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Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions

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Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions

Judith V. Royster[*]

TABLE OF CONTENTS

I. INTRODUCTION 241

II. DISTINGUISHING TRIBAL FROM FEDERAL LAW 246

III. STANDARD OF REVIEW 254
A. Tribal Court Determinations of Tribal Law 255
B. Tribal Court Findings of Fact 261
C. Tribal Court Determinations of Federal Law 263

IV. EXTENT OF REVIEW 266
A. Review of Tribal Court Jurisdiction 266
B. *Review on the Merits* 271
1. No Independent Basis of Federal Jurisdiction 272
2. Federal Question Jurisdiction 275
3. Diversity Jurisdiction 278

V. CONCLUSION 281

I. INTRODUCTION

> [O]n the one hand there is increasing recognition of the stature of tribal courts, but on the other hand there is the companion development which seems to bring tribal courts more directly into the orbit of federal review. Or to say it another way, the more important tribal courts become, particularly in their authority over non-Indians, the more need there seems to be for increasing federal scrutiny.[1]

* Associate Professor of Law, University of Tulsa. I would like to thank Professors Laurie Reynolds and Alex Tallchief Skibine for their comments, and Taiawagi Helton for his research assistance. Copyright © 1997 by Judith V. Royster. Used by permission of Judith V. Royster.

1. FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 95 (1995). Professor Pommersheim noted this developing paradox in the federal law reaction to tribal courts.

In 1996, the Tenth Circuit handed down its decision in *Mustang Production Co. v. Harrison.*[2] The first time I read it, I thought it was a good decision. The court held that Indian tribes retain the inherent sovereign power to tax throughout their Indian country, including all trust allotments.[3] Accordingly, the Cheyenne-Arapaho Tribes possessed the governmental authority to impose a severance tax on non-Indian companies extracting oil and gas from allotments held in trust for members of the Tribes.[4] The court's decision seemed correct on the substantive law and protective of tribal sovereignty. All in all, it seemed like a good decision.

Then I read it again. This time I noticed the procedural background of the case. Mustang originally filed a challenge to the tribal taxes in federal district court.[5] On motion of the Tribes, the federal court stayed the action pending exhaustion of tribal remedies.[6] Mustang then filed suit in Cheyenne-Arapaho District Court, which granted summary judgment to the Tribes.[7] On appeal, the Cheyenne-Arapaho Supreme Court affirmed.[8] Mustang sought review in federal district court, which determined that the Cheyenne-Arapaho Tribes properly exercised their jurisdiction to tax the lessees.[9] The Tenth Circuit affirmed.[10] But I recalled this statement of the Supreme Court of the United States in *Iowa Mutual Insurance Co. v. LaPlante*:[11] "Unless a federal court determines that the Tribal Court lacked jurisdiction, however, proper deference to the tribal court system precludes relitigation of issues raised by the [plaintiff's] claim and resolved in the Tribal Courts."[12]

So I read *Mustang Production* a third time. Sure enough, the federal courts had said nothing about the authority of the Cheyenne-Arapaho

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2. 94 F.3d 1382 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1288 (1997).
3. *See id.* at 1385.
4. *See id.*
5. *See id.* at 1384.
6. *See id.*
7. *See* Mustang Fuel Corp. v. Cheyenne-Arapaho Tax Comm'n, 18 Indian L. Rep. 6095, 6096 (Chey.-Arap. D. Ct. 1991). Initially, Mustang filed an administrative appeal with the Cheyenne-Arapaho Tax Commission, which ruled that, as an administrative agency, it had no jurisdiction to determine the validity of an act it was charged with enforcing. *See* Mustang Fuel Corp. v. Cheyenne-Arapaho Tax Comm'n, 21 Indian L. Rep. 6058, 6060 (Chey.-Arap. S. Ct. 1993) (citing Mustang Prod. Co. v. Combs, No. 89-005 (Chey.-Arap. Tax Comm'n, June 14, 1989)).
8. *See Mustang Fuel*, 21 Indian L. Rep. at 6065.
9. *See* Mustang Fuel Corp. v. Hatch, 890 F. Supp. 995, 1004 (W.D. Okla. 1995), *aff'd sub nom.* Mustang Prod. Co. v. Harrison, 94 F.3d 1382 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1288 (1997).
10. *See* Mustang Prod. Co. v. Harrison, 94 F.3d 1382, 1386 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1288 (1997).
11. 480 U.S. 9 (1987).
12. *Id.* at 19.

courts to hear Mustang's lawsuit. The judicial authority of the Tribes apparently was not even raised as an issue in the federal courts. Instead, the federal courts proceeded directly to the merits of the case, relitigating the substantive determinations of the tribal courts.

