Exhaustion of Tribal Remedies
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10-19-1995

EXHAUSTION OF TRIBAL REMEDIES: JURISDICTION, GEOGRAPHY, AND THE INTERESTS OF THE LITIGANTS

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I. INTRODUCTION

Natural resource development and environmental disputes generate complex cases, and their outcomes often significantly affect lands and communities. Deciding such disputes can be an important instrument of governmental power. And, particularly when the parties contest which government will have jurisdiction over a development, the decision which court system will have adjudicatory power over it may materially affect the balance of power between governments. Until recently, the battle over jurisdiction has been waged between state and federal courts, largely ignoring the tribal courts.(1) In recent years, as tribal courts arose and proliferated, the federal courts have turned to allocating judicial power between tribal courts and their federal and state competitors.

This paper addresses the present status of the doctrine of defining the allocation of judicial power between tribal, federal, and state courts. It also suggests the federal courts' increasing preference for staying or dismissing their cases in favor of tribal courts reflects a doctrine needing direction.(2) *National Farmers Union Ins. Co. v. Crow Tribe of Indians*(3) and *Iowa Mutual Ins. Co. v. LaPlante*,(4) identify the key tribal interests at stake; they also suggest the interests of the other stakeholders and of the dispute resolution system and how those interests should be reconciled with Indian interests in a federal court's decision whether to proceed, but not so clearly. The result increasingly is a jurisprudence that mechanically requires abstention or exhaustion, because courts fail to identify or undervalue the interests of state and federal governments and court systems, and of the private litigants.

First, the paper will analyze the holdings in *National Farmers Union* and *Iowa Mutual*, examine the linkage between those Supreme Court decisions, and illustrate the lower court decisions that have applied those decisions to require abstention in ever-broader categories of cases.(5)

Second, to determine whether the broader doctrine developing in the lower courts properly is founded in *National Farmers Union* and *Iowa Mutual*, the paper will examine the abstention doctrine principles the federal courts have developed in contests between federal and state courts,(6) and argue that *National Farmers Union* and *Iowa Mutual* reflect applications, respectively, of the abstention doctrines of *Younger v. Harris*(7) and *Colorado River Water Conservation District v. United States*(8) and their progeny. If that analyses is correct, those doctrines imply limits on the scope of the Indian abstention doctrine that the lower federal courts have ignored.(9)

Third, the paper analyzes whether the present Indian abstention doctrine properly is explained by other important principles and policies of Indian law that some courts and writers have advanced.(10) These arguments generally have carried the day with the federal courts: abstention to allow tribal courts first to address a matter has been deemed necessary, among other reasons, to the "federal policy of promoting tribal self-government [that] encompasses the development of the entire tribal court system . . ."(11) or to allow tribal courts to "interpret and apply tribal law."(12) While such policies certainly support deference to tribal courts in many cases, they do not weigh

equally in all cases, and should be balanced appropriately against other considerations recognized in decisions applying the abstention doctrine in other contexts.(13)

Finally, the paper will address the impact of landownership and reservation boundaries on the decision whether to abstain.(14)

Potent solutions have been proposed to the problems posed by the shift of judicial power to tribal courts, ranging from statutorily defining the Indian abstention rules(15) to creating a federal Indian Court of Appeals.(16) Congress should consider such bold strokes. However, a workable solution would be to return to the abstention doctrines of *Younger* and *Colorado River* and apply them as appropriate in "Indian abstention" cases, giving due regard for applicable federal Indian policies, to decide whether to abstain or to proceed to address the difficult issues that current disputes present. Infusing Indian abstention decisions with *Younger* and *Colorado River* analysis would impart a balance that may counter the inefficiency and unfairness that often plagues dispute resolution in Indian country. For this jurisprudence to function effectively, it seems clear the lower courts need Supreme Court guidance.

II. THE INDIAN ABSTENTION DOCTRINE

A. *National Farmers Union* and Federal Question Abstention

Two relatively minor lawsuits, *National Farmers* Union and *Iowa Mutual*,(17) have altered the balance of judicial power in Indian country.(18) Both were personal injury suits filed in tribal court by Native American plaintiffs, and in both a non-Indian defendant subsequently filed a federal court action to avoid the tribal court. Both Supreme Court decisions sent the parties back to tribal court. These two Supreme Court decisions form the foundation, however, for ever-widening barriers to federal court review of far broader classes of cases.

National Farmers Union arose when a member of the Crow Tribe was injured in a motorcycle collision at a Montana public school on fee lands within the Crow Reservation. The tribal member sued the county school district and its insurer in tribal court and obtained a default judgment.(19) Rather than move to set aside the default judgment under an available tribal court procedure,(20) the defendant insurer for the school district sought injunctive relief in the United States District Court for the District of Montana. The federal district court granted the requested injunctive relief, finding that the tribal court lacked civil jurisdiction over the action,(21) and the Ninth Circuit reversed.(22)

Viewed from the standpoint of non-Indian federal court plaintiffs, Justice Stevens' opinion in *National Farmers Union* has good news and bad news. Favorably, it concludes that the contention that an Indian tribe lacks power to subject a non-Indian property owner to civil jurisdiction of a tribal court "is one that must be answered by reference to federal law and is a 'federal question' under [28 U.S.C.] § 1331."(23) The bad news for would-be federal court plaintiffs is that this federal question generally cannot be litigated in federal court: *National Farmers Union* concluded that the federal court should not address this federal question "until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made."(24) Although *National Farmers Union* provided exceptions to this rule, they are of narrow scope: exhaustion may not be required when (1) tribal jurisdiction is asserted in bad faith, (2) tribal jurisdiction violates "express jurisdictional prohibitions," or, (3) where exhaustion would be futile for lack of an adequate tribal court opportunity to challenge jurisdiction.(25)

B. *Iowa Mutual* and Diversity Jurisdiction Abstention

Iowa Mutual reached a similar result in a diversity case where the federal court plaintiff tried a bit

harder in the tribal system. In *Iowa Mutual*, a member of the Blackfeet Indian Tribe who was injured in an accident on a ranch on the Blackfeet Reservation in Montana, sued the ranch owner, a Blackfeet tribal member, and its insurance carrier in Blackfeet Tribal Court. The insurance company moved the Tribal Court to dismiss for lack of jurisdiction over the subject matter, and the Tribal Court denied, holding that the tribe could regulate the conduct of non-Indians engaged in commercial relations with Indians on the reservation.(26) The Blackfeet Tribe has a Court of Appeals, but the insurer could not obtain tribal appellate review until after trial on the merits.

The insurer then filed suit in federal court under the diversity statute. It sought a declaration that it was under no duty to defend or indemnify its insured. Unlike the insurance company in *National Farmers Union*, the insurer did not challenge the jurisdiction of the tribal court under federal question jurisdiction;(27) rather, it sought a declaration that it had no duty to defend or indemnify the ranch owner because LaPlante's injuries fell outside its coverage.(28) The Supreme Court affirmed the lower court decisions, holding that the insurance company must exhaust available tribal remedies, including tribal appellate court review.(29)

Justice Marshall's opinion for the majority in *Iowa Mutual*(30) suggests the kind of analysis that has resulted in inflexible application of *National Farmers Union* and *Iowa Mutual* in the lower courts. Justice Marshall found in *National Farmers Union* a policy that "directs" a federal court to stay its hand until the tribal court has determined its jurisdiction.(31) *Iowa Mutual* found a federal policy against placing the federal courts "in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs."(32) Finally, it concluded that "[a]djudication of such matters by any nontribal court also infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law."(33)

Iowa Mutual does declare in a footnote(34) that the rule it prescribes "is analogous to principles of abstention articulated in *Colorado River Water Conservation District v. United States*,"(35) which sets flexible standards to guide the abstention decision in federal cases generally.(36) While this reference might have borne the seed of a jurisprudence that borrows from the federal courts' abstention cases, there is little evidence that the lower courts have heeded such advice.

Justice Marshall's opinion makes clear, however, that the federal district court had subject matter jurisdiction under the diversity statute.(37) Ninth Circuit cases rejecting diversity jurisdiction over cases cognizable in tribal court(38) were "[r]elegated to a dismissive footnote"(39) of *Iowa Mutual*.(40) Justice Marshall's majority opinion on the effect of the diversity jurisdiction statute focuses on the uncontroversial conclusion that the diversity statute does not divest tribal courts of jurisdiction.(41) But neither does federal court diversity jurisdiction "limit" state court jurisdiction; rather, it vests federal courts with concurrent jurisdiction over some cases, and federal courts do not universally defer to state courts in all such cases.(42) *Iowa Mutual* does not address federal cases defining abstention standards to be applied in diversity cases, except for its reference to "principles of abstention" recognized in Colorado River.(43)

Iowa Mutual also prescribed a procedure for federal court review of tribal jurisdictional rulings that can best be described as slow, narrow, and cumbersome. "At a minimum," federal court review of questions decided by the tribal courts should await final action by tribal appellate courts.(44) Then, if the tribal appeals court affirms tribal court jurisdiction, "petitioner may challenge that ruling in the District Court."(45) And, the resulting federal court review may be limited to the jurisdictional issue, unless the federal court determines that the tribal court lacked jurisdiction; in that instance, presumably, the federal court plaintiff, doubtless drained and delayed, will start from scratch in federal court.(46)

Iowa Mutual and *National Farmers Union* reflect several central similarities. First, in both cases the tribal court action was first-filed and the federal court action was filed in response. Second, in neither case did the federal court action progress substantially before the tribal court plaintiff moved to dismiss the federal court case. Third, *National Farmers Union* and *Iowa Mutual* affirmed the existence of federal court jurisdiction over federal question and diversity actions, respectively, although both required that the issues be presented first to the tribal court. Finally, both cases affirmed the availability of federal court review following required tribal court decisions.(47) Given these limitations, *National Farmers Union* and *Iowa Mutual* can be seen as appropriate extensions of the abstention doctrines that the federal courts have developed to determine whether a federal court should proceed despite ongoing state proceedings.(48)

C. Application of the Abstention Doctrine by the Lower Federal Courts

The Supreme Court, since its 1987 decision in *Iowa Mutual*, has not written on the Indian abstention doctrine.(49) The lower federal courts have, however, applied *National Farmers Union* and *Iowa Mutual* to require abstention in situations hardly compelled by the facts, procedural postures, and holdings of the Supreme Court's cases. They have shown little regard for factors which motivate abstention decisions in off-reservation situations.

After *National Farmers Union* and *Iowa Mutual*, the federal courts have required abstention, unlike in *National Farmers Union* and *Iowa Mutual*, where there was no ongoing tribal court dispute,(50) when federal court jurisdiction was invoked by the sole Indian party in the case,(51) and though all parties could be joined in the federal court, but not in tribal court.(52) Exhaustion has been required although there were substantial proceedings in the federal court and significant delay before the motion to abstain was filed.(53) And, federal courts have required exhaustion in disputes regarding tribal tax or regulatory power over non-Indian activities on fee lands and areas largely opened to non-Indian settlement, or on off-reservation lands, where, under *Bourland*, *Brendale*, and *Montana*, the existence of tribal jurisdictional authority presents a federal question that is highly fact-dependent.(54) However, other cases have declined to require abstention when federal questions indicated the need for a federal forum or when the existence of tribal adjudicatory power was particularly questioned.(55) Often, differing results arise from significant differences that have developed among the Circuit Courts of Appeal in applying the doctrine.

III. EXHAUSTION AND ABSTENTION IN INDIAN CASES IN THE COURTS OF APPEALS

Six of the eleven Circuit Courts of Appeal have decided Indian abstention cases in the eight years since *Iowa Mutual* was decided. The Circuits have vacillated between implying that abstention is mandatory, unless one of the three exceptions recognized in footnote 21 of *National Farmers Union* is present, to applying a "particularized inquiry" to determine whether to abstain.(56) The following discussion emphasizes the major cases that reflect the Circuits' present positions.

A. Tenth Circuit

Since *Iowa Mutual*, the Tenth Circuit has never declined to require exhaustion or abstention.(57) The Tenth Circuit early required exhaustion in an action for breach of contract by a non-Indian construction company against a tribal housing authority, despite that no action was pending in tribal court.(58) The Tenth Circuit extended *Washoe Housing Authority* to dismiss *sua sponte* on exhaustion grounds a civil rights action against both tribal and federal officials.(59) The Tenth Circuit also has held that a bank's effort to use the federal interpleader statute to determine rights in off-reservation accounts utilized by an Indian tribe and a gaming management firm does not warrant an exception from the exhaustion requirement.(60) Consequently, the bank's contention that there is no tribal court jurisdiction over its off-reservation activities of fee lands in management

of an account "should first be heard in tribal court."[(61)]

The Tenth Circuit's recent decision in *Pittsburg & Midway Coal Mining Co. v. Watchman*,[(62)] reflects the inflexibility of the Tenth Circuit's abstention law. *Pittsburg & Midway* challenged the Navajo Nation's taxation of its revenues from off-reservation coal mining activities; the Navajo Nation sought to justify taxation by contending that the area in question was "Indian country" within the meaning of 18 U.S.C. § 1151, because it allegedly was part of a "dependent Indian community."[(63)] *Pittsburg & Midway* first observes that "the tribal abstention doctrine applies throughout Indian country, not just on formal reservations."[(64)] And that "[t]he policies behind abstention are most strongly implicated when a federal court action is brought after a tribal court action has already been filed."[(65)] And, finally, "[t]his case falls farther down the sliding scale because it involves `non-Indian activity occurring outside the reservation.'"[(66)] However, the decision in *Pittsburg & Midway* suggests that the "particularized inquiry" applicable in the off-reservation situation is limited, at least in the context of a challenge to tribal taxation, to determining whether the area in question lies within Indian country: "the district court must abstain if the South McKinley Mine lies within Indian country."[(67)]

The Tenth Circuit cases reflect that it likely will treat abstention as mandatory in on-reservation cases. In off-reservation cases, at least in cases challenging assertions of critical tribal powers, abstention may be required whenever the lands in question lie within "Indian country."

B. Ninth Circuit

While early Ninth Circuit decisions reflected a flexible application of abstention factors, recent Ninth Circuit decisions suggest abstention in the Ninth Circuit may be mandatory in on-reservation cases. In *Alaska v. Native Village of Venetie*,[(68)] and *Burlington Northern R.R. v. Blackfeet Tribe,*[(69)] the Ninth Circuit held abstention was not necessary before federal courts addressed federal questions defining the scope of tribal powers. In *Burlington Northern*, the Ninth Circuit found federal court review supported by several factors, including that "[t]he 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."[(70)] In both cases, the Ninth Circuit engaged in a particularized inquiry to determine whether the policies articulated in *National Farmers Union* and *Iowa Mutual* counseled for or against abstention.

More recent Ninth Circuit cases reflect an increasingly inflexible rule. In *Burlington Northern R.R. v. Crow Tribal Council*,[(71)] a different Ninth Circuit panel rejected the considerations found material in *Burlington Northern v. Blackfeet Tribe* and held that the "district court had no discretion" to relieve a non-Indian challenging tribal jurisdictional assertions "from exhausting tribal remedies prior to proceeding in federal court . . . ."[(72)] Next, *Crawford v. Genuine Parts Co.*[(73)] reversed a district court's refusal to abstain in a diversity action for personal injuries. The Ninth Circuit held the district court lacked discretion to retain the case, notwithstanding that the action, originally filed by Native American plaintiffs in state court, had been pending in state and federal court over five years when the plaintiffs moved to "transfer" the case to tribal court on the eve of trial.[(74)] Because the accident occurred on the reservation, the Ninth Circuit deemed the case a "reservation affair."[(75)] Next, the Ninth Circuit required exhaustion in an action by the United States against tribal members to recover fines for illegal grazing on lands held in trust by the federal government for the benefit of a tribe, notwithstanding a federal statute that has been interpreted to vest exclusive jurisdiction in federal court.[(76)]

The recent narrowing of the window through which Ninth Circuit plaintiffs can avoid abstention orders is reflected further in the second of two *Stock West* cases and the *Middlemist* case. In the *Stock West* cases, an off-reservation corporation filed a legal malpractice action against the

non-Indian attorney for the Colville Tribe. In its first decision, a Ninth Circuit panel concluded the action against the non-Indian attorney was not a "reservation affair" because the actionable opinion letter was delivered off-reservation.(77) On *en banc* reconsideration, the Ninth Circuit required abstention.(78) *Stock West II* held that abstention was required because "colorable questions"(79) were presented as to whether the tribal courts would have jurisdiction or if there is a need to interpret tribal law.(80) Finally, the Ninth Circuit's *Middlemist* decision required abstention in a federal question action by non-Indians to enjoin application of a tribal shoreline protection ordinance to their privately owned lands within reservation boundaries.(81)

Although recent Ninth Circuit cases reflect a strong tendency toward mandatory exhaustion, contrary to some commentary,(82) Ninth Circuit opinions seems to fall just shy of such a conclusion. Rather, the Ninth Circuit cases appear to require the district court to determine a nexus between the reservation interest, tribal court powers, and the issues in the litigation before requiring exhaustion. However, the recent Ninth Circuit decisions appear to accord no weight to the pendency of tribal court litigation and other fairness factors.

C. Eighth Circuit

While the Eighth Circuit Court of Appeals has required exhaustion of tribal remedies in several cases,(83) other Eighth Circuit decisions reflect significant exceptions to the abstention requirement. In *Blue Legs v. United States Bureau of Indian Affairs*(84) and *Northern States Power Co. v. Prairie Mdewakanton Sioux Indian Community*,(85) the Eighth Circuit held that overriding federal issues and policy foreclosed exhaustion of tribal remedies. In *Blue Legs*, the Eighth Circuit held that an action under the Resource Conservation and Recovery Act(86) may be brought in federal court, without need for exhaustion of tribal court remedies, because federal courts have exclusive jurisdiction over such suits.(87) In *Northern States*, the Eighth Circuit concluded that the Hazardous Materials Transportation Act(88) pre-empted the tribal ordinance.(89) *Blue Legs* and *Northern States*, consequently, reflect that federal courts have jurisdiction in the Eighth Circuit to determine when federal law forecloses tribal jurisdiction, and they are not obligated to defer to initial tribal court determinations on such issues.(90) Eighth Circuit jurisprudence, consequently, reflects a more robust role for the federal court in initially addressing the federal question whether jurisdiction is foreclosed in tribal court. A similar district court decision from the Eighth Circuit is *Myrick v. Devils Lake Sioux Mfg. Corp.*,(91) holding that abstention is not required over the claim of a tribal member against a corporation organized under state law alleging age discrimination under federal statutes. There was no challenge to any pending tribal court case, the tribe or an arm of the tribe was not a party, and the case "predominately presents issues of federal law."(92)

The Eighth Circuit recently has addressed whether abstention is appropriate in an action challenging tribal taxing power [and employment] over non-Indian activities on fee lands. The *Duncan Energy* case(93) reversed a district court's decision to retain jurisdiction. The Eighth Circuit held that "[c]ivil jurisdiction over tribal-related activities on reservation land presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or by federal statute."(94) *Duncan Energy* does not cite either *Blue Legs* or *Northern States*, thus raising the question whether the Eighth Circuit considers the federal pre-emption issues raised in those cases distinct from the issues of tribal taxing and employment jurisdiction under federal common law that it addressed.

D. Seventh Circuit

Altheimer & Gray v. Sioux Mfg. Corp.(95) applied the abstention doctrine to a suit addressing the validity under federal law of a contract between a tribally owned corporation and a non-Indian-owned corporation. In the contract, the tribe and tribal corporation waived all claims to immunity from suit, agreed that the contract would be "interpreted in accordance with the laws of

the State of Illinois," and agreed "to submit to the venue and jurisdiction of the federal and state courts located in the State of Illinois."[(96)] The Seventh Circuit first recognized that many factors held to favor abstention were absent: "there has been no direct attack on a tribal court's jurisdiction, there is no case pending in tribal court, and the dispute does not concern a tribal ordinance as much as it does state and federal law."[(97)] Finally, the Seventh Circuit emphasized the importance of enforcing contractual dispute resolution provisions to reinforce "the Tribe's self government and self determination."[(98)] Business development on tribal lands, however, would likely be inhibited if forum selection clauses were enforceable only in a forum the parties agreed would not be used. *Altheimer & Grey*, consequently, reflects that the Seventh Circuit will analyze pragmatically the factors pertinent to the case before it in addressing whether to abstain.

E. Eleventh Circuit

In the Eleventh Circuit, the district court in *Tamiami Partnership Ltd. v. Miccosukee Tribe*,[(99)] required exhaustion of tribal remedies in an action to compel contractually specified arbitration to resolve a dispute between a tribe and a gaming operator. The abstention decision is remarkable, and, in my view, misguided, because, in the written agreements, the tribe waived its immunity from suit, agreed to arbitration to resolve any dispute, and agreed that federal court would have jurisdiction to enforce the agreement.[(100)] Refusing to enforce concededly unambiguous and enforceable forum selection provisions cannot be squared with *National Farmers Union*, or with a court's duty to enforce agreements. *Tamiami Partnership*, consequently, raises the spectre that Eleventh Circuit courts may defer to tribal court notwithstanding express agreement vesting the federal court with jurisdiction.[(101)]

F. Fourth Circuit

Two district court decisions in the Fourth Circuit abstain in deference to tribal courts. *Tom's Amusement Co. v. Cuthbertson*,[(102)] was an action for breach of contract by a non-Indian supplier of gaming machines against a non-Indian operator of a gaming establishment located on the reservation of the Eastern Band of Cherokee Indians. Concluding that the gaming establishment operator was an agent of the Band, who did business under a gaming license granted by the Band, the district court concluded that the action would have "a direct impact on Indians or their property."[(103)]

Notwithstanding its observation that property of the federal court plaintiff may be "held hostage" during the procedural maneuvering, the district court held exhaustion was required.[(104)] The district court observed, chillingly, that "[t]he posture of Plaintiff in this case is a risk undertaken by businesses engaging in contractual relations directly or indirectly involving the Tribe."[(105)] This risk is heightened by judicial decisions that fail to accord weight to considerations of fairness to litigants.

In the other Fourth Circuit decision, *Warn v. Eastern Band of Cherokee Indians*,[(106)] an action between non-Indian campground operators and their lessor, the Band, the agreement "clearly provides that Tribal Court is the proper forum for any dispute concerning the breach of lease."[(107)] The district court properly abstained.

This review reflects that the federal Courts of Appeals increasingly apply inflexible rules to decide whether to abstain. The discussion that follows contrasts these rules with the very different rules the federal courts have developed when the contest is between federal and state courts.

IV. THE ABSTENTION DOCTRINE IN THE FEDERAL COURTS

The federal courts also have developed an abstention doctrine to determine whether to abstain in cases cognizable both in federal and state court. State/federal abstention is animated by two major

interests: limiting federal courts' intrusion upon important areas of state policy and avoiding duplicative, often "reactive," litigation, pending concurrently in state and federal court. The federal courts early on recognized that "[t]he pendency of a prior suit in another jurisdiction is not a bar [to a federal action] . . . even though the two suits are for the same cause of action."(108) Over time, the Supreme Court found exceptions to this rule, circumstances that justified a federal court's decision to stay or dismiss its case pending decisions in state proceedings. It has recognized four classes of cases where specific state or federal interests supported staying the federal action pending the resolution of state court proceedings.

Termed "*Younger*," "*Colorado River*," "*Pullman*," and "*Burford*," abstention, each of the four prongs of the abstention doctrine allows a federal court to stay its hand in circumstances shaped to defuse a specific form of federal-state friction. *Younger* and *Colorado River* are most pertinent here.

Younger abstention determines whether a federal court may enjoin or issue declaratory orders obstructing state criminal or civil enforcement machinery. *Younger* may apply when the state's interest in smooth functioning of its criminal justice system or its civil enforcement machinery is threatened by a federal court action to enjoin pending state criminal proceedings.(109) Originally limited to federal actions to enjoin state criminal proceedings, the *Younger* doctrine expanded to allow abstention when a federal declaratory judgment would affect pending criminal proceedings (110) and to federal actions to enjoin state civil enforcement proceedings.(111) *Younger* abstention is available, however, only when state proceedings are pending.(112)

Colorado River abstention doctrine applies whenever parallel proceedings are pending simultaneously in state and federal courts and addresses whether the federal court should stay its hand to allow the state court action to proceed. The doctrine was premised originally on considerations of judicial economy found to justify federal court abstention when concurrent cases were pending in certain matters governed by state law.(113) An early trend towards liberal federal court abstention in duplicative litigation cases was sharply constrained, however, by the Supreme Court's decisions in *Colorado River Water Conservation Dist. v. United States*(114) and *Moses H. Cone Memorial Hospital Co. v. Mercury Constr. Co.*(115) *Colorado River* and *Moses H. Cone* reined in lower court discretion to abstain, concluding that federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them"(116) and cautioning that abstention is warranted only in "exceptional circumstances" arising from real benefits the stay will yield for concrete procedural or substantive interests.(117) These cases articulate five (or six) factors to be weighed in determining whether "exceptional circumstances" are present to warrant staying a federal suit due to the pendency of concurrent litigation in state court:(118)

the relative progress of the federal and state court litigation; the importance of avoiding piecemeal litigation; whether there is a congressionally declared policy that would be served by abstention; the relative inconvenience of the federal court to the parties; and whether there is a federal question being litigated.(119)

The *Colorado River* factors have also been applied to actions brought in federal court by tribes.(120) There is no "tribal exception" to *Colorado River*.

Pullman and *Burford* abstention focus on defusing federal-state conflict by allowing federal courts to avoid unnecessary or intrusive resolution of unsettled issues of great import to the state. In *Pullman*, this involved a federal constitutional issue which might have been mooted by a state court's interpretation of state law.(121) *Burford* abstention applies in cases that would disrupt a comprehensive state regulatory scheme(122) or that present difficult, unresolved state law issues of substantial public import that transcend the results in the specific case.(123)

V. THE ABSTENTION DOCTRINE AND TRIBAL COURTS: HARMONIZING *NATIONAL FARMERS UNION* AND *IOWA MUTUAL* WITH *YOUNGER* AND *COLORADO RIVER*

The lower courts' difficulties in discerning distinctions that take into account the interests of litigants and the needs of a federal dispute resolution system arises, in my view, from the failure of *National Farmers Union* and *Iowa Mutual* to articulate adequately the analysis that I find embedded in the two decisions. Put simply, the Supreme Court wrote large the Indian law and policy considerations underlying its decisions and left obscure, but still decipherable, its federal jurisdiction premises.

National Farmers Union and *Iowa Mutual* reflect a doctrine woven not only from the fabric of federal Indian law, but also from strands of the "federal" abstention doctrine. While little recognized as such, the two cases seem clearly to be offspring of the *Younger* and *Colorado River* prongs of the abstention doctrine, respectively. In both *National Farmers Union* and *Iowa Mutual*, the tribal court plaintiffs filed first, and the federal action was filed in reaction to the tribal court filings. In each case, there was a tribal court proceeding pending at the time the federal district court addressed the question whether to abstain in light of the concurrent jurisdiction of the tribal and federal courts. But there were differences between the two cases that would require different treatment under the "federal" abstention doctrines, and *National Farmers Union* and *Iowa Mutual* appear to recognize and give meaning to those differences.

A. *National Farmers Union* as a *Younger* Abstention Case

The federal court plaintiff in *National Farmers Union* joined tribal officials and sought to enjoin both the proceedings in tribal court and the enforcement of its default judgment. This attempt to employ the federal court as a shield against official conduct of a sovereign falls squarely within the *Younger* line of cases.(124) The Supreme Court's invocation of the *Younger* doctrine is reflected, albeit subtly, by *National Farmers Union*'s citation(125) at a critical juncture to *Juidice v. Vail*.(126) *Juidice v. Vail* was a significant first application of *Younger* in a non-criminal proceeding; the federal court abstained in an action to enjoin a state civil contempt proceeding initiated on behalf of a private creditor against a debtor, one of the federal court plaintiffs, by the federal court defendant, a justice of New York county court.(127) The three circumstances which *National Farmers Union*'s footnote 21 holds would excuse exhaustion of tribal remedies (bad faith jurisdictional assertions, express jurisdictional prohibitions, and inadequate opportunities to challenge jurisdiction) are reviewed and found absent in the state proceedings in *Juidice v. Vail*.(128)

Juidice is a fitting federal-state analogy to *National Farmers Union*. It applied *Younger* in a civil setting, and both federal court plaintiffs sought relief from state judicial proceedings. However, in *Juidice* and *Younger v. Harris,* and in the *Younger* line of cases generally, the state court proceeding that the federal court plaintiff sought to enjoin was initiated by state officials.(129) Even so, *National Farmers Union* closely paralleled *Juidice* because the federal court plaintiff in *National Farmers Union* sought to enjoin enforcement of a Crow Tribal Court judgment and named as defendants in federal court the Crow Tribe, its Tribal Council, the Tribal Court, judges of the Court and the chairman of the Tribal Council.(130) The Supreme Court has since extended *Younger* to actions to enjoin collection of a state court judgment, and a sizable one at that.(131)

B. *Iowa Mutual* as a *Colorado River* Abstention Case

Iowa Mutual, by a similar analysis, is revealed to be a correct application of *Colorado River* abstention. Since no tribal officials were prosecuting criminal actions or instituting civil enforcement against the insurance company in *Iowa Mutual*, *Younger* abstention would not apply. Before federal jurisdiction was invoked, three private parties were litigating a private dispute in tribal court. However, the pendency of proceedings in tribal court at the time of LaPlante's motion to dismiss required the motion to be treated under *Colorado River*.(132) This conclusion is reinforced because

Iowa Mutual's only citation to "federal jurisdiction" case law outside the Indian law area is to *Colorado River*:

Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite. In this respect, the rule is analogous to principles of abstention articulated in *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800 (1976): even where there is concurrent jurisdiction in both the state and federal courts, deference to state proceedings renders it appropriate for the federal courts to decline jurisdiction in certain circumstances.(133)

Although *Iowa Mutual* regrettably declined to define fully the "certain circumstances" that support abstention, this reference to *Colorado River* for guidance in future cases seems unmistakable. *Iowa Mutual* confuses the matter by its reference earlier in the same footnote to "the exhaustion rule enunciated in *National Farmers Union* . . . ."(134) Although this suggests a unitary "exhaustion rule" applicable to *National Farmers Union* and *Iowa Mutual*, the differences between the cases and their citations to different authority refute the existence of such a rule. Clearly, the exhaustion required in *National Farmers Union* was not premised upon *Colorado River,* because it arose in a *Younger* context and imported exceptions to its exhaustion requirement from *Younger* jurisprudence. *Iowa Mutual*, by contrast, has the character of a *Colorado River*, not a *Younger*, case, and this is reinforced by its reliance on, again in footnote 8, "*Colorado River*, [where] as here, strong federal policy concerns favored resolution in the nonfederal forum."(135) In *Iowa Mutual*, the Supreme Court properly turned to *Colorado River* rather than *Younger* abstention because the common law damage action plainly did not implicate the interest in avoiding disruption of government enforcement machinery that animates the *Younger* doctrine.

Iowa Mutual, however, failed to touch all of the *Colorado River* bases,(136) and that may have spawned confusion in the lower courts. *Iowa Mutual*'s discussion of the case certainly considers matters that implicate *Colorado River* factors, such as inconvenience of the federal forum, the desirability of avoiding piecemeal litigation, and the order in which jurisdiction was obtained by the concurrent forums; however, *Iowa Mutual* failed to clarify that it was addressing those factors by their *Colorado River* handles. Nonetheless, *Iowa Mutual* clearly is a *Colorado River* case.

C. Applying *Younger* and *Colorado River* to *Indian Country* Cases

Significant differences would flow from correctly determining at the onset whether an Indian abstention case raises *Younger* or *Colorado River* abstention issues, or if neither is satisfied. First, both doctrines would require in the first instance, as was the case in *National Farmers Union* and *Iowa Mutual*, the pendency of concurrent actions in federal and tribal court. This would alter the results in numerous cases. Second, different considerations apply under the two doctrines to determine whether the federal court should proceed. In the *Younger* context, if a criminal or civil enforcement proceeding is pending in a tribal court or agency, only the exceptions in footnote 21 of *National Farmers Union*, focusing on bad faith harassment, express limitations on tribal court jurisdiction, or the absence of a procedure to challenge tribal jurisdiction, justify a decision not to abstain. *Colorado River* abstention, by contrast, contemplates that federal courts will retain a broader class of cases because concerns for disrupting tribal enforcement machinery are absent or reduced, and abstention does not hinge on the three *National Farmers Union* factors. Instead, the six fairness and economy factors of *Colorado River* and *Moses H. Cone,* which focus on the interests of the parties and the dispute resolution system, are dispositive. Those factors often are reflected in the relative progress of the federal and tribal court cases and convenience and comprehensiveness of the adjudications.

These distinctions are not merely formal: in the *National Farmers Union* context, strong tribal interests counsel federal court caution before enjoining a first-filed tribal court criminal or civil enforcement action, or the enforcement of a tribal court judgment, absent the specific, narrow exceptions of *National Farmers Union*'s footnote 21. In the *Iowa Mutual* situation, the primary considerations should be those of the litigants and the efficient resolution of the dispute; the

relatively weaker tribal interests in requiring tribal members or non-Indian parties to Indian country litigation to litigate private disputes in tribal court must be weighed against the expense, inconvenience, or uncertainty to the parties that the *Colorado River* factors are designed to avoid.

Crawford v. Genuine Parts Co.[(137)] illustrates the effect of applying the wrong rule. Crawford was a diversity jurisdiction personal injury damage action filed by an injured Native American in state court. The defendants removed the case from state to federal court. There was no enffort to enforce tribal court judgment and no tribal civil or criminal enforcement proceeding. Consequently, *Crawford* should be analyzed under the *Iowa Mutual* prong of the Indian abstention doctrine.

The Native American plaintiff delayed until twenty-three days before a trial setting to move to dismiss to require exhaustion of tribal remedies;[(138)] the court case had been pending in state, then federal, court some five years when the district court denied the motion to dismiss, based in part on the delay in filing the motion.[(139)] The Ninth Circuit reversed, holding "we do not perceive room in the Supreme Court's precedents for a decision not to defer."[(140)] Ignoring the flexible factors of *Colorado River* that expressly consider delay in filing the abstention motion, the Ninth Circuit concluded that the absence of the three *Younger* factors articulated in *National Farmers Union* mandated abstention.[(141)]

If *Colorado River* guides abstention decisions in Indian country diversity cases under *Iowa Mutual*, *Crawford* is plainly wrong. It is erroneous under *Colorado River* on two grounds: there was no pending tribal court proceeding, and the Ninth Circuit held that the district court lacked discretion to consider fairness factors that are clearly pertinent under *Colorado River*. *Crawford* articulates no tribal interest implicated in the proceeding significant enough to compel abstention given the obvious prejudice to the non-Indian defendant and the waste of the litigants' and the federal judge's efforts over several years. While tribal courts may have interests in handling such cases, just as do state courts, their interests should not automatically trump those of all other participants.

D. "Comity" is a Two-Way Street

The *Younger* and *Colorado River* underpinnings of *National Farmers Union* and *Iowa Mutual* are reflected in *Iowa Mutual*'s emphasis upon the notion of "comity" to guide exhaustion decisions. While the term does not appear in *National Farmers Union*, *Iowa Mutual* describes *National Farmers Union* as resting upon the conclusion that "considerations of comity direct that Tribal remedies be exhausted before the question is addressed by the District Court."[(142)] "Comity" entered abstention jargon in *Younger v. Harris*, which described the concept as two-edged, embodying a "proper respect for state functions," but no

blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments . . . .[(143)]

"Comity" contemplates an equitable jurisprudence that identifies the interests of competing sovereigns and opposing parties and seeks a resolution that harmonizes legitimate interests of all participants in the controversy. Any balancing of interests is lost in the current Indian abstention doctrine. There is much the "Indian abstention" doctrine can gain by borrowing from its "federal abstention" cousin. First, the four abstention doctrines are narrowly tailored to reflect the interests at stake. Second, *Younger* and *Colorado River* abstentions both require the existence of a presently pending state court proceeding and then condition abstention on determinations that the state court proceeding be an adequate one. These abstention doctrines suggest a two-pronged rule for use in Indian abstention cases: first, there generally must be a pending tribal court proceeding, and second, specific factors under the appropriate branch of the four "federal" abstention doctrines and fundamental fairness must favor abstention.

VI. TRIBAL, STATE, AND FEDERAL OTHER COURTS' POWERS OVER DISPUTES IN INDIAN COUNTRY

There remains the argument that tribal courts have unique exclusivity of jurisdiction supporting "automatic" exhaustion. A review of modern authority reflects that, while tribal courts enjoy a powerful priority over state courts in certain cases, federal courts have traditionally served as arbiters of the status of tribes, except where congressional interests expressly limited their jurisdiction. Tribes do not enjoy exclusive, original jurisdiction in non-Indian Civil Rights Act federal question cases -- or in diversity cases.

A. State vs. Tribal Courts

The first modern Supreme Court decisions to define the role of tribal courts arose in conflicts between tribal courts and state courts. The 1959 Supreme Court decision in *Williams v. Lee*[(144)] is the watershed. A non-Indian owner of a federally licensed trading post on the Navajo reservation sued to collect a debt owed by a Navajo living on the reservation arising from a transaction at the on-reservation trading post. *Williams* held that an Arizona state district court lacked jurisdiction, and that the action must proceed in Navajo tribal court.

Williams discerned a central question that framed the Supreme Court's determinations concerning the jurisdiction of state versus tribal courts: "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[(145)] That influential phrase shaped later cases that subsequently have defined the balance of judicial power, and has underlaid the recognition of other powers in Indian country.

What is most remarkable about *Williams v. Lee* is its holding that only the tribal court had jurisdiction over the action, despite the fact that the state court plaintiff had served a summons on the Navajo defendant when the debtor had been off the reservation.[(146)] Ordinarily, a state court has subject matter jurisdiction over transitory "actions, like the action in Williams on a debt arguably occurring outside Arizona's borders," and the state court's power to proceed depends on personal jurisdiction over non-resistant parties.[(147)] While *Williams v. Lee* has been described as declaring that tribal court jurisdiction over on-reservation controversies is "exclusive,"[(148)] it addressed only state and tribal claims to jurisdiction over the collection action by a reservation business against a reservation Indian, and it emphasized that "no Federal Act has given state courts jurisdiction over such controversies."[(149)]

Williams v. Lee reflects, however, that the jurisdiction it found was not grounded in territorial hegemony. It recognized that state courts "have been allowed to try non-Indians who committed crimes against each other on a reservation."[(150)] *Williams* also observed that state court may entertain suits by Indians against outsiders.[(151)] While *Williams v. Lee* invested tribes with important new dispute resolution powers, its recognition of state power over such on-reservation controversies clarifies that it is founded both in geography, the on-reservation situs of the transaction and parties, and in tribal affiliation and consent,[(152)] including the tribal membership of the defendant and his or her actions.[(153)]

Further reflecting the Court's balance between tribal and other courts are the Supreme Court's decisions in two cases, both named *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*[(154)] Both *Wold* cases rejected state courts' efforts to decline subject matter jurisdiction over an action filed by a tribe in state court against non-Indians arising from on-reservation dealings, at least when the tribal court did not have jurisdiction over such a claim.[(155)] The Supreme Court's decision in *Wold II* went further, holding that North Dakota could not

condition access to its courts on a tribe's waiving its immunity from suit.[(156)] The *Wold* cases, consequently, obligate state courts to assume and decide cases involving tribes, at least when necessary to an efficient and complete resolution of the controversy. While these cases may reflect a tribal court primacy over state courts in actions involving Indians, they reflect that state courts can, and sometimes must, handle many reservation-based disputes. Tribal court jurisdiction, even as against state courts, generally is not mandatory. Finally, the Supreme Court's only decision whether diversity jurisdiction exists for on-reservation disputes, *Iowa Mutual*, confirms that, subject to appropriate abstention, diversity jurisdiction otherwise present is not defeated because one diverse party resides on reservation.

B. The Federal Courts vs. the Tribal Courts

The federal courts have played a central role in resolving disputes within Indian country and in shaping the contours of tribal sovereignty. Federal question jurisdiction[(157)] has served traditionally as the major vehicle resolving disputes concerning the status of the tribes, the scope of their power, and the applicability of federal law to them. Federal question jurisdiction was a broader font of judicial power within Indian country than elsewhere, because tribal governmental and possessory powers intrinsically are subject to determination by federal law.[(158)] The *Oneida* cases reflect the federal courts' vigorous use of the federal question jurisdiction in Indian law cases.

Although the Supreme Court yielded federal court jurisdiction to tribal courts in *Santa Clara Pueblo v. Martinez*,[(159)] it did so under a specific federal statute. The Indian Civil Rights Act of 1968[(160)] had subjected Indian tribes, for the first time, to constitution-like duties similar to those applicable to state or federal governments. The ICRA did not, however, expressly provide for federal court jurisdiction over actions arising under the statute, and *Santa Clara Pueblo* determined that no implied right of action existed to enforce the ICRA. Federal court ICRA suits against tribal officials would, the Court concluded, interfere with "tribal autonomy and self-government beyond that created by the change in substantive law itself" and may "undermine the authority of the tribal court."[(161)] This the Court found impermissible under *Williams v. Lee,* because it would "infringe on the right of the Indians to govern themselves."[(162)] While *Santa Clara Pueblo* clearly sent ICRA plaintiffs to tribal court, it left intact federal question[(163)] and diversity jurisdiction over actions on Indian land.[(164)] Federal court power to resolve federal questions in Indian country is consistent with federal "plenary" power over tribal affairs.[(165)]

C. Abstention in Federal Question Cases in Indian Country

That federal question jurisdiction underlies a controversy has traditionally weighed heavily against abstention.[(166)] Federal decision of federal question cases has long been regarded as instrumental to obtain the benefits of federal court experience in "federal specialties,"[(167)] and because of "the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution."[(168)] In 1824, Chief Justice Marshall described Supreme Court review of federal issues on appeal from a state court after the case has been shaped by fact findings of an unsympathetic state court, as an "insecure remedy" for federal rights.[(169)] Consequently, federal courts have felt the need to retain federal question jurisdiction to protect federal rights, despite the fact that such cases may also involve state law issues and impact state policies.[(170)]

Federal review of federal questions at some appropriate stage is constitutionally mandated. Article III, section 2 of the Constitution, which requires that "'The judicial Power [of the United States] shall extend to all Cases in Law and Equity arising under this Constitution, the Laws of the United States, and Treaties."[(171)] Since Congress has not provided for United States Supreme Court review of the decisions of tribal courts, the federal judicial power must extend to cases presenting

federal questions in Indian country initially at the district court level.

In the highly fact-dependent jurisdiction controversies framed by recent Supreme Court case law which allocate regulatory jurisdiction and other powers between tribes and states,[(172)] the power to find the facts may decide the law. Important legitimacy interests favor having the relatively disinterested federal forums decide those cases in the first instance. Courts applying the Indian abstention doctrine should consider the significant, if not dispositive, role that initial federal review of facts may have in federal question cases. These federal interests in allocating power in Indian country are reflected in recent cases that refuse to abstain in cases brought by tribes to enjoin state officials. In *Sycuan Band of Mission Indians v. Roache*[(173)] and *Fort Belknap Indian Community v. Mazurek*,[(174)] the federal courts refused to require exhaustion of state court remedies and exercised federal question jurisdiction, concluding that "the jurisdictional issue is paramount and federal . . . ."[(175)] In a similar setting, the federal courts have employed a procedure that allows a tribe's federal claims to be decided in federal court after state law claims are decided in state proceedings.[(176)] The same regard should be given to the federal interest in resolving federal questions when the contest is between federal and tribal courts.

D. Abstention in Diversity Jurisdiction Cases in Indian Country

The policies underlying federal courts' diversity jurisdiction address concerns prevalent in jurisdictional disputes in Indian country. Regarding diversity jurisdiction, Justice Story wrote "[t]he constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice."[(177)] The drafters of the diversity statutes also feared elected judges or legislative review: "Not unnaturally, the commercial interests of the country were reluctant to expose themselves to the hazards of litigation before such courts as these."[(178)] While the premises of diversity jurisdiction are questioned contemporarily,[(179)] and the threshold amount in controversy recently raised,[(180)] the federal judicial policy to provide a more neutral forum remains grounded in the federal Constitution, Article III, section 2, and the federal Judicial Code.[(181)]

The proper functioning of the abstention doctrine in Indian country diversity cases is not fully articulated in *Iowa Mutual*. The federal courts generally have resisted requests to abstain in diversity cases; the doctrine seems to serve no purpose in a contest between federal and state courts because the removal statute[(182)] reflects a policy that any case cognizable under the diversity statute may be heard at the option of the defendant in federal court.[(183)] The Supreme Court recognized in *Iowa Mutual* that diversity jurisdiction may exist in on-reservation disputes, but it declined to address the weight that federal courts should give to the concerns of the diversity statute to even the playing field by neutralizing the possible effect of local bias by tribal courts against outsiders. This concern often motivates diversity filings in the Indian country context, and the policies underlying the diversity statute compel the federal courts to weigh this factor in an abstention decision. Some lower federal court decisions have ignored these policies in fashioning decisions that extend *Iowa Mutual* inflexibility to cases where no tribal court case is pending and fairness and convenience favor exercise of diversity jurisdiction.

VII. THE GEOGRAPHY OF ABSTENTION

Cases brought to determine whether tribal, federal, or state governments have power to control development usually implicate directly federal question jurisdiction.[(184)] Federal law is determinative whether the question is the existence of tribal judicial power,[(185)] or the broader question whether tribes or states have territorial jurisdiction.[(186)] Yet recent cases apply very different tests in determining whether tribes have legislative as compared to adjudicatory jurisdiction. This section will address, first, abstention in controversies arising on on-reservation fee

lands, then it will address off-reservation disputes.

A. Abstention in Cases Challenging Tribal Power over Non-Indians on Fee Lands on Reservations

Montana v. United States[(187)] defines tribal powers over non-Indian activities on fee lands within reservations. *Montana* assessed tribal power to regulate non-members' hunting and fishing on non-Indian owned fee lands within the Crow Reservation. *Montana* first concluded that tribal treaty-based powers to regulate non-Indian hunting and fishing on treaty-confirmed lands were abrogated by "the allotment and alienation of tribal lands as a result of passage of the General Allotment Act of 1887 . . . and the Crow Allotment Act." Then, addressing the Tribe's inherent sovereign power over non-Indian activities on fee lands within the reservation, *Montana* concluded that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of tribes."[(188)] These considerations led the *Montana* court to find a "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[(189)] However, *Montana* concluded that "consensual relationships" between non-Indians and a tribe may support such regulation or that tribal civil regulation over non-Indians' activities on fee lands within the reservation may be justified when non-Indians' conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[(190)]

Cases applying *Montana* reflect that tribal powers over non-Indians depend substantially on the extent to which the tribe, its members, or their property, as compared to non-members and their property interests, are affected.[(191)] The Supreme Court's *Brendale* decision[(192)] best illustrates this doctrine: a divided Supreme Court held that the Yakima Tribe had power to apply its land use regulations to lands within the "closed" portion of the Yakima Reservation, where tribal land ownership and population predominated, but that the county could zone the "opened" portions of the Reservation, opened to settlement and entry under allotment acts and occupied primarily by non-Indians, who owned most of the land.[(193)] These cases imply a presumption that tribes lack power over non-Indians' activities on fee lands within a reservation, and that a tribe bears a burden to demonstrate interests sufficient, under *Montana* and *Brendale*, to show effects on *Montana*-protected interests.

Decisions applying the abstention doctrine, by contrast, generally disregard both *Montana*'s presumption regarding power over on-reservation fee lands and *Brendale*'s demographic factors in deciding whether a federal or tribal court should initially decide federal questions.[(194)] *National Farmers Union*, which arose on fee lands on the same Crow Reservation involved in *Montana*, did not address the *Montana* presumption in requiring the federal court to abstain over the issue whether Crow Tribal Court had power to adjudicate an action arising from non-Indian activities on state-owned lands on the Reservation.[(195)] Consequently, *National Farmers Union* and *Montana/Brendale* may create "conflicting presumptions" regarding tribal jurisdiction over non-Indian activities on fee lands within a reservation: Tribal power presumptively exists to determine tribal court adjudicatory jurisdiction, but not to assert legislative jurisdiction.[(196)]

National Farmers Union provides little overt guidance on how such a conflict should be resolved. This silence may be explained by the *National Farmers Union* Court's focus on, and express rejection of, the insurance company's argument that *Oliphant v. Suquamish Indian Tribe*[(197)] automatically foreclosed tribal court jurisdiction over non-Indians.[(198)] Neither *National Farmers Union* nor *Iowa Mutual* address how the *Montana* presumption or factors should be applied in determining tribal adjudicatory power over non-Indian activities on fee lands.[(199)] However, neither case suggests that tribal adjudicatory power is broader than tribal regulatory power. Consequently, any conflict between *Montana* and *Iowa Mutual* presumptions seems best resolved if *National Farmers Union* is read, as argued above, as an application of *Younger* abstention doctrine, based on the prior

pendency of proceedings in the tribal court capable of resolving the issues subject to federal review. (200)

In recent abstention cases challenging tribal assertions of regulatory or taxing jurisdiction over development activity on fee lands similar to the "open" portion of the Yakima Reservation at issue in *Brendale*, the federal courts have dismissed federal question actions, even though parallel proceedings were not pending in tribal courts. In *Middlemist*, non-Indian fee land owners within the Flathead reservation filed a federal question action in federal court to compel the Secretary of the Interior to disapprove a tribal aquatic lands conservation ordinance, contending that the Confederated Salish and Kootenai Tribes lacked power over non-Indians' fee lands.(201) The *Middlemist* decisions address this contention under the second of *National Farmers Union*'s three exceptions to the exhaustion rule, whether tribal jurisdictional assertions violate "express jurisdictional prohibitions," and find it lacking. Quoting *Iowa Mutual*, the *Middlemist* district court held that original adjudicatory jurisdiction "presumptively" lies in tribal court.(202)

Duncan Energy challenged tribal taxing and employment regulatory powers over the Northeast Quadrant of the Fort Berthold Reservation, where population and landholding tilt decidedly in the non-Indian direction under a *Brendale* analysis.(203) The Eighth Circuit reversed the district court's decision not to abstain, expressly rejecting the position that "*National Farmers Union* and *Iowa Mutual* are inapplicable to cases involving fee lands."(204)

Interpreting *National Farmers Union* as "presumptively" resting initial jurisdiction in tribal courts or agencies over all on-reservation actions spawns both substantive and procedural issues. In addressing tribal criminal jurisdiction over members, the Supreme Court's influential decision in *United States v. Wheeler*(205) found "implicit divestiture" of tribal powers "involving the relations between an Indian tribe and nonmembers of the tribe . . ." and that "the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations."

Yet some lower courts have interpreted *National Farmers Union* to allow tribal courts to determine all factual questions potentially dispositive of the question whether such powers exist. This seems inconsistent with primary federal responsibility to decide these questions. *Montana* and *Brendale* require tribes to shoulder a threshold burden to support jurisdiction; important issues of federalism are present if *National Farmers Union* is construed to allow tribal courts to determine initially in all cases whether they met that burden.(206)

B. Abstention Cases Arising Off-Reservation

Recent decisions also have interpreted *National Farmers Union* and *Iowa Mutual* expansively in declining to exercise jurisdiction over actions challenging tribal taxing jurisdiction over non-Indian lands outside reservation lands claimed by a tribe to be "Indian country" under the Federal Criminal Code. *Pittsburgh & Midway Coal Mining Co. v. Watchman*,(207) in which a mining company challenged Navajo Nation taxation of its off-reservation mine, is the most significant of these.(208) In an earlier appeal, the Tenth Circuit rejected the Navajo Nation's contention that the mine area remained part of the Navajo Reservation(209) and remanded for consideration of whether the mine is within "Indian country" under 18 U.S.C. § 1151, and, if so, whether the federal district court should abstain from deciding the federal question whether the Nation could tax the mine's receipts. (210) On remand, the district court concluded that the mine was not located within Indian country as defined by 18 U.S.C. § 1151(b) or (c).

The Tenth Circuit reversed again, holding that the district court had applied an improper test to determine whether the mine lay within "Indian country." More significantly, the Tenth Circuit held also that, if the mine lies within off-reservation "Indian country," the district court must abstain

pending resolution of all issues in the Navajo administrative and judicial systems.(211) In perhaps the first such holding by any Court of Appeals, *Pittsburgh & Midway* concludes that 18 U.S.C. § 1151 "represents an express Congressional delegation of civil authority over Indian country to the tribes."(212) This holding foreshadows disputes in which non-Indians seeking to ascertain whether they must comply with taxing, or court jurisdiction, must predict the outcome of the highly unpredictable results of a four-pronged, fact-dependent test to determine whether specific off-reservation lands are located within a "dependent Indian community."(213) *Pittsburgh & Midway*, consequently, casts a shadow of jurisdictional uncertainty over off-reservation areas with Native American landholding and populations, where the law applicable and the courts and agencies with jurisdiction cannot be determined without litigation in one or more forums. This may extend so-called "reservation blight," where legal uncertainty impairs economic development, into the areas surrounding reservations and further limit economic opportunities in areas arguably classed as "dependent Indian communities."

Pittsburgh & Midway's holding regarding tribal power over off-reservation Indian country is significant both because it disclaims reliance on tribal inherent civil power over off-reservation non-Indians and, also, because it relies instead on its conclusion that Congress expressly delegated such powers to tribes in its codification of the federal criminal laws. Consequently, it sidesteps the significant policy implications of its holding. Significantly, it does not analyze the language or purpose of the statute upon which it relies. Rather, it elevates to the law of the Circuit and expands the Supreme Court's earlier observation in *dictum* in *DeCoteau v. District County Court*, a case analyzing state criminal powers, that "[w]hile § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction."(214) Neither *Pittsburgh & Midway* nor the Tenth Circuit cases it cites analyzes the correctness of that description or rebuts the argument that the cases DeCoteau cites did not address off-reservation civil powers.(215) The Tenth Circuit also relied on its cases involving Oklahoma's attempts to tax tribes on tribal lands where, in the unique circumstances of Oklahoma history, no tribal "reservation" remains.(216)

These precedents do not directly address the issue of a federal delegation to tribes of civil regulatory or adjudicatory power over non-Indians in off-reservation fee lands within "dependent Indian communities." The statute, 18 U.S.C. § 1151, expressly addresses only federal, not tribal, power to prosecute defined criminal offenses.(217) And, the Supreme Court has never characterized the statute as "delegating" powers to tribes.

Recent decisions immunizing certain non-reservation Indian activities from state taxation similarly do not address a delegation of federal power to tribes. Rather, they appear to reflect that trust land status is a sufficient fulcrum upon which tribes may resist state taxes.

The Supreme Court first decided *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*,(218) and ruled that Oklahoma could not tax the tribe's receipts from a convenience store located on lands held in trust for the tribe within any reservation, but ruled that the state could collect the tax on tribal sales at the store to non-Indians. The Court did not cite 18 U.S.C. § 1151, but it did conclude that tribal tax immunity existed because the trust lands were "validity set apart for the use of the Indians."(219) A year later, *Oklahoma Tax Comm'n v. Sac and Fox Nation*(220) held that the income from employment with the tribe on tribal lands of tribal members residing in "Indian county" "whether the land is within reservation boundaries, on allotted lands, or in dependent communities . . ." may be immune from Oklahoma's income taxes. However, *Sac and Fox* relied specifically upon the history of the Sac and Fox Nation, similar to that of other Oklahoma tribes, in which the Nation relinquished its reservation during the allotment period.(221) The *Sac and Fox* Court also relied upon a provision of Public Law 280 specific to Oklahoma and some other states, giving them the option of assuming criminal and civil jurisdiction "in the areas of Indian country situated within such states."(222) The Court concluded that Oklahoma's failure to assume Public Law 280 jurisdiction

"would seem to dispose of" any contention that the State has jurisdiction to tax.[(223)]

In 1995, the Supreme Court decided *Oklahoma Tax Comm'n v. Chickasaw Nation*.[(224)] It upheld the Tenth Circuit's application of *Citizen Band Potawatami* to foreclose state excise taxation of gasoline sales by the tribe on tribal trust lands,[(225)] but reversed the Tenth Circuit's invalidation of state taxation of the income of tribal members from employment with the tribe on tribal trust lands, unless such members live within "Indian country." Justice Ginsburg, writing for a five-member majority, recognized geographic limits to immunity from state taxation and the necessity that the tribal members also reside within "Indian county," rather than on the reservation.[(226)]

The Oklahoma tax decisions support that, in appropriate circumstances, tribes or tribal members may be immune from state taxation for activities in Indian country outside reservation boundaries; however, they do not appear to support the conclusion that 18 U.S.C. § 1151 affirmatively delegates to tribes civil authority over non-Indian activities in off-reservation Indian country. Consequently, they support that "Indian country" may reflect the geographic outer limits of the federal shield against state activities; they may not support also invoking the concept as a sword to broaden tribal court jurisdiction over off-reservation non-members. Finally, the Oklahoma cases suggest that highly specific factual, legal, and historical inquiries are necessary to determine the federal question whether off-reservation Indian country status has civil consequences of any sort.[(227)] These are issues particularly appropriate for federal court resolution.

VIII. CONCLUSION

Federal court decisions require abstention or exhaustion of tribal remedies in broad classes of cases. But, courts deciding Indian abstention cases often ignore not only presumptions favoring the exercise of federal judicial power, but also the impact of abstention decisions on the litigants. Applying the abstention doctrine developed in the federal/state context to federal tribal court cases would foster a jurisprudence that considers the interests of all parties to current cases and the need for a fair and efficient dispute resolution system.

ENDNOTES

1. *See generally* Judith Resnick, *Dependent Sovereign: Indian Tribes, States, and the Federal Courts,* 56 U. Chi. L. Rev. 671, 675-86 (1989); as Professor Resnick observes, the main treatise in this area for many years, Hart & Wechsler's The Federal Courts and the Federal System, in several of its editions, barely mentioned the Indian tribes. *Id.* at 686 n. 62.

2. This paper draws upon ideas developed in a prior paper, *Dispute Resolution in Indian Country: Harmonizing National Farmers Union, Iowa Mutual, and the Abstention Doctrine in the Federal Courts*, 71 N.D. L. Rev. 519 (1995).

3. 471 U.S. 845 (1985).

4. 480 U.S. 9 (1987).

5. *See infra* Parts II(c) and III.

6. *See infra* Part IV.

7. 401 U.S. 37 (1971).

8. 424 U.S. 800 (1976).

9. *See infra* Part V.

10. *See, e.g.,* Alex Tallchief Skibine, *Deference Owed Tribal Courts' Jurisdictional Determinations: Towards Co-Existence, Understanding, and Respect Between Different Cultural and Judicial Norms*, 24 N.M. L. Rev. 191 (1994); Frank Pommersheim, *Liberation, Dreams, and Hardwork: An Essay on Tribal Court Jurisprudence,* 1992 Wis. L. Rev. 411, 412-13 (1992).

11. *Iowa Mutual,* 480 U.S. at 16-17.

12. *Id.* at 16.

13. *See infra* Part VI.

14. *See infra* Part VII.

15. *See* Raymond Cross, *De-Federalizing American Indian Commerce: Toward a New Political Economy for Indian Country,* 16 Harv. J.L. & Pub. Pol'y 445, 489-89 (1993) (proposing a model for the deregulation of business transactions); Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction,* 73 N.C. L. Rev. 1089, 1153-57 (1995) (proposing United States Supreme Court certiorari review of tribal court decisions).

16. Michael Pacheco, *Finality in Indian Tribunal Decisions: Respecting Our Brothers' Vision,* 16 Am. Indian L. Rev. 119, 153 (1991).

17. National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985); Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987).

18. "Indian country is an incredibly complex jurisdiction issue disguised in a colorful phrase." Fred L. Ragsdale, *The Deception of Geography* in American Indian Policy in the Twentieth Century 65, 69 (Vine DeLoria, Jr., ed. 1985). Except in Part VII, the paper uses the term "Indian country" in the non-technical sense, without jurisdictional implications.

19. 471 U.S. at 847-48.

20. *Id.* at 856 n.22. The Crow Tribal Court's rules provided for a motion to set aside a default judgment. *Id.*

21. 560 F. Supp. 213, 217 (D. Mont. 1983) (finding specifically that a tribal court lacked jurisdiction over non-Indian activities on fee lands within the reservation because the judge found lacking any of the grounds held necessary to support regulatory jurisdiction in such circumstances by Montana v. United States, 450 U.S. 544, 556-57 (1981)).

22. 736 F.2d 1320, 1323 (9th Cir. 1994).

23. 471 U.S. at 852.

24. *National Farmers Union,* 471 U.S. at 857. On remand, following the Supreme Court decision in *National Farmers Union*, the Crow Tribal Court denied the insurer's motion to dismiss, finding jurisdiction under the *Montana* test, and the Crow Tribal Court affirmed. Sage v. Lodge Grass School Dist., Civ. No. 82-287 (Crow Trib. Ct. Sept. 12, 1995); *see* Margery H. Brown & Brenda C. Desmond, *Montana Tribal Courts: Influencing the Development of Contemporary Indian Law,* 52 Mont. L. Rev. 211, 250-51 (1991) (discussing implementation of the tribal court exhaustion requirement).

25. *National Farmers Union,* 471 U.S. at 856 n.21. *National Farmers Union* requires "exhaustion" of tribal remedies, rather than that the federal court should "abstain" pending the tribal court's determination of its jurisdiction. *Id.* This choice of labels may have little significance given that the Supreme Court has described an abstention decision as requiring "exhaustion of state remedies."

Steffel v. Thompson, 415 U.S. 452, 473 (1974). Professor Skibine has argued, however, that Indian abstention cases should be decided under principles of administrative law exhaustion. Skibine, *supra* note 10, at 204.

26. *Iowa Mutual*, 480 U.S. at 11-12.

27. *See* 480 U.S. at 20 (Stevens, J., concurring in part and dissenting in part) (noting that the insurer did not question the jurisdiction of the tribal court).

28. *Id.* at 13.

29. *Id.* at 19.

30. *Id.* at 20-22 (Stevens, J., dissenting).

31. *Id.* at 16.

32. *Id.*

33. *Id.*

34. 480 U.S. at 16 n.8.

35. 424 U.S. 800 (1976).

36. *See infra* Part III.

37. *See Iowa Mutual*, 480 U.S. at 17-19, 20-22 (Stevens, J., concurring in part and dissenting in part).

38. *See, e.g.,* R. J. Williams Co. v. Fort Belknap Housing Authority, 719 F.2d 979, 982 (9th Cir. 1983); *cert. denied*, 472 U.S. 1016 (1985).

39. *Brown & Desmond, supra* note 24, at 259.

40. *Iowa Mutual*, 480 U.S. at 20 n.13.

41. *Id.* at 17-18 (stating that Congress, in enacting and amending 28 U.S.C. § 1332, "has never expressed any intent to limit the civil jurisdiction of the tribal courts.").

42. *Compare* Meredith v. City of Winter Haven, 320 U.S. 228, 238 (1943), *and*, Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 30 (1959) (refusing to abstain), *with*, County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89 (1959); *see generally,* Note, *Federal Court Abstention in Diversity of Citizenship Cases*, 62 S. Cal. L. Rev. 1237 (1989).

43. *See infra* notes 113-120 (discussing *Colorado River* abstention).

44. *Iowa Mutual*, 480 U.S. at 17.

45. *Id.* at 19.

46. *Id.*

47. *See* Laurie Reynolds, *Extolling Tribal Sovereignty*, 73 N.C. L. Rev. at 1119-25.

48. *See infra* Part V.

49. To the contrary, it has denied writs of certiorari in several cases. *See*, *e.g.*, Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation, 27 F.3d 1294 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 779 (1995); Middlemist v. Secretary of the United States Dep't of the Interior, 19 F.3d 1318 (9th Cir.), *cert. denied*, 115 S. Ct. 420 (1994); Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803 (7th Cir.), *cert. denied*, 114 S. Ct. 621 (1993); Crawford v. Genuine Parts Co., 997 F.2d 1405 (9th Cir. 1991), *cert. denied*, 502 U.S. 1096 (1992); Burlington Northern R.R. v. Blackfeet Tribe, 924 F.2d 899 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992). *See also* Granberry v. Greer, 481 U.S. 129, 131 n.4 (1987) (citing *Iowa Mutual* and *National Farmers Union* in a footnote referencing "nonexhaustion as an inflexible bar to consideration of the merits . . . by the federal courts . . .").

50. *Id.*; *see, e.g.,* Burlington Northern R.R. v. Crow Tribal Council, 940 F.2d 1239, 1245 (9th Cir. 1991); United States v. Plainbull, 957 F.2d 724, 728 (9th Cir. 1992); Crawford v. Genuine Parts Co., 947 F.2d 1405, 1407 (9th Cir. 1991), *cert. denied*, 502 U.S. 1096 (1992) ("Whether proceedings are . . . pending in . . . tribal court is irrelevant.").

51. Wellman v. Chevron U.S.A., Inc., 815 F.2d 577 (9th Cir. 1987).

52. Middlemist v. Secretary of United States Dep't of Interior, 824 F. Supp. 940, 946 (D. Mont. 1993), *aff'd*, 19 F.3d 1318 (9th Cir.), *cert. denied*, 115 S. Ct. 420 (1994).

53. *See, e.g.,* Crawford v. Genuine Parts Co., 947 F.2d 1405 (9th Cir. 1991), *cert. denied*, 502 U.S. 1096 (1992); United States v. Tsosie, 849 F. Supp. 768, 770-71 (D.N.M. 1994).

54. *See, e.g.,* Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation, 27 F.3d 1294 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 779 (1995); *see also* Pittsburg & Midway Mining Co. v. Watchman, 52 F.3d 1531 (10th Cir. 1995); *see* Part VII, *infra*.

55. *See, e.g.,* Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community, 991 F.2d 458 (8th Cir. 1993); Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803 (7th Cir.), *cert. denied*, 114 S. Ct. 621 (1993); Burlington Northern R.R. v. Blackfeet Tribe, 924 F.2d 899 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 3013 (1992); Alaska v. Native Village of Venetie, 856 F.2d 1384 (9th Cir. 1988); Lower Brule Constr. Co. v. Sheesley's Plumbing & Heating Co., 84 B.R. 638 (D.S.D. 1988).

56. *See* the analysis of Circuit-by-Circuit exhaustion cases in Timothy W. Joranko, *Exhaustion of Tribal Remedies in the Lower Courts After National Farmers Union and Iowa Mutual: Toward a Consistent Treatment of Tribal Courts by the Federal Judicial System*, 78 Minn. L. Rev. 259, 268-86 (1993); and Phillip Wm. Lear and Blake D. Miller, *Exhaustion of Tribal Court Remedies: Rejecting Brightline Rules and Affirmative Action*, 71 N.D. L. Rev. 276, 286-92 (1995).

57. *See*, *e.g.*, Brown v. Washoe Housing Authority, 835 F.2d 1327, 1327-28 (10th Cir. 1988); Smith v. Moffett, 947 F.2d 442, 443-44 (10th Cir. 1991); Bank of Oklahoma v. Muscogee (Creek) Nation, 972 F.2d 1166, 1170-71 (10th Cir. 1992).

58. Brown v. Washoe Housing Authority, 835 F.2d 1327, 1327-28 (10th Cir. 1988).

59. *See also* Smith v. Moffett, 947 F.2d 442, 443-44 (10th Cir. 1991) (tribal member's civil rights action). The district court in United States v. Tsosie, 849 F.2d 768, 770 (D.N.M. 1994), cited *Smith v. Moffett* in its *sua sponte* dismissal of an action filed by the United States, on its own behalf and on behalf of Navajo tribal members, against another Navajo tribal member for ejectment and damages for trespass on an allotment located outside the Navajo reservation. These *sua sponte* dismissals raise questions concerning the enforceability in the Tenth Circuit of agreements to resolve disputes in non-tribal courts, at least when the tribe, itself, is not a party to the forum selection agreement.

60. Bank of Oklahoma v. Muscogee (Creek) Nation, 972 F.2d 1166, 1170-71 (10th Cir. 1992).

61. *Id.* at 1170.

62. 52 F.3d 1531 (10th Cir. 1995).

63. The geographic implications of *Pittsburg & Midway* are discussed *infra* at Part VII.

64. *Id.* at 1537.

65. *Id.*

66. *Id.*; quoting Texaco, Inc. v. Zah, 5 F.3d 1374, 1378 (10th Cir. 1993). In *Texaco*, the Tenth Circuit remanded a case involving Navajo Nation taxation of non-Indian activity outside the reservation, directing the district court to engage in a particularized inquiry to determine whether abstention would be required in the off-reservation situation. 5 F.3d at 1378. The *Texaco* decision contrasted this analysis with that applicable within reservations: "[w]hen 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.*

67. 52 F.3d at 1539; the *Pittsburg & Midway* court emphasized, in reaching this conclusion, the significance of tribal taxation to its conclusion: "[t]he power to tax is a sufficiently essential aspect of sovereignty to require P&M to initiate its jurisdictional challenge in Navajo tribal court" and "P&M's lawsuit presents a direct challenge to the Navajo Nation's jurisdiction and involves the interpretation of Navajo law." *Id.* at 1538.

68. 856 F.2d 1384, 1388 (9th Cir. 1988); *see also White Mountain Apache Tribe v. Smith Plumbing Co.*, 956 F.2d 1301, 1306 (9th Cir. 1988) (abstention not required in an action to recover from construction surety for non-payment of a construction contract on tribal lands, where the action is between non-Indian companies, "no Indian assets or other property situated in Indian country could be directly affected by a judgment," and the disposition of the action in federal court would not affect rights between the tribe and the surety that might later be resolved in tribal court.)

69. 924 F.2d 899, 901 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992).

70. *Id.* at 901 n.2.

71. 940 F.2d 1239, 1241-42 (9th Cir. 1991).

72. *Id.* at 1245.

73. 947 F.2d 1405, 1406 (9th Cir. 1991), *cert. denied*, 502 U.S. 1096 (1992).

74. *Id.* at 1406-07.

75. *Id.* at 1408.

76. United States v. Plainbull, 957 F.2d 724, 726 (9th Cir. 1992) (the Ninth Circuit interpreted the statute, 28 U.S.C. § 1355, as exclusive of state court jurisdiction, but not of tribal court jurisdiction). *Plainbull* recognizes, however, that abstention is discretionary, and "is an extraordinary and narrow exception" to the duty of a district court to adjudicate a controversy properly before it. *Id.* at 727, quoting County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188 (1959).

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

78. 964 F.2d 912 (9th Cir. 1992) ("*Stock West II*").

79. 964 F.2d at 919.

80. *Id.* at 919-20; a Ninth Circuit lower courts has gleaned from *Stock West* the requirement that "the assertion of tribal court jurisdiction is plausible and appears to have a valid or genuine basis." Cropmate Co. v. Indian Resources Int'l., Inc., 840 F. Supp. 744, 748 (D. Mont. 1993) (controversy between two corporations organized under state law a "reservation affair" requiring abstention, where parallel actions were filed on the same day in tribal and state court seeking relief under the same contract and one of the owners of one of the corporations was a tribal member).

81. Middlemist v. United States Dep't of the Interior, 824 F. Supp. 940, 944 (D. Mont. 1993), *aff'd*, 19 F.3d 1318 (9th Cir.), *cert. denied*, 115 S. Ct. 420 (1994).

82. *See* Joranko, *Toward a Consistent Treatment of Tribal Courts*, at 277.

83. *See*, *e.g.*, Weeks Constr., Inc. v. Oglala Sioux Housing Auth., 797 F.2d 668, 672-74 (8th Cir. 1986); Kishell v. Turtle Mountain Housing Auth., 816 F.2d 1273, 1276 (8th Cir. 1987); DeMent v. Oglala Sioux Tribal Court, 874 F.2d 510, 511-12 (8th Cir. 1989).

84. 867 F.2d 1094, 1097-98 (8th Cir. 1989).

85. 991 F.2d 458, 459 (8th Cir. 1993).

86. 42 U.S.C. § 6901-87 (1988 and Supp. V 1993).

87. 867 F.2d at 1098.

88. 49 U.S.C. § 1811 (Supp. V 1993).

89. 991 F.2d at 462.

90. The Eighth Circuit's decision in Twin City Constr. Co. v. Turtle Mountain Band of Chippewa Indians, 911 F.2d 137, 138 (8th Cir. 1990), concludes a string of decisions arising from a breach of contract action filed against a non-Indian corporation in tribal court. Those decisions initially address interpretation of a tribal code provision concerning whether a non-Indian had taken actions to "submit" to the jurisdiction of tribal court. The federal district court initially reversed the tribal court's determination that it had jurisdiction over the non-Indian construction company, and a divided *en banc* panel of the Eighth Circuit affirmed. 866 F.2d 931 (8th Cir.) (*en banc*), *cert. denied*, 490 U.S. 1085 (1989). After the tribal council amended the tribal code to specify clearly that tribal court had jurisdiction over the action, the Eighth Circuit required abstention to allow the tribal court to first consider whether it had jurisdiction under the amended tribal code. 911 F.2d 139-40.

91. 718 F. Supp. 753, 754-55 (D.N.D. 1989).

92. *Id.* at 755.

93. 27 F.3d 1294 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 779 (1995); for a more detailed discussion of *Duncan Energy*, *see infra* Part VII.

94. 27 F.3d at 1299, (in terms arguably inconsistent with *Blue Legs* and *Northern States*, the Eighth Circuit observed that "the examination of tribal sovereignty and jurisdiction should be conducted in the first instance by the tribal court itself." *Id.*; *see also* City of Timberlake v. Cheyenne River Sioux Tribe, 10 F.3d 554, 559 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 2741 (1994).

95. 983 F.2d 803 (7th Cir.), *cert. denied*, 114 S. Ct. 621 (1993).

96. 983 F.2d at 807.

97. *Id.* at 814.

98. *Id.* at 815. One commentator has criticized the Seventh Circuit because it "decided for itself what was best for the tribe, reject[ing] the Tribe's own determination of where best to litigate . . . ." Joranko, *Toward a Consistent Treatment of Tribal Courts*, 78 Minn. L. Rev. at 282.

99. 788 F. Supp. 566, 567 (S.D. Fla. 1992), *rev'd on other grounds*, 999 F.2d 503, 508 (11th Cir. 1993) (lack of federal question jurisdiction).

100. 788 F. Supp. at 568 ("[t]he waiver clause is clear and unambiguous.").

101. The Miccosukee Tribal Court apparently disregarded the contractual stipulation to federal court jurisdiction and entered its own order directing the parties to arbitrate the commercial dispute, reserving jurisdiction "to hear matters not covered under the arbitration clause." 999 F.2d at 505.

102. 816 F. Supp. 403 (W.D.N.C. 1993).

103. *Id.* at 405.

104. *Id.* at 407.

105. *Id.*

106. 858 F. Supp. 524, 527 (W.D.N.C. 1994).

107. *Id.*

108. Stanton v. Embrey, 93 (3 Otto) U.S. 548, 554 (1876); see Erwin Chemerinsky, Federal Jurisdiction 660-75 (1994). This article does not address specific statutory limitations on federal court jurisdiction that require dismissal or abstention.

109. *See, e.g.,* Younger v. Harris, 401 U.S. 37 (1971).

110. *See* Samuels v. Mackell, 401 U.S. 66 (1971).

111. Juidice v. Vail, 430 U.S. 327 (1977).

112. *See* Steffel v. Thompson, 415 U.S. 452, 462 (1974); *accord*, Ankenbrant v. Richards, 504 U.S. 689, 112 S. Ct. 2206, 2216 (1992).

113. *See, e.g.,* Brillhart v. Excess Ins. Co., 316 U.S. 491, 495 (1942).

114. 424 U.S. 800 (1976).

115. 460 U.S. 1 (1983).

116. *Colorado River,* 424 U.S. at 817; *see also Moses H. Cone*, 460 U.S. at 13-16.

117. *Colorado River,* 424 U.S. at 813, 818; *Moses H. Cone,* 460 U.S. at 25-26 ("The task is to ascertain whether there exist 'exceptional' circumstances, the 'clearest of jurisdictions,' that can suffice under *Colorado River* to justify the surrender of that jurisdiction.").

118. *Colorado River* abstention generally is proper only if there are pending state court proceedings that are truly duplicative of the federal ones, where the same parties are litigating the same issues in both forums. *See, e.g.,* Crawley v. Hamilton County Comm'rs, 744 F.2d 28, 31 (6th Cir. 1984) (finding abstention inappropriate because there were not parallel state court proceedings); Bankers

Trust Co. v. Chatterjee, 636 F.2d 37, 41 (3d Cir. 1980) (finding that since proceedings were not truly duplicative, neither could be avoided).

119. Chemerinsky, *supra*, note 108, at 669; see *Colorado River,* 424 U.S. at 818; *Moses H. Cone,* 460 U.S. at 23 (finding that existence of a federal question weighs heavily against abstention); *Moses H. Cone* articulates a sixth factor, the adequacy of the forums to protect the parties' rights. 460 U.S. at 23.

120. Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 566-67 (1993).

121. *See, e.g., Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

122. See, e.g., Burford v. Sun Oil Co., 319 U.S. 315, 334 (1943); *Burford* sanctioned dismissal of an action that would inject the federal courts into management of Texas' comprehensive oil and gas regulatory scheme.

123. A variant strain of the *Burford* doctrine, allowing a federal court to stay (not dismiss) to seek state court resolution of an unsettled question of state law, such as whether state law empowered cities to condemn utility property, is reflected in Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 30 (1959). Scholars debate whether *Burford* and *Thibodaux* should be considered separate doctrines. See the thoughtful discussion of the abstention doctrine in James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 Stan. L. Rev. 1079 (1994).

124. *See supra* Part III.

125. *National Farmers Union*, 471 U.S. 845, 856 n.21 (1985).

126. 430 U.S. 327, 338 (1977).

127. Juidice v. Vail, 430 U.S. 327, 329, 335-36 (1977).

128. *Id.* at 337-38 (quoting Huffman v. Pursue, Ltd., 420 U.S. 592, 611 (1975)); *Juidice*, however, addressed "express constitutional prohibitions," rather than the "express jurisdictional prohibitions" which were the focus of *National Farmers Union*. *Id.* Professor Skibine has argued, correctly, that the three exceptions to abstention recognized in *National Farmers Union*'s footnote 21 are "similar in spirit" to those applied in administrative law exhaustion cases. *Skibine, supra* note 10, at 205. However, the Supreme Court's direct citation to *Juidice v. Vail* and the near identity of the exceptions recognized in *National Farmers Union* footnote 21 and the page it cites in *Juidice* suggest that *Younger,* not administrative law, underlies *National Farmers Union*'s abstention requirement.

129. *See, e.g.,* Younger v. Harris, 401 U.S. 37 (1971) (involving an action to enjoin state criminal prosecution); Steffel v. Thompson, 415 U.S. 452, 455 (1974) (involving an action for declaratory judgment against state officials and private parties). *Younger* abstention cases often have arisen in the context of actions against state officials acting "under color of state law," sought to be enjoined under 42 U.S.C. 1983, with federal court jurisdiction premised on 28 U.S.C. § 1343(3).

130. See *National Farmers Union*, 471 U.S. at 848.

131. In Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 10-11 (1987), the Supreme Court majority held that the district court should have abstained under the *Younger* doctrine, to require Texaco to assert its constitutional objections to Pennzoil's $10 billion dollar judgment in Texas courts. Interestingly, the *Pennzoil* majority, like *National Farmers Union*, placed substantial reliance on *Juidice v. Vail. See* Anne Althouse, *The Misguided Search For State Interest In Abstention Cases: Observations on the Occasion of Pennzoil v. Texaco,* 63 N.Y.U. L. Rev. 1051 (1988).

132. *See supra* at notes 113-20.

133. 480 U.S. 9, 16 n.8 (1987).

134. *Id.*

135. 480 U.S. at 16 n.8 (citing *Colorado River*, 424 U.S. 800, 819 (1976)). The cited page of *Colorado River* analyzes one of the four factors it requires be considered in abstention decisions, "the desirability of avoiding piecemeal litigation."

136. *See supra* notes 118, 119.

137. 947 F.2d 1405 (9th Cir. 1991), *cert. denied*, 502 U.S. 1096 (1992).

138. *Id.* at 1407.

139. *Id.*

140. *Id.* at 1408.

141. *Id.*

142. *Iowa Mutual*, 480 U.S. at 15 (citing *National Farmers Union*, 471 U.S. at 857); *see also* 480 U.S. at 16 n.8 ("[e]xhaustion is required as a matter of comity, not as a jurisdictional prerequisite.").

143. Younger v. Harris, 401 U.S. 37, 44 (1971); *see* Rehnquist, *Taking Comity Seriously,* 46 Stan. L. Rev. at 1086 ("the watch word is not deference to one forum, but sensitivity to both"); *see also*, Phillip W. Lear & Blake D. Miller, *Exhaustion of Tribal Court Remedies: Rejecting Bright-Line Rules and Affirmative Action*, 71 N.D. L. Rev. 277, 292-95 (1995) (exploring the international law lineage of "comity").

144. 358 U.S. 217 (1959).

145. *Id.* at 220.

146. *Id.* at 218.

147. *See* Ragsdale, *The Deception of Geography* at 72:

In the *Williams* case, there was personal jurisdiction because both parties went before the court. The holding was that the Arizona court lacked subject matter jurisdiction, however. In other words, that court could not hear this kind of case. If the same facts had happened in London, England, the same people, the same debt, and identical service of the summons, then unquestionably Arizona would have had subject matter jurisdiction.

148. *See* Charles F. Wilkinson, American Indians, Time, and the Law at 1-3 (1987); *see also Talton v. Mayes*, 163 U.S. 376 (1896) (Cherokee tribe has exclusive jurisdiction to try offense by one member against another).

149. 358 U.S. at 222. It appears that the citizenship of the parties could not support federal court in diversity jurisdiction.

150. *Williams*, 358 U.S. at 220 (citing People of State of New York ex rel. Ray v. Martin, 326 U.S. 496 (1946)).

151. *Williams*, 358 U.S. 219 (citing Felix v. Patrick, 145 U.S. 317 (1892)).

152. *See* Ragsdale, *The Deception of Geography, supra,* note 91, at 71 n.16.

153. Cases following *Williams v. Lee* which find tribal court primacy over state courts generally are consistent with *Williams v. Lee*. Kennerly v. District Court, 400 U.S. 423 (1971), found a tribal council resolution which purported to give tribal court and state court concurrent jurisdiction over suits against tribal members ineffective to establish jurisdiction in Montana state court over an action to collect an on-reservation debt against tribal members. Fisher v. District Court, 424 U.S. 382, 387-90 (1976), held that Montana courts lack jurisdiction over an adoption proceeding in which all parties were members of the Northern Cheyenne Tribe and residents of its Reservation.

154. Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138 (1984) [hereinafter *Wold 1*]; and Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C., 476 U.S. 877 (1986) [hereinafter *Wold II*].

155. *See Wold I*, 467 U.S. at 148-51; *Wold II*, 476 U.S. at 883; North Dakota has acted to accept jurisdiction over actions involving Indian citizens arising on Indian reservations under Public Law 280. *Wold I*, 467 U.S. at 144. Although Bryan v. Hasca Indian Community, 426 U.S. 373, 383-84 (1976), observes that a principle purpose of Public Law 280 was to "allow" "State courts to adjudicate civil controversies" arising in Indian country, it is well recognized that, in matters not affecting either the federal government or the tribal relations, an Indian has the same status to sue or be sued in state courts as any other citizen, unless a treaty or statute expressly ousts state jurisdiction. Felix S. Cohen's Handbook of Federal Indian Law, 379-89 (1942).

156. 476 U.S. at 889. The *Wold II* court also found material that "the Tribe has no other effective means of securing relief for civil wrongs," including the potential need for state court enforcement. *Id.*

157. *See* 28 U.S.C. § 1331 (1988); U.S. Const. art. III, § 2; a specific statute makes clear that the federal courts have jurisdiction over actions by any "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior" to bring federal question actions. *See* 28 U.S.C. § 1362 (1988); *see generally*, F. Cohen's Handbook of Federal Indian Law at 311-12 (1982).

158. *See, e.g.*, Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 670 (1974) (possessory action by tribe presents federal question because "Indian title is a matter of federal law and can be extinguished only with federal consent."); *see also* Oneida County v. Oneida Indian Nation, 470 U.S. 226, 234 (1985) ("[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law.").

159. 436 U.S. 49 (1978).

160. 25 U.S.C. § 1301-03 (1988) ("ICRA").

161. 436 U.S. at 59.

162. *Id.* The Court also found the express provision of an habeas corpus remedy, and the failure of the ICRA to mention other remedies, reflected the intention that only habeas corpus relief for ICRA violations be available in federal court. *Id.* at 65.

163. *National Farmers Union*'s holding affirms that federal question exists in an action to test tribal court jurisdiction.

164. *See* 28 U.S.C. § 1332 (1988). Following *Williams v. Lee,* there was a split in the circuits over whether diversity jurisdiction over actions involving on-reservation Indians was barred because the exercise of jurisdiction would interfere with tribal self-government. *Compare* Hot Oil Service, Inc. v.

Hall, 366 F.2d 295, 297 (9th Cir. 1966) (exercise of diversity jurisdiction barred) *with* Poitra v. DeMarrias, 502 F.2d 23 (8th Cir. 1974), *cert. denied*, 421 U.S. 934 (1975); *see supra* note 37.

165. *See* United States v. Wheeler, 435 U.S. 313, 319 (1978), cited in *National Farmers Union*, 471 U.S. at 846 n.14.

166. *See Moses H. Cone,* 460 U.S. at 23.

167. American Law Inst., Study on the Division of Jurisdiction, Commentary on Federal Question Jurisdiction at 70; Indian law easily fits the class of cases that includes bankruptcy, patent, and federal anti-trust.

168. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347-48 (1816); Professor Clinton, however, has argued that the independence of the federal judges and effectually the Supremacy Clause, vouchsafed by life tenure and related Constitutional protections, primarily motivated federal court review of federal questions. *See* Robert N. Clinton, *A Mandatory View of Early Implementation of and Departures From the Constitutional Plan,* 86 Colum. L. Rev. 1515, 1542 (1986).

169. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 822 (1824).

170. *See* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 416-17 (1964) (review of state court decision by the Supreme Court is "an inadequate substitute" for an initial determination by a federal district court. "How the facts are found will often dictate the decision of federal claims.")

171. *See generally,* Clinton, *Mandatory Federal Court Jurisdiction,* 86 Colum. L. Rev. at 1541-43.

172. *See, e.g.,* Montana v. United States, 450 U.S. 544 (1981); Brendale v. Confederated Tribes and Bands of Yakima Nation, 492 U.S. 409, 423-24 (1989); *see also* South Dakota v. Bourland, 113 S. Ct. 2309 (1993).

173. 54 F.3d 535, 541 (9th Cir. 1994).

174. Fort Belknap Indian Community v. Mazurek, 43 F.3d 428, 431-32 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 49 (1995).

175. 43 F.3d at 432; *see also* Seneca-Cayuga Tribe v. Oklahoma, 874 F.2d 709, 714 (10th Cir. 1989), *cert. denied*, 1995 WL 380633 (Oct. 10, 1995) (federal district court properly enjoined state court proceeding in which state sought to enjoin tribal gaming because state power to regulate Indian gaming was federal, not state, question).

176. Confederated Salish and Kootenai Tribes v. Simonich, 29 F.3d 1398, 1406 (9th Cir. 1994).

177. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347 (1816).

178. *See* Henry Friendly, *The Historic Basis of the Diversity Jurisdiction*, 41 Harv. L. Rev. 483, 498 (1928); see also Frank, *Historical Bases of the Federal Judicial System,* 13 Law & Contemp. Probs. 3, 22-28 (1948) (among two other reasons, "the desire to avoid regional prejudice against commercial litigants . . ."); P. Bator, et al., Hart and Wechsler's The Federal Courts and the Federal System 1051-53 (1973).

179. *See* Wechsler, *Federal Jurisdiction and the Revision of the Federal Judicial Code,* 13 Law & Contemp. Probs. 216, 234-40 (1948).

180. *See* Act of Nov. 19, 1988, Pub. L. 100-702, 102 Stat. 4646, 28 U.S.C. § 1332(a) to require amount in controversy of $50,000.

181. *See also* Clinton, *Mandatory Federal Court Jurisdiction,* 86 Colum. L. Rev. at 1548, 1583.

182. 28 U.S.C. § 1332.

183. An influential early study concluded that, in diversity cases, "the disadvantages of abstention outweigh any conceivable gain in requiring state determination of state questions in routine diversity suits between private litigants involving no issue of public law." American Law Institute, Study on the Federal Jurisdiction at 218 (citing Meredith v. City of Winter Haven, 320 U.S. 228 (1943)).

184. *See*, *e.g.*, *National Farmers Union*, 471 U.S. at 852.

185. *Id.*

186. *See, e.g.*, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 562 (1832).

187. 450 U.S. 544 (1981).

188. *Id.* at 564.

189. 450 U.S. at 565.

190. *Id.* at 565-66.

191. *See, e.g.,* Brendale v. Confederated Tribes and Bands of Yakima Nation, 492 U.S. 408, 423-24 (1989); *see also* South Dakota v. Bourland, 113 S. Ct. 2309 (1993).

192. Brendale v. Confederated Tribes and Bands of Yakima Nation, 492 U.S. 408, 423-24 (1989).

193. 492 U.S. at 431-32.

194. *See, e.g.,* Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation, 27 F.3d 1294 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 779 (1995); Middlemist v. Secretary of the United States Dep't of the Interior, 824 F. Supp. 940, 946 (D. Mont. 1993), *aff'd*, 19 F.3d 1318 (9th Cir.), *cert. denied*, 115 S. Ct. 420 (1994).

195. *National Farmers Union* only mentioned *Montana* in its recognizing that the existence of tribal adjudicatory powers presented a federal question, to show that the case had determined tribal "power to regulate hunting and fishing . . ." 471 U.S. at 851 n. 12. *See* Part II.A., *supra*.

196. *See* Laurie Reynolds, *Extolling Tribal Sovereignty*, 73 N.C. L. Rev. at 1129-30.

197. 435 U.S. 191 (1978) (independent status of tribes forecloses criminal jurisdiction over non-Indians).

198. 471 U.S. at 853-55.

199. Contrary to the interpretation of *Montana* set forth above, in describing "[t]ribal power over the activities of non-Indians on reservation lands," immediately following a citation to *Montana*, *Iowa Mutual* stated "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts . . . ." *Iowa Mutual*, 480 U.S. at 18.

200. *See supra* Part V.A.

201. *Middlemist*, 824 F. Supp. at 942-43.

202. *See id*. at 946.

203. Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation, 27 F.3d 1294, 1296 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 779 (1995).

204. 27 F.3d at 1300. In neither *Middlemist* nor *Duncan Energy* was an action pending in the tribal court or agency.

205. 435 U.S. 313, 326 (1978).

206. Existing decisions reflect that federal court review of tribal court action will be deferential, reviewing legal conclusions *de novo* and deferring to tribal court findings of fact unless they are "clearly erroneous." FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1313 (9th Cir. 1990); *see also Duncan Energy*, 27 F.3d at 1301.

207. *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531 (10th Cir. 1995). The author was one of the counsel for an *amicus curiae* supporting Pittsburgh & Midway in the proceeding.

208. *See also Texaco, Inc. v. Zah*, 5 F.3d 1374 (10th Cir. 1993), decision on remand, ___ U.S.L.W. ___ (D.N.M. Jan. 30, 1995); *United States v. Tsosie*, 849 F. Supp. 768 (D.N.M. 1994).

209. *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387 (10th Cir.), *cert. denied*, 498 U.S. 1012 (1990).

210. 18 U.S.C. § 1151, enacted as part of the re-codification of the federal criminal laws in 1944, defines the term "`Indian Country,' as used in this chapter [of the Federal Criminal Code]" to mean

(a) all land within the limits of any Indian reservation . . ., (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same (emphasis supplied).

Act of June 25, 1948, ch. 645, 62 Stat. 757, 80th Cong., 2d. Sess., H.R. 3190; Act of May 24, 1949, ch. 139, 63 Stat. 94, 81st Cong., 1st Sess., H.R. 3762.

211. 52 F.3d at 1539.

212. *Id.* at 1541.

213. [W]hether a particular geographical area is a dependent Indian community depends on a consideration of several factors. These include: (1) whether the United States has retained "title to the lands which it permits the Indians to occupy" and "authority to enact regulations and protective laws respecting this territory"; (2) "the nature of the area in question, the relationship of the inhabitants in the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area"; (3) whether there is "an element of cohesiveness . . . manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality"; and (4) "whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples.

Id. at 1545.

214. *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975); *see also California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5 (1987).

215. *DeCoteau* cited in support of the quoted language cases involving on-reservation tribal powers. *See, e.g.*, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 177-78 (1973); *Kennerly v. District Court*, 400 U.S. 423, 424 (1971); *Williams v. Lee*, 358 U.S. 217, 220-22 (1959). Consequently, the *Pittsburgh & Midway* decision rested alternatively, on the proposition that it is bound by "considered *dictum*" of the Supreme Court. 52 F.3d at 1540 n.10.

216. *Pittsburgh & Midway* observed that the *DeCoteau* language had been "followed" consistently by Tenth Circuit decisions. 52 F.3d at 1540, *citing*, *Indian Country, U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 973 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988), *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073, 1076 (10th Cir.), *cert. denied*, 114 S. Ct. 555 (1993); *see Oklahoma Tax Comm'n v. Sac & Fox Nation*, 113 S. Ct. 1985, 1991 (1993).

217. *See Confederated Tribes & Bands of Yakima Nation v. County of Yakima*, 903 F.2d 1207, 1217 (9th Cir. 1990) (§ 1151 "does not have general applicability in the civil context . . . . [B]y its own terms [it] is a criminal statute"); *aff'd*, *County of Yakima v. Confederated Tribes & Bands of Yakima Nation*, 112 S. Ct. 683, 689 (1992) (Court rejects contention that § 1151 and alleged implied repeal of § 6 of General Allotment Act preclude state taxation of tribal members' fee lands within reservation).

218. 498 U.S. 505 (1991).

219. *Id.* at 511.

220. 113 S. Ct. 1985, 1990-92 (1993).

221. *Id*. at 1991.

222. 25 U.S.C. §§ 1321(a), 1322(a).

223. *Id*. at 1992, quoting, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. at 178-79. *See also Chickasaw Nation v. State of Oklahoma*, 31 F.2d 964 (10th Cir. 1994) (Treaty of April 28, 1866 forecloses Oklahoma income taxation of income of Chickasaw Tribal members, earned from Tribal Enterprises on the reservation or in Indian Country, regardless of whether tribal member actually lives on reservation or in Indian Country.)

224. 115 S. Ct. 2214 (1995).

225. 115 S. Ct. at 2220-21.

226. *Id.* at 2222-24.

227. The Oklahoma cases generally concern state taxing powers, rather than the existence of tribal power over non-Indians. Additionally, the federal courts' repeated resolution of these issues strongly suggests that federal courts, rather than tribal courts, are appropriate tribunals to resolve such issues.