a clear understanding of how the Eighth Circuit would analyze jurisdictional issues.

Subsequently, the tribe revised its code to eliminate the perceived jurisdictional impediment and sought to dissolve the federal injunction against the tribal court action. On appeal, the Eighth Circuit dissolved the injunction so that the case could proceed in tribal court. Without citing *National Farmers Union* or *Iowa Mutual*, the panel found that exhaustion was necessary:

In directing that the action should proceed [in tribal court], we are not determining that the tribal court does have jurisdiction. We are simply directing that all issues of jurisdiction resulting from the pending action should now be considered under the amended tribal code in the appropriate forum or forums.

Most recently, the Eighth Circuit decided *Northern States Power Co. v. Prairie Island Mdeiwakanton Sioux Indian Community*, in which a nuclear power producer challenged a tribal ordinance regulating the transport of nuclear waste across the reservation. The plaintiff argued that the Hazardous Materials Transportation Act ("HMTA"), which expressly preempts tribal ordinances if they "create[] an obstacle to the accomplishment and execution" of the Act, preempted the tribal ordinance at issue. The Eighth Circuit analyzed the effect of the tribal ordinance and concluded that it was preempted. The Eighth Circuit failed to articulate a reason why the tribal court should not have had the first opportunity to consider whether the Act limited the tribe's power—other than the circular conclusion that exhaustion was not required because the Eighth Circuit considered the tribal ordinance preempted.

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159. Twin City Const. Co. v. Turtle Mountain Band of Chippewa Indians, 866 F.2d 971, 972 (8th Cir.) (en banc), cert. denied, 490 U.S. 1085 (1989). For a criticism of the divided court result and the bases therefor, see Malone, supra note 157, at 1050-51.

160. *Turtle Mountain*, 911 F.2d at 139.

161. *Id.* at 139-40.

162. *Id.*

163. 991 F.2d 458, 459 (8th Cir. 1993).


165. 49 U.S.C.A. app. § 1811 (a)(2).

166. 991 F.2d at 460.

167. *Id.* at 462.

168. *Id.* at 462-63.
2. **Lower Court Actions**

The United States District Court for the District of North Dakota has begun to create exceptions to the exhaustion requirement beyond those set forth in *National Farmers Union*. For example, in *Myrick v. Devils Lake Sioux Manufacturing Corp.*, an Indian brought claims based on age and race discrimination and breach of contract against his employer, a tribal corporation. The district court found that no exhaustion was necessary. The court distinguished *Iowa Mutual* and *National Farmers Union* on the ground that no action was pending in tribal court, ignoring *Kishell's* admonition that exhaustion is "equally applicable" in such cases. The court also distinguished *Weeks Construction* because it involved questions of tribal law, although the breach of contract claim in *Myrick* presumably arose under tribal law. Finally, the court distinguished *Kishell* by reasoning that the defendants in *Kishell* "were agencies created by the tribes and the issues [in *Kishell*] were primarily intra-tribal," although the employment relation at issue in *Myrick* between tribal corporation and tribal member governing work on the reservation was clearly an internal tribal matter. The district court simply concluded that "[t]he present case does not fit within any of the cases cited" because there is no attack on the jurisdiction of the tribal court, the tribe is not a party, and the case "predominately presents issues of federal law."

In short, the district court did not require exhaustion in *Myrick* because the case did not fall precisely within the holding of any Supreme Court or Eighth Circuit case in every conceivable particular, notwithstanding the Eighth Circuit's clear statements and the actual facts of the case before it. In so doing, the

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170. Id. at 755.
171. Id. at 754-55.
174. Id.
175. The issues in *Myrick* were probably even more "internal" than the situation presented in *Kishell*, because *Kishell* involved questions of ownership and use of trust land in which the United States had an interest. *Kishell*, 816 F.2d at 1274. Indeed, the United States was a party in *Kishell*, id., whereas only a tribal member and a corporation were parties in *Myrick*. 718 F. Supp. at 755.
district court relied on distinctions that each had been expressly rejected by the Supreme Court or the Eighth Circuit.\textsuperscript{177}

Another North Dakota district court found exhaustion unnecessary in \textit{Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation}, in which non-Indian plaintiffs challenged the tribe’s imposition of oil and gas severance taxes on their mining operations on allotted lands within the reservation.\textsuperscript{178} The court found that exhaustion was not necessary, after a flippant discussion in which the district court relied on the overruled panel opinion in \textit{Stock West I}\textsuperscript{179} and mischaracterized \textit{Weeks Construction} as involving “internal tribal disputes.”\textsuperscript{180} Displaying a poor understanding of English vocabulary, the court stated that “this is not a case where \textit{tribal jurisdiction} is challenged, but a case where the power of the tribe to excise a severance tax is challenged.”\textsuperscript{181} Because the case did not involve a “purely internal tribal controversy,” the court found no exhaustion necessary.\textsuperscript{182} In so doing, it failed to recognize that the challenge to the tribe’s taxation authority necessarily challenged the tribal court’s adjudicatory authority over taxation matters, which placed the case squarely under \textit{National Farmers Union}.

In summary, the Eighth Circuit has joined the Tenth and Ninth Circuits in holding that the existence of a pending tribal court action and the presence of non-Indian parties have no bearing on the issue of exhaustion. The Eighth Circuit is unique, however, because of the degree to which some district courts have avoided applying the exhaustion doctrine by searching for exceptions to appellate holdings based on the particular circumstances that made \textit{Kishell} “especially appropriate” for exhaustion, \textit{Kishell}, 816 F.2d at 1276, into an affirmative limitation of the exhaustion requirement when those factors are not present. On the contrary, however, it is clear from \textit{Kishell} that the Eighth Circuit was not attempting to restrict the exhaustion requirement by listing those factors. See \textit{id.} (recognizing the “federal government’s longstanding policy of encouraging tribal self-government” and suggesting that plaintiffs should be required to exhaust tribal remedies so as not to “impair the authority of the tribal courts”).

\textsuperscript{177} The district court in \textit{Myrick} may have converted the circumstances that made \textit{Kishell} “especially appropriate” for exhaustion, \textit{Kishell}, 816 F.2d at 1276, into an affirmative limitation of the exhaustion requirement when those factors are not present. On the contrary, however, it is clear from \textit{Kishell} that the Eighth Circuit was not attempting to restrict the exhaustion requirement by listing those factors. See \textit{id.} (recognizing the “federal government’s longstanding policy of encouraging tribal self-government” and suggesting that plaintiffs should be required to exhaust tribal remedies so as not to “impair the authority of the tribal courts”).

\textsuperscript{179} \textit{Id.} at 1011.
\textsuperscript{180} \textit{Id.}
\textsuperscript{181} \textit{Id.} at 1011-12 (emphasis added). Generally, “jurisdiction” means the “[a]uthority of a sovereign power to govern or legislate; power or right to exercise authority; control.” \textit{Amoco Prod. Co. v. Sea Robin Pipeline Co.}, 844 F.2d 1202, 1206 n.15 (5th Cir. 1988) (quoting \textit{WEBSTER’S NEW INTERNATIONAL DICTIONARY} 1347 (2d ed. 1957) (unabridged)).
\textsuperscript{182} \textit{Duncan Energy}, 812 F. Supp. at 1012.
cases before them. In addition, the outcomes in *Blue Legs* and *Northern States Power* indicate the emergence of a separate exception to exhaustion in cases in which the tribe's jurisdiction is arguably limited by a statute of general application, as opposed to limitations found in treaties or federal common law.

D. Exhaustion in the Seventh Circuit

The Seventh Circuit became the fourth court of appeals to consider an exhaustion case with its recent decision in *Altheimer & Gray v. Sioux Manufacturing Corp.*[^3] *Altheimer* arose out of a dispute over the validity of a consulting contract between a tribally-owned corporation and a non-Indian corporation.[^4] The case focused on whether the contract required the approval of the Secretary of the Interior under 25 U.S.C. § 81 and whether the tribe's sovereign immunity barred the action.[^5] The contract clearly related to reservation affairs because it provided for an arrangement in which the non-Indian corporation would help the tribal corporation manufacture latex medical products on the reservation.[^6] The contract, however, contained choice of law and choice of forum clauses, which provided that Illinois law would govern contract interpretation and that state or federal courts in Illinois would resolve all disputes.[^7]

The Seventh Circuit began its analysis by focusing on the absence of a pending tribal court action and misreading *Iowa Mutual*. The court stated that *Iowa Mutual* "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."[^9] The Seventh Circuit nonetheless acknowledged that the policies underlying the exhaustion requirement extend beyond cases in which a tribal court action is pending or tribal court jurisdiction is challenged *per se*.[^8] Yet, rather than choose the bright-line rules that the Tenth and Ninth Circuits use,[^9] and that the Eighth Circuit apparently uses,[^9] the Seventh Circuit found it "necessary to examine the factual circumstances of each case . . . to determine whether the issue in dispute is truly a reservation

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[^3]: 983 F.2d 803 (7th Cir. 1993).
[^4]: *Id.* at 806.
[^5]: *Id.* at 808, 812.
[^6]: *Id.* at 806.
[^7]: *Id.* at 807.
[^8]: *Id.* at 814.
[^9]: *Id.*
[^10]: *See supra* notes 64-127 and accompanying text.
[^11]: *See supra* notes 128-168 and accompanying text.
affair,” citing *Burlington Northern II.* In other words, the court chose the test that was examined and rejected by the same courts it purported to follow.

The Seventh Circuit found that *Altheimer* involved primarily issues of Illinois and federal law, ignoring the fact that it had interpreted the tribe’s code only two pages earlier to resolve the sovereign immunity issue. The Seventh Circuit manifested discomfort with this reasoning, noting that the “interpretation of another jurisdiction’s laws, however, does not alone foreclose application of the tribal exhaustion rule.” Lacking a better basis, the Seventh Circuit justified its decision not to require exhaustion on its belief that exhaustion would “undercut the Tribe’s self-government and self-determination” because the tribe had contracted to refer disputes to Illinois courts. Rather than characterize the choice of forum provision as an act of self-determination that the court was bound to follow, or as a jurisdictional limitation that satisfied an exception to the exhaustion requirement, the panel instead based its decision on its own belief concerning where the tribe’s best interests lay: “If contracting parties cannot trust the validity of choice of law and venue provisions, [the tribal corporation] may well find itself unable to compete and the Tribe’s efforts to improve the reservation’s economy may come to naught.” In other words, the Seventh Circuit decided for itself what was best for the tribe, rejected the tribe’s own determination of where best to litigate, and imposed its determination on the tribe—all in the name of promoting the tribe’s self-determination.

### E. Exhaustion in Other Federal Courts

Lower courts in two other circuits have also required adherence to the exhaustion doctrine. In *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, the United States District Court for the Southern District of Florida considered whether exhaustion was appropriate in a dispute over a contract between the tribe and the manager of its gaming operations. The court ruled that exhaustion was appropriate, which is an unsurprising result considering that the case clearly arose on the reservation,

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192. *Altheimer*, 983 F.2d at 814.
193. *Id.*
194. *Id.* at 812.
195. *Id.* at 814.
196. *Id.* at 815.
197. *Id.*
involved the tribe as a party, and an action arising out of the same transaction was pending in tribal court. It is noteworthy, however, that the contract included terms providing that the district court shall have jurisdiction over the suit. Notwithstanding the contractual terms, the court required exhaustion in order to give the tribal court the first opportunity to review its jurisdiction. The Florida court found that course appropriate under Iowa Mutual and under the federal Indian gaming laws, that were intended to strengthen tribal governments.

In Tom’s Amusement Co. v. Cuthbertson, the United States District Court for the Western District of North Carolina considered whether exhaustion is required in a dispute between a gaming manager and a slot machine lessor. The court held that exhaustion was proper even though no action between the parties was pending in tribal court and neither party was an Indian or tribal official. The court did so because the case arose on tribal lands, relying on Iowa Mutual, Stock West II, and Tamiami Partners.

F. SUMMARY AND ANALYSIS

The positions of the courts in the federal circuits that have ruled on exhaustion clearly conflict. The Tenth and Ninth Circuits have developed clear rules requiring exhaustion in nearly all cases in which it is requested, excepting only cases in which the assertion of tribal court jurisdiction is patently violative of jurisdictional limitations. The Seventh Circuit and district courts within the Eighth Circuit, however, have chosen to examine the particular circumstances of each case to determine

199. Id.
200. Id. at 568. The contract provided that the tribe waived its sovereign immunity, and that the United States District Court for the Southern District of Florida would have jurisdiction. Id.
201. Id. at 569.
204. 816 F. Supp. 403, 404 (W.D.N.C. 1993).
205. Id. at 407.
206. Id. at 406-07.
207. See supra notes 64-127 and accompanying text.
whether exhaustion would further the policies set forth in *National Farmers Union* and *Iowa Mutual.*

The courts that have chosen the particularized test have decided that the absence of a pending tribal court action presents a potential distinction between the cases before them and *Iowa Mutual.* Indeed, the absence of a tribal court action is the primary factor that allowed those courts to distinguish *Iowa Mutual* and *National Farmers Union.* The courts of appeals of the Eighth, Ninth, and Tenth Circuits have expressly rejected that distinction. Choosing between the rules developed in the conflict among the circuits requires a two-fold analysis. One must consider whether the existence of a pending tribal court action constitutes a meaningful distinction, and also whether the particularized inquiry is preferable to a bright line rule. In addition, the Eighth Circuit's rulings in *Blue Legs* and *Northern States Power* raise the separate question of whether exhaustion is necessary when a tribe's jurisdiction arguably may be limited by a statute of general application.

1. The Relevance of a Pending Tribal Court Action

The absence of a pending tribal court action provides a basis for courts to make a case for avoiding the stare decisis effect of *Iowa Mutual* and *National Farmers Union.* Although the courts utilizing the particularized inquiry have never clearly stated their rationale, they appear to rely on the Supreme Court's admonition: "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 . . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot properly be denied." This principle is subject to the limitations that the Supreme Court has set forth through the development of abstention doctrines. As a normal rule, however, abstention is considered "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." As a result, courts must reason that the duty to accept jurisdiction is firm and exceptions must be narrowly construed. Because *Iowa*

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208. See supra notes 128-182 and accompanying text.
209. See, e.g., Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803, 814 (7th Cir. 1993) (noting that in this case there was "no direct attack on a tribal court's jurisdiction, . . . [and] no case pending in tribal court . . . .")
*Mutual* and *National Farmers Union* are exceptions, the argument would follow, they too must be limited to their barest stare decisis requirements.

This argument fails in its premise because it is based on an excessively narrow view of the stare decisis effect of *Iowa Mutual*. The rule announced in *Iowa Mutual* extends beyond situations in which a tribal court action is already pending, because the Court expressly stated that "petitioner must exhaust available tribal remedies before instituting suit in federal court."212 The Supreme Court's *ratio decidendi* was the need to avoid "direct competition with the tribal courts."213 That competition will exist whenever a federal court exercises concurrent jurisdiction over a matter within the tribal court's jurisdiction, regardless of whether an action is already pending, because the federal court will compete with the tribal court for control over reservation affairs. Further evidence to support this reading of *Iowa Mutual* comes from the Court's own characterization of the question presented, which was, "whether a federal court may exercise diversity jurisdiction before a tribal court system has an opportunity to determine its own jurisdiction."214 Notably absent from the Court's framing of the issue, however, is the mention of the existence of a pending tribal court action.

Limiting *Iowa Mutual* and *National Farmers Union* to their facts would frustrate their purposes. Due to the degree that federal law controls reservation affairs, and the fact that disputes over tribal court jurisdiction always present federal questions, a vast percentage of cases ordinarily within tribal court jurisdiction are also litigable in federal court.215 Limiting *Iowa Mutual* and *National Farmers Union* to their facts could virtually eliminate tribal court authority over reservation affairs by allowing cases such as these to proceed in the federal forum. No court

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213. *Id.* at 16.
214. *Id.* at 11.
215. *See, e.g.*, Altheimer & Gray *v. Sioux Mfg. Corp.*, 983 F.2d 803, 810-11 (7th Cir. 1993) (illustrating how virtually any contract into which an Indian tribe enters could create a federal question under 25 U.S.C. § 81); *see also* Chilkat *Indian Village v. Johnson*, 870 F.2d 1469, 1473 (9th Cir. 1989) (ruling that claims for enforcement of tribal ordinance against a non-Indian defendant presents a "federal question" which is litigable in federal court). These rulings establish that virtually any contract into which a tribe enters and all disputes about the applicability of tribal ordinances are litigable in federal court absent an exhaustion requirement. For a discussion of the effect of decisions such as *Chilkat* on tribal court authority, see Julie A. Pace, Comment, *Enforcement of Tribal Law in Federal Court: Affirmation of Indian Sovereignty or a Step Backwards Towards Assimilation*, 24 *Ariz. St. L. J.* 435, 459-67 (1992).
has articulated a defensible reason why the goals of *Iowa Mutual* and *National Farmers Union* should be frustrated whenever the proponent of federal jurisdiction simply wins "the race to the courthouse." If a litigant cannot defeat the purpose of *Iowa Mutual* by filing after the tribal court action begins, a litigant should not be able to do so by filing earlier. This distinction is merely temporal and bears no relation to the rationale or analysis of *Iowa Mutual*.

Arguably, the presence of a tribal court action may appear relevant because in such cases the federal court would interfere with the tribal court's management of a particular case. This infringement upon tribal authority may seem greater than in cases in which no action is pending. The Supreme Court, however, articulated a broader rationale in *Iowa Mutual*, concluding that the exercise of federal jurisdiction interferes with tribal court "authority over reservation affairs" and "tribal lawmaking authority." The Court thus sought to avoid infringement on tribal court authority over its own tribal laws and reservation, not simply the management of individual cases.

In addition to the policies set forth in *Iowa Mutual* and *National Farmers Union*, considerations of ripeness and standing that underlie abstention doctrines favor exhaustion prior to the initiation of a federal court action. Many of the cases raising exhaustion involve questions of tribal regulatory and adjudicatory authority over non-Indians on reservations. Until enforcement is sought through tribal forums, the threat of tribal assertions of jurisdiction remains uncertain enough to raise standing concerns. Similarly, the federal court can have no more than theoretical bases for its decision unless and until the manner in which tribal jurisdiction is exercised over a particular person is established by enforcement in the tribal forum. Only after the fact, manner, and means of enforcement are established does the case present a ripe controversy.

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


218. For this reason, the Ninth Circuit in *Burlington Northern II* rejected an attempt to limit *Iowa Mutual* to cases in which a tribal court action was pending. 940 F.2d at 1246.
2. The Bright Line Rule vs. The Particularized Inquiry

Numerous considerations favor the Ninth and Tenth Circuits’ bright line rule over the particularized inquiry that the Seventh Circuit recently adopted. Most notably, the rule is easily understandable by potential litigants, thereby eliminating doubts about the proper forum in which to pursue litigation and when and where to raise the exhaustion issue. This clarity, in turn, helps to eliminate unnecessary preparation and presentation of cases to the federal forum, conserving judicial and economic resources.

The particularized inquiry requires parties to devote substantial effort to litigating in federal forums to develop the factual predicates for the application of the National Farmers Union and Iowa Mutual policies, only to find themselves cast out of the federal forum in which they have devoted so much effort (and which has devoted so much effort to them). Indeed, consideration of such issues as whether the case presents “a reservation affair” will not always lend itself to resolution by simple review of the complaint and may require significant factual development through affidavits or evidentiary hearings.

It is significant that the two circuits that have examined the issue most closely have adopted bright line rules. The Ninth Circuit’s experience is particularly instructive. The Ninth Circuit struggled to develop exceptions and prudential considerations to govern the particularized inquiries. Frustrated with the difficulties of degree that cases such as Stock West II present and the lack of principled bases for distinction between cases, the Ninth Circuit avoided the difficulties by simply eliminating the inquiry.

Indeed, courts that have tried to develop principled reasons to avoid exhaustion in cases that may be within tribal court jurisdiction have failed to articulate meaningful and logical bases for distinction. These courts have been forced to resort to logic like the court in Duncan Energy, when it reasoned that the case before it did not involve “tribal jurisdiction” but merely “the power of the tribe.” Worse yet, the court in Myrick concluded

219. See supra notes 64-127 and accompanying text.
220. See supra note 124 and accompanying text (discussing Stock West II (en banc)).
that an employment relationship between a tribal member and a tribal corporation is not an internal tribal affair.\footnote{222}{Myrick v. Devils Lake Sioux Mfg. Corp., 718 F. Supp. 753, 755 (D.N.D. 1989).}

The Seventh Circuit's consideration of Altheimer is also instructive. One factor that the court cited as weighing against exhaustion was that the case involved applications of federal law which were "distant" to the tribal court.\footnote{223}{Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803, 814 (7th Cir. 1993).} National Farmers Union, however, directs federal courts to refer federal law questions to tribal courts.\footnote{224}{See supra notes 38-40 and accompanying text.} Apparently uncomfortable with its own rationale, the court in Altheimer belittled the rationale immediately after articulating it.\footnote{225}{Altheimer, 983 F.2d at 814-15; see also supra notes 193-197 and accompanying text (analyzing the Court's decision-making process).} The only other factor that the court cited was its own consideration of the tribe's interests.\footnote{226}{Altheimer, 983 F.2d at 815.} In so doing, however, the court defeated the very goals of tribal self-determination to which it appealed and purported to promote. In short, the Seventh Circuit failed to articulate any meaningful reason why Iowa Mutual and National Farmers Union did not require it to refer the validity of the contract and the application of the choice of forum clause to the tribal court for initial determination. Certainly the tribal court occupies the best position for judging whether the tribe's interests mandate enforcement of the clause.

The principal reason to avoid the particularized inquiry, however, is that the inquiry itself defeats the policies underlying Iowa Mutual and National Farmers Union. The particularized inquiry requires federal courts to examine whether the case before it involves a "reservation affair" or an "important tribal interest" as part of a balancing test.\footnote{227}{See, e.g., id. at 811 (stating that it is "necessary to examine the factual circumstances of each case . . . in order to determine whether the issue in dispute is truly a reservation affair entitled to the exhaustion doctrine.").} Tribal self-determination, however, requires that the identification of important tribal interests or matters sufficiently connected to the reservation to warrant tribal court resolution occur within tribal forums. Indeed, the importance of a matter to the tribe or its nexus to the reservation is an issue particularly within the tribal courts' expertise. National Farmers Union teaches that federal courts
should take advantage of that expertise when it is available through exhaustion.\textsuperscript{228}

The particularized inquiry necessarily leads to the "infringe[ment] upon tribal law-making authority" that the Supreme Court condemned and sought to avoid in \textit{Iowa Mutual}.\textsuperscript{229} The inquiry causes this harm in two ways. First, the inquiry often leads federal courts to examine and interpret tribal laws in the first instance—either to determine whether the matter falls within the tribe's declared interests as part of the inquiry itself,\textsuperscript{230} or because federal courts decide cases involving matters of tribal law after exhaustion is rejected.\textsuperscript{231} As the courts in \textit{Iowa Mutual}, \textit{Weeks Construction}, and \textit{Stock West II} (en banc) recognized, this practice infringes on tribal court interpretative authority over matters of tribal law.\textsuperscript{232} In addition, the particularized inquiry leads to infringement of tribal court adjudicatory authority by causing cases that fall under concurrent federal and tribal court jurisdiction to be litigated first in federal court.\textsuperscript{233}

Finally, the bright line rule better comports with federal institutional principles. Adoption of a judicially-applied "prudential" test lends itself too readily to encroachments by the federal judiciary on tribal sovereignty. The decisions in \textit{Myrick} and \textit{Duncan Energy} offer clear examples of this potential realized.\textsuperscript{234} Under "plenary power," defining limits on tribal sovereignty, including the power of tribal court systems, remains the domain of Congress as a fundamentally political question.\textsuperscript{235} Judicial respect for the roles of Congress and the judiciary mandates strict scrutiny of congressionally enacted limitations on tribal court authority and the avoidance of judicially created ones.

\textsuperscript{228} See supra note 43 and accompanying text.
\textsuperscript{229} Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1986).
\textsuperscript{230} See, e.g., Myrick v. Devils Lake Sioux Mfg. Corp., 718 F.2d at 755 (distinguishing \textit{Myrick} from \textit{National Farmers Union, Iowa Mutual, Kishell}, and \textit{Weeks} because those cases involved "primarily intra-tribal" interests).
\textsuperscript{231} Altheimer presents one clear example of this problem. 983 F.2d at 812. The Seventh Circuit, after describing the case as one involving primarily federal law, resolved one of the two principle issues in the case by interpreting the tribe's own law and order code. \textit{Id}.
\textsuperscript{232} See supra notes 53, 133, 126 and accompanying text.
\textsuperscript{233} See supra note 230 and accompanying text.
\textsuperscript{234} See supra notes 169-182 and accompanying text.
\textsuperscript{235} Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903); see also Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained.") (citing Talton v. Mayes, 163 U.S. 376, 384 (1896)).
In short, the Ninth and Tenth Circuit rule offers the advantages of clarity and economy. The rule also avoids frustrating the goals of *Iowa Mutual* and *National Farmers Union* that occurs with the particularized inquiry.

3. The *Blue Legs* and *Northern States Power* Rulings

The outcomes in *Blue Legs* and *Northern States Power* indicate that the Eighth Circuit's general solicitude for the exhaustion requirement may not extend beyond cases in which the tribe's jurisdiction is limited by traditional Indian law considerations such as treaties, federal common law doctrines, or statutes addressing particularly "Indian" issues. In both *Blue Legs* and *Northern States Power*, the Eighth Circuit rejected attempts to require exhaustion when tribal authority was arguably limited by statutes dealing with issues of general concern such as solid waste disposal and nuclear materials transport.²³⁶

*National Farmers Union*, however, contemplates that tribal courts will review in the first instance federal statutes that arguably limit tribal authority. The Court states that, "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, ... as well as a detailed study of relevant statutes. ... We believe that examination should be conducted in the first instance in the Tribal Court itself."²³⁷ Of course, RCRA and the HMTA may limit tribal jurisdiction or tribal court authority. Yet *National Farmers Union* requires that the tribal court address this issue in the first instance. No principled distinction exists between the traditional limitations on tribal authority that the Eighth Circuit requires to be addressed by the tribal court and the federal statutory limitations addressed in *Blue Legs* and *Northern States Power*.

*Northern States Power* illustrates further reasons why the tribal court should be allowed to address its jurisdiction in the first instance. Considerations of ripeness dictate that a federal court should not decide whether a tribal ordinance would interfere with a federal statutory goal until the nature and fact of that interference are established by concrete tribal action. More importantly, determining the manner in which a tribal ordi-

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²³⁶ Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community, 991 F.2d 458, 459 (8th Cir. 1993) (nuclear material transport); Blue Legs v. United States Bureau of Indian Affairs, 867 F.2d 1094, 1095 (8th Cir. 1989) (solid waste disposal).

nance will operate and the effect it will have on federal interests requires an interpretation of the tribal ordinance, which Iowa Mutual and the Eighth Circuit's own ruling in Weeks Construction make the unique province of the tribal court. The Eighth Circuit avoided this point in Northern States Power by describing the effects of the tribal ordinance as a "factual determination[1]" for the district court. That "factual determination," however, plainly involved the construction of tribal ordinances, which is at the core of the values underlying Iowa Mutual. Finally, as with a Pullman abstention, inter-sovereign considerations suggest that the tribal court be given an opportunity to search for a construction of the tribal ordinance that would avoid illegality, thereby adhering to the general federal policy of avoiding unnecessary or undue infringement on tribal self-government.

In addition to these considerations, a rule suggesting that tribal exhaustion is unnecessary when a statute of general application arguably limits tribal court jurisdiction, begs the question of whether the statute at issue even applies to particular Indians and Indian tribes. As a general matter, statutes of general concern or application do not apply to Indians or Indian tribes when those statutes would affect treaty rights or tribal self-government. Thus, the threshold question of whether such statutes even apply to a given tribe requires the type of analysis of Indian treaties and tribal interests which lies at the heart of National Farmers Union and Iowa Mutual.

In short, the rule suggested by Blue Legs and Northern States Power is not based on a principled distinction between those cases and National Farmers Union. The rule also ignores the basic values underlying the exhaustion doctrine. This is not to say that the Eighth Circuit was wrong insofar as it interpreted RCRA's and the HMTA's effects on tribal sovereignty. Iowa Mutual and National Farmers Union, however, require that the tribal court have the first opportunity to make that ruling unless the statute is so clear that the exercise of tribal jurisdiction would be patently violative of express jurisdictional limitations.

238. See Northern States Power, 991 F.2d at 463.
239. See supra note 127.
240. See, e.g., E.E.O.C. v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246, 249 (8th Cir. 1993) (holding that the ADEA does not apply to tribal entities because employment is an internal tribal matter).
III. FEDERAL REVIEW AFTER EXHAUSTION

Both National Farmers Union and Iowa Mutual provide that after exhausting tribal court remedies, the losing party has the right to challenge the tribal court’s jurisdictional ruling in federal court. Iowa Mutual makes clear that the parties may not relitigate their federal claims beyond the jurisdictional challenge, unless and until the federal court determines that the tribal court lacked jurisdiction over the dispute.241 Thus, under Iowa Mutual, the tribal court’s jurisdiction is a threshold issue in a federal proceeding.

This opportunity for review places the district court in the unique position of resolving a dispute over tribal court jurisdiction that the same parties have already litigated in another sovereign’s forum. As a result, the district court enters the dispute after the tribal court has already resolved substantial questions of law and fact. These questions include interpretations of federal law necessary to determine the tribal court’s jurisdiction, interpretations of jurisdictional limitations that the tribe’s own laws have imposed upon the tribal court, and findings of fact that the tribal court has made to resolve the jurisdictional dispute. Even before deciding the jurisdictional issue, the federal court must decide how to treat the interpretations of law and findings of fact it receives from the tribal court.

A federal district court should review the tribal court’s construction of jurisdictional limitations contained in federal law de novo. While a state court’s ruling on jurisdiction, even as limited by federal law, is reviewable only on appeal to the Supreme Court, National Farmers Union and Iowa Mutual clearly contemplate district court review of the federal law limitations on tribal court jurisdiction. The federal court is clearly the appropriate forum to interpret federal law; indeed, the only federal

court to consider this precise issue so concluded.\textsuperscript{242} More difficult questions arise in the context of the tribal court's interpretation of jurisdictional limitations contained in tribal law and the findings of fact necessary to rule on jurisdictional limitations in both federal and tribal law.

A. INTERPRETATIONS OF TRIBAL LAW

Only three cases have arisen in which federal courts have considered jurisdictional limitations imposed on tribal courts by tribal law, after the tribal court had interpreted and applied those same limitations in a case between the same parties. In one case, the federal court considered itself bound by the tribal court's interpretation of the tribe's own law.\textsuperscript{243} In the other two, the federal courts reviewed the tribal law questions de novo and reversed the rulings of the tribal court.\textsuperscript{244}

In \textit{Sanders v. Robinson}, a non-Indian plaintiff challenged the tribal court's jurisdiction over a divorce action that a tribal member filed against him, after first exhausting his tribal court remedies.\textsuperscript{245} Without discussion of the tribal constitutional and code provisions at issue, the Ninth Circuit simply stated that, "[t]he Northern Cheyenne Appellate Court has held (in this same case) that these provisions permit tribal court jurisdiction over a non-Indian married to an enrolled member of the tribe. That court's interpretation of tribal law is binding on this court."\textsuperscript{246}

By contrast, in both \textit{Twin City Construction v. Turtle Mountain Indians}\textsuperscript{247} and \textit{Heinert v. Oglala Sioux Tribe},\textsuperscript{248} Eighth Circuit district courts considered cases that had proceeded through the tribal system. In each case the tribal constitution provided that tribal courts would only have jurisdiction over non-Indians if they "consent" or "submit" to tribal court jurisdiction.\textsuperscript{249} The tribal courts found that the constitutional provi-

\textsuperscript{242} FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1314 (9th Cir. 1990), cert. denied, 499 U.S. 943 (1991).
\textsuperscript{243} See infra notes 245-246 and accompanying text.
\textsuperscript{244} See infra notes 247-251 and accompanying text.
\textsuperscript{246} Id. at 633.
\textsuperscript{247} 866 F.2d 971 (8th Cir. 1989) (en banc) (5-5 affirmance), cert. denied, 490 U.S. 1085 (1989).
sions in each case did not bar jurisdiction by adopting a broad conception of "consent" that stemmed from the non-Indian's presence on the reservation and contacts with tribal members. Nonetheless, the district courts in both cases ignored the tribal court interpretation of tribal laws and enjoined the tribal courts from continuing to exercise jurisdiction over the cases. Once again, the lower courts have developed a conflict concerning the implementation of the exhaustion requirement. These cases raise the question of whether a tribal court's interpretation of its own laws should bind a federal court.

The most persuasive answer is yes, based on the analogous situation of the effect of state court interpretations of state law on federal courts. Federal courts are bound by state court interpretations of a state's own laws. The Supreme Court held in Talton v. Mayes that the same interpretive considerations apply to tribal court interpretations of tribal law. In Talton, the plaintiff argued that the Cherokee tribal court's use of a five-person grand jury to return his indictment violated Cherokee law because the tribe had repealed the statute allowing for such grand juries. The Supreme Court rejected this claim:

[T]he determination of what was the existing law of the Cherokee Nation as to the constitution of the grand jury [was] solely a matter within the jurisdiction of the courts of that nation. . . . Such has been the decision of this court with reference to similar contentions arising upon an indictment and conviction in a state court. In re Duncan, 139 U.S. 449. The ruling in that case is equally applicable to the contentions in this particular arising from the record before us.

The ruling in Duncan, which the Supreme Court deemed "equally applicable" between state and tribal courts, stated that "[w]hether certain [state] statutes have or have not binding force it is for the state to determine," or, "[a]s a matter of propriety and right, the decision of the state courts on the question as to

250. Parisien, 16 INDIAN L. REP. at 6014 (stating that "[n]on-Indian conduct allegedly has affected directly the health and welfare of a tribal member," thus giving the tribe a governmental interest in the matter); Heinert, 14 INDIAN L. REP. at 3034 (stating that the tribal court denied a special appearance by non-tribal member plaintiffs in which they claimed that they did not consent to jurisdiction).

251. Twin City, 866 F.2d at 971-72; Heinert, 14 INDIAN L. REP. at 3035.


254. Id. at 379.

255. Id. at 385.

256. Duncan, 139 U.S. at 385 (quoting Town of S. Ottawa v. Perkins, 94 U.S. 260, 268 (1877)).
what are the laws of a state is binding upon those of the United States.\textsuperscript{257}

This rule comports with principles of tribal sovereignty and common sense. Among a tribe’s sovereign powers is the authority to declare its own laws. Substitution by a federal court of its own view of tribal law for that announced by tribal forums violates a tribe’s sovereignty.\textsuperscript{258} Indeed, because tribal courts normally have the power to interpret tribal laws by the organic laws of the tribes, it is a pure contradiction in terms for a federal court to declare that tribal law is not precisely what the tribe’s high court announces.

In addition, the considerations underlying \textit{Iowa Mutual} support application of the tribal court’s interpretation of tribal law. As the Court stated in \textit{Iowa Mutual}, the tribal court is “best qualified to interpret and apply tribal law.”\textsuperscript{259} This is true not only because of the proximity of the tribal court to tribal conditions and decisionmakers, but also because the tribal court will, in most instances, have the greatest knowledge of tribal court precedent. Such precedent is often unavailable to federal courts because tribal court decisions are often unpublished.\textsuperscript{260}

\textsuperscript{257} \textit{Id.} at 456; \textit{see also} Tom v. Sutton, 533 F.2d 1101, 1106 (9th Cir. 1976) (stating that federal courts “should accept the interpretation [of state constitutions] of the courts of that state unless there are federal constitutional questions involved. . . . [L]ike deference should be given to tribal courts in regard to their interpretation of tribal constitutions.”)  

\textsuperscript{258} \textit{See Felix S. Cohen, Handbook of Federal Indian Law} 247 (Rennard Strickland ed., 1982); \textit{see also} Pace, \textit{supra} note 216, at 466-67.  

\textsuperscript{259} \textit{Iowa Mut. Ins. Co. v. LaPlante}, 480 U.S. 9, 16 (1987).  

\textsuperscript{260} \textit{See} Pace, \textit{supra} note 216, at 461 (“Deferece is . . . warranted because tribal interpretations may differ significantly from a federal court’s interpretation based on the influence of unwritten Indian traditions and customs on a tribal court.”); \textit{see also} Frank Pommersheim, \textit{A Path Near the Clearing: An Essay on Constitutional Adjudication in Tribal Courts}, 27 \textit{Gonzaga L. Rev.} 393. Professor Pommersheim argues persuasively that tribal courts should enjoy wide latitude to interpret tribal constitutions in accordance with the particularized traditions and cultural notions of law of each tribe. \textit{Id.} at 406. He notes that the texts of tribal constitutions will rarely reflect such values because many tribal constitutions were drafted by the Bureau of Indian Affairs shortly after the enactment of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-469 (1988). \textit{Id.} at 396. As such, they tend to reflect the Bureau’s own institutional values rather than the tribes’. \textit{Id.} at 397. In addition, the constitutional amendment process dictated by Congress is cumbersome for tribes to use. \textit{See} 25 U.S.C. § 476. Professor Pommersheim points out that tribal courts can utilize their powers of interpretation as one useful mechanism to bring the tribal constitutions closer to the individual desires of the various tribes concerning their own organic laws. Pommersheim, \textit{supra}, at 401-02. As a result, federal court “re-interpretations” would not only contravene important tribal goals of cultural and legal self-determination, but federal courts will often err concern-
Nothing in National Farmers Union contravenes these clear rules. Although National Farmers Union contemplates federal court review of the tribal court's jurisdictional ruling, it appears that the Supreme Court contemplated review of the federal law issues only: "When [petitioners] invoke the jurisdiction of a federal court under § 1331, they must contend that federal law has curtailed the powers of the Tribe, and thus afforded them the basis for the relief they seek in a federal forum."261

Thus, the rule applied when challenging tribal court jurisdiction in federal court should parallel the rule applied by federal courts when interpreting state "long-arm" statutes in diversity cases. In such cases, the state court's interpretation of its own state "long-arm" statute binds the federal court, which then applies federal interpretations of applicable constitutional jurisdictional limitations.262 Similarly, when reviewing tribal jurisdiction, the tribal court's interpretation of tribal law should bind the federal court, which should only review the federal law question de novo.263

B. Tribal Court Findings of Fact

The most difficult question is also the question that federal courts least frequently address: what effect should the federal court give the tribal court findings of jurisdictional facts? In many cases, determination of this issue alone may determine the outcome. In areas in which federal law is sufficiently clear, the tribal court findings of fact, if accepted, can render the federal court decision a fait accompli.

Only one federal court has addressed this critical issue, however. The Court of Appeals for the Ninth Circuit, in FMC v. Shoshone-Bannock Tribes, held that district courts should apply the "clearly erroneous" standard to review factual findings by tribal courts.264 The court reasoned that the Supreme Court wanted tribal courts to "develop the factual record" and that the

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262. See, e.g., Mountaire Feeds, Inc. v. Agro Impex, S.A., 677 F.2d 651, 653 (8th Cir. 1982) (accepting Arkansas's interpretation of state "long-arm" statute as allowing all constitutionally permissible jurisdiction).
264. 905 F.2d 1311, 1313 (9th Cir. 1990), cert. denied, 111 S. Ct. 1404 (1991).
clearly erroneous standard of review "accords with traditional judicial policy of respecting the fact-finding ability of the court of first instance."265

The Supreme Court's treatment of factual findings made in non-federal forums has varied over time and between applications. Most recently, the Court's concern with judicial economy and its respect for the role of state judicial bodies in the federal system have led the Court toward its result in University of Tennessee v. Elliot.266 The final portion of this Article analyzes the Court's current approach to factual findings made in other sovereigns' forums and shows how that approach suggests that factual findings by tribal courts should bind federal courts.

1. Issue Preclusion Between Sovereign Forums: The Elliot Conception

In Elliot, the Supreme Court considered whether the factual findings of a state administrative law judge binds a litigant who filed federal civil rights claims under 42 U.S.C. § 1983 and Title VII of the Civil Rights Act of 1964.267 Elliot arose out of the discharge of a state university employee who, upon receiving news of his discharge, simultaneously requested an administrative hearing from the university and filed suit in federal district court. The employee claimed that the discharge was racially discriminatory and therefore violated § 1983 and Title VII.268 The district court allowed the state administrative hearing to go forward and an extensive factfinding process ensued.269 At the close of the administrative hearing, the factfinder, the "administrative assistant to the Vice President for Agriculture of the University of Tennessee,"270 found that the plaintiff's discharge was not "racially motivated."271 That finding, if applied by the federal court, would have foreclosed the § 1983 claim.
In deciding whether to give that finding preclusive effect, the Supreme Court first determined that findings by state administrative law judges did not qualify for treatment under the "full faith and credit" provisions of 28 U.S.C. § 1738,272 which require federal courts to give preclusive effect to state court rulings and factual findings.273 The Court thus endeavored to consider whether to develop a "federal common law rule[] of preclusion in the absence of a governing statute."274

The Court then posited that courts should presume that preclusion applies unless they find Congressional intent to make an exception.275 The Court justified the presumption in favor of preclusion on two grounds. The rule of preclusion "serves the value underlying general principles of collateral estoppel: enforcing repose. This value, which encompasses both the parties' interest in conserving judicial resources . . . is equally implicated whether fact-finding is done by a federal or state agency."276 In addition, the Court noted that "[h]aving federal courts give preclusive effect to the factfinding of state administrative tribunals also serves the value of federalism" underlying the Full Faith and Credit Clause of the United States Constitution and acts as a nationally unifying force.277 A contrary rule, the Court found, would undercut that "value" by leaving "the courts of a second forum, state or federal, free to reach conflicting results."278

The Supreme Court then applied its newly-created presumption in favor of preclusion. It found that Congress's intent in enacting Title VII overcame the presumption favoring preclusion and allowed the plaintiff to relitigate the facts of his Title VII claim.279 The Court, however, found no such congressional intent with respect to § 1983 and considered the plaintiff bound by the administrative findings in his § 1983 claim.280

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272. Id. at 794. Section 1738 provides that federal courts are bound by legal and factual rulings made by state courts in cases properly before them. 28 U.S.C. § 1738 (1988).
273. 478 U.S. at 794-795.
274. Id. at 795.
275. Id.
276. Id. at 798 (citation and footnote omitted).
277. Id.
278. Id. at 799.
279. The court rejected the argument that the plaintiffs' apparent willingness to litigate the factual questions in the state administrative forum should affect the application of rules of issue preclusion. Id. at 796 n.5
280. Id. at 797-99.
Five years later, the Court reiterated Elliot's analysis in Astoria Federal Savings & Loan Association v. Solimino, appealing to the virtues of judicial economy. The Court again analyzed the precise federal statute under which the plaintiff sought relief to determine whether the statute's language or purpose overcame "the lenient presumption in favor of administrative estoppel." The Court found that the provisions of the Age Discrimination in Employment Act of 1967 overcame that presumption and that rules of preclusion did not apply. The Court relied on the Act's requirement that the parties exhaust state remedies before returning to federal court. Congress certainly would not, the Court reasoned, provide complainants a federal court remedy that could be rendered "strictly pro forma" by the results of the preceding state court action.

2. Issue Preclusion Between Tribal and Federal Courts: Reconciling Elliot with the Role of Tribal Courts

Elliot represents values which readily transfer to issue preclusion between federal and tribal courts. If nothing else, Elliot's emergent appeal to economy and cohesion within the federal system dictate that preclusion should apply. More significantly, Elliot's reliance upon Congress to limit rules of inter-sovereign preclusion applies squarely to the role of Congress vis-a-vis the sovereign powers of Indian tribes.

Issue preclusion between tribal and federal courts after exhaustion can easily be placed into this emergent framework by applying the same analysis. The identical virtues of judicial economy and inter-sovereign cohesion which justify the presumption in favor of preclusion apply as well to the tribal court findings. Indeed, the policies underlying National Farmers

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282. Id. at 2172.
284. Astoria, 111 S. Ct. at 2171.
285. Id.
286. Id.
287. Critics of tribal courts often appeal to a supposed lack of quality of tribal courts and tribal court decision-makers as a justification for refusing to accord tribal court determinations equal respect with state court determinations. See Gordon K. Wright, Note, Recognition of Tribal Decisions in State Courts, 37 Stan. L. Rev. 1397, 1407, 1418-23 (1985). As commentators point out, however, these same considerations are present in varying degrees within numerous state forums. Id. at 1408. Indeed, local bias against distant litigants is the acknowledged basis for federal courts' diversity jurisdiction. See Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987). Local bias and parochial favor were also the initial impetus for creating lower federal courts with jurisdiction over fed-
Union and Iowa Mutual—promoting federal courts and relying on tribal courts’ expertise in interpreting federal jurisdictional law—give these principles added weight. Absent a rule of preclusion, parties challenging tribal court jurisdiction would simply ignore the tribal court proceedings, especially in cases in which the adjudicatory and regulatory jurisdiction of the tribe is the principle disputed issue.288 This would frustrate the goals of Iowa Mutual by usurping tribal courts’ ability to apply the law.

The Supreme Court has consistently refused to “look behind” the fact-finder when analyzing issues of comity and inter-sovereign issue preclusion. For example, in Elliott, the majority was completely unconcerned that the state administrative fact-finder was actually a subordinate employee of one of the parties. University of Tennessee v. Elliott, 478 U.S. 788, 791 (1986). As for tribal courts, the Supreme Court has repeatedly rejected attacks on their abilities to fairly and competently adjudicate disputes involving both Indians and non-Indians. See generally Duro v. Reina, 495 U.S. 676, 687 (1989) (“It is true that our decisions recognize broader retained tribal powers outside the criminal context. Tribal courts... resolve civil disputes involving nonmembers, including non-Indians.”); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978) (“Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. ... Nonjudicial tribal institutions have also been recognized as competent law-applying bodies.”) (citations omitted); Williams v. Lee, 358 U.S. 217, 222 (1958) (holding that state court did not have jurisdiction over controversy between Indian and non-Indian parties).

In any event, according respect to tribal court determinations is most likely the ready cure for any deficiencies of tribal courts. Greater responsibility over decisions will naturally lead tribes to devote more resources to their tribal courts, especially now that funding for tribal governmental functions has become widely available through the contracting mechanism for which the Indian Education and Self-Determination Act provides. 25 U.S.C. §§ 450-450n (1988 & Supp. III 1991). Greater respect for the role of tribal court judges will also naturally attract legally-trained people to tribal court judgeships. In addition, continual exposure to complex questions of federal law will provide tribal courts with growing expertise. See Middlemist v. Secretary of United States Dept’ of Interior, 824 F. Supp. 940, 945 (D. Mont. 1993).

288. In cases such as Burlington Northern I and II and Duncan Energy, in which the only issue in the case was the extent of tribal jurisdiction, see supra notes 91, 98, 178, the party opposing tribal court jurisdiction would have strong financial (and possibly emotional) incentives to simply default or not present evidence in the tribal court action if they knew they would simply receive a trial de novo on the only disputed issue in federal district court after exhaustion. Such litigants are unlikely to undertake costly and time-consuming presentations of evidence before a fact-finder whose factual findings would only be cast aside on review in a separate forum.
meaningfully to fairly litigated factual situations and by eroding respect for tribal courts. In short, the factors that justified the presumption in favor of preclusion for state courts apply equally to tribal courts. This presumption prevails, unless the federal remedy identified in National Farmers Union dictates otherwise.

Unlike in Elliot and Astoria, litigants' post-exhaustion federal remedy is not congressionally created, being normally a creature of judge-made "federal common law." One simple answer then, is that there is no congressional intent underlying the post-exhaustion federal remedy that could overcome the presumption in favor of preclusion. In the absence of countervailing congressional purpose, the presumption should apply and tribal court findings of fact should be given preclusive effect. This analysis has the added virtue of being entirely consistent with the Supreme Court's conceptions of tribal courts in Santa Clara Pueblo and Iowa Mutual—that the authority of tribal courts over reservation affairs remains unlimited except to the extent Congress has expressly imposed limitations.

The fact that the federal law limitations on tribal court jurisdiction occasionally arise out of statutes, such as the Allotment Acts, or treaties that the Supreme Court has read to diminish tribal authority, adds some complexity to the analysis. Such statutes, however, rarely address the availability of federal remedies or the manner in which they are to be applied, let alone with the clarity found in Title VII or the ADEA, as in Elliot and Astoria. Yet Elliot makes clear that a mere congressional desire to limit tribal authority cannot overcome the presumption favoring preclusion. Section 1983, the statute at issue in Elliot, was designed to provide a federal remedy against abuses of state power. If the purpose of § 1983 fell short, so must the implied purposes of legislation such as the Allotment Acts. What appears to be necessary for a statute to overcome the presumption is a congressional concern for the integrity of the federal remedy itself. Only in rare instances will a federal


statute limiting tribal authority also evidence such an intent on
the part of Congress.\footnote{292} This analysis makes clear that in order
to place tribal court exhaustion within a coherent framework of
federal jurisprudence, tribal court findings of fact should bind
federal courts in the same manner as state forum findings, un-
less the party challenging the tribal court’s jurisdiction can
point to a statutory scheme that manifests a specific congres-
sional intent to create a federal court remedy against tribal
power.\footnote{293}

As an aside, there is one difference between administrative
 preclusion at issue in \textit{Elliot} and \textit{Astoria} and preclusion applied
to tribal courts. The Court in \textit{Astoria} characterized the pre-
sumption in favor of administrative preclusion as a “lenient”
one, which is easily overcome by a slight indication of congres-
sional intent.\footnote{294} The Court also noted that the clarity of con-
gressional intent necessary to overcome judicially-created
common law presumptions of this type varies with the values
and subject matter affected by the rule.\footnote{295} In many areas, a rule
of “plain statement and strict construction prevail[s].”\footnote{296} Of
course, the Supreme Court also made clear in \textit{Santa Clara

\footnote{292} One such instance may be criminal cases in which habeas corpus is
utilized under the Indian Civil Rights Act. In many instances, federal courts
consider the factual questions de novo when federal habeas is used to challenge
411, 417 n.8. Exhaustion may not be applicable, however, in cases where
habeas is used to challenge the tribal court’s criminal jurisdiction. \textit{Greywater

\footnote{293} Other commentators have suggested that the same result could be
reached through an interpretation of 28 U.S.C. § 1738, which precludes federal
courts from re-examining findings of fact made in state courts and which would
consider tribal courts tantamount to state courts and thus entitled to the bene-
fits of § 1738. \textit{See, e.g., Clinton, supra} note 16, at 897-908. There are two
problems with this analysis. First, tribal courts do not fit into the federal sys-

tem as readily as state courts, as the commentators recognize. In addition,
\textit{Iowa Mutual} and \textit{Santa Clara} make clear that tribal courts, which are manifes-
tations of power by non-constitutional sovereigns, do not depend on congress-
sional grants of authority for their power. \textit{Iowa Mut. Ins. Co. v. LaPlante}, 480
Rather, they have all powers of which they have not been expressly divested.
\textit{Iowa Mut.}, 480 U.S. at 18; \textit{Santa Clara}, 436 U.S. at 55-57. Thus, the \textit{Elliott
analysis}, which presumes the existence of the rule of preclusion in the absence
of an express divestiture, is more consistent with the role of tribes than an anal-
ysis based on § 1738, which depends on a new and separate congressional grant
of power.

\footnote{294} \textit{Astoria Federal Savings \\ & Loan Assoc. v. Solimino}, 111 S. Ct. 2166,
\footnote{295} \textit{Id.} at 2170.
\footnote{296} \textit{Id.}
that potential infringements on tribal sovereignty and the authority of tribal courts is one such area. Thus, distinct from administrative estoppel, tribal court preclusion should not rest on a "lenient presumption" but stand absent a "plain statement" to the contrary. The foregoing analysis leads to the conclusion that the "clearly erroneous" standard of FMC v. Shoshone-Bannock Tribes falls short of the proper rule. Indeed, the "clearly erroneous" standard arises out of rules of appeal among forums of the same sovereign. More important, the "clearly erroneous" standard is grafted from the Federal Rules of Civil Procedure and the Administrative Procedure Act, which are congressionally-created statutory bases for decision. Among tribal and federal courts, no statutory bases exist for a rule of decision that could similarly limit the effect of tribal court findings of fact. The rule of FMC thus appears inappropriate in the absence of congressional expression to the contrary.

CONCLUSION

The uneasy fit between tribal and federal courts most likely results from the lack of explicit definition of the status of Indian nations in the Constitution and from the inherent limitations of the "plenary power" doctrine as an answer to questions that more than merely define the regulatory power of Congress over Indians and Indian tribes. Some commentators have even suggested that the treatment of tribal courts is best handled in the context of international law and the rules of comity applied by federal courts to the rulings of foreign nation tribunals—a result certainly consistent with the sovereign-to-sovereign relations that the treaty-based arrangements between the United States and the Indian nations contemplated.

The Supreme Court, however, seems determined to draw the tribal courts into the federal system by developing a relationship between federal and tribal courts, just as it did for regulatory authority with the "plenary power" doctrine. If this must be so, the final "fit" developed between tribal and federal courts should recognize the separate nature of tribal governments, the

298. See supra note 254 and accompanying text.
300. See, e.g., Clinton, supra note 22, at 904-08 (discussing application by state courts of the comity doctrine to tribal governments).
firm federal policy promoting tribal self-government, and the consistent doctrine that limitations on tribal authority must stem from acts of Congress and rest on clear indications of congressional intent, not judicial fiat.

Adherence to the principles announced in *Iowa Mutual* and *National Farmers Union* and the rule of respect for the judiciary's limited role in defining the parameters of tribal sovereignty dictate application of the bright line rules requiring exhaustion as applied by the Ninth and Tenth Circuits. The particularized inquiry which has arisen in other circuits defeats these principles. If courts faithfully apply the bright line rules, respect for tribal courts will increase, competition between federal and tribal courts will decrease, litigants will know from the first instant how to proceed with their case, and limitations on tribal sovereign authority will remain within Congressional power. After exhaustion, consistency with general principles of law governing the relations between courts of different sovereigns requires that tribal court interpretations of tribal law bind federal courts, and that the ordinary rules of issue preclusion apply in all but the rare case of an identifiable congressional intent to the contrary.