Now I was puzzled. At no time did the federal courts determine that the tribal courts lacked authority to hear the lawsuit. In fact, according to the recent Supreme Court decision in *Strate v. A-1 Contractors*,[13] by holding that the Tribes possessed the legislative authority to impose the tax on Mustang, the federal courts implicitly determined that the Tribes also possessed the adjudicatory authority to hear the lawsuit.[14] So why was it that the federal courts could relitigate the issues raised by the lawsuit and resolved by the Cheyenne-Arapaho courts? Didn't *Iowa Mutual* prohibit exactly that review? This Article attempts to answer these questions.

Any answer must begin with the exhaustion doctrine. In *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*,[15] the Supreme Court created an exhaustion rule for federal cases raising issues of tribal court jurisdiction.[16] The doctrine states that in order to support the congressional policy of tribal self-government, to encourage the "orderly administration of justice," and to promote the expertise of tribal courts,[17] lawsuits that properly invoke federal jurisdiction[18] may be dismissed or held in abeyance pending the exhaustion of tribal remedies.[19] Although the exhaustion doctrine is a matter of comity and not jurisdictional,[20] most federal courts require exhaustion as a matter of course whenever there is a colorable claim of tribal jurisdiction over a lawsuit.[21] Once all available

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13. 117 S. Ct. 1404 (1997).

14. The Court in *A-1* held that a tribe's judicial power over non-Indian litigants is coterminous with the tribe's legislative and regulatory power over those non-Indians. *See id.* at 1413. It thus appears that if a federal court holds that a tribe has either judicial or legislative/regulatory power in an area, the court in fact holds that the tribe has both. *See id. A-1* is discussed in more detail *infra* notes 169-81 and accompanying text.

15. 471 U.S. 845 (1985).

16. *See id.* at 856-57.

17. *See id.*

18. *National Farmers* was a federal question case. *See id.* at 852-53. Two years later the Court extended the exhaustion doctrine to diversity cases. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 17-20 (1987).

19. See *National Farmers*, 471 U.S. at 856-57. Whether the federal district court dismisses or stays pending tribal court exhaustion is within the federal court's discretion. *See id.* at 857.

20. *See Iowa Mut.*, 480 U.S. at 16 n.8.

21. *See id.*; *see also* Stock West Corp. v. Taylor, 964 F.2d 912, 919-20 (9th Cir. 1992) (en banc). For a circuit-by-circuit analysis of exhaustion requirements, see 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, 268-87 (1993).

tribal remedies have been exhausted, the losing party retains the right to seek review in federal court.[22]

In its most recent decision on tribal courts, the Supreme Court may have undercut this approach. In *A-1*, the Court held that the courts of the Three Affiliated Tribes of the Fort Berthold Reservation did not have jurisdiction over a lawsuit between two nonmembers arising out of a vehicle accident on a state highway running through the reservation. *See* Strate v. A-1 Contractors, 117 S. Ct. 1404, 1413 (1997). Because the Court held that tribal adjudicatory jurisdiction was co-extensive with tribal regulatory jurisdiction, it applied the tests for regulatory authority set forth in *Montana v. United States*, 450 U.S. 544 (1981), to determine tribal court jurisdiction. *See A-1*, 117 S. Ct. at 1413. Under *Montana*, tribes are generally divested of regulatory jurisdiction over nonmember activities on non-Indian fee lands unless the nonmembers have entered into consensual relationships with the tribes or their members, or unless the activities impact tribal sovereign interests such as health and welfare, political integrity, or economic security. *See Montana*, 450 U.S. at 565-66. Applying *Montana* to the lawsuit at issue in *A-1*, the Court found that the defendant had not entered into any consensual relationships with the tribes or their members and that neither adjudicatory nor regulatory authority over traffic accidents between nonmembers on state highways was necessary to preserve tribal sovereign interests. *See A-1*, 117 S. Ct. at 1415-16.

It is the final footnote of *A-1* that appears to undercut the exhaustion rule. The Court stated:

> When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct . . . . Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement must give way, for it would serve no purpose other than delay.

Id. at 1416 n.14 (citations omitted). Footnote 14 cannot be taken literally. The only way in which it is "evident" that a tribal court lacks jurisdiction over a cause of action arising in Indian country is if that determination is made under the applicable federal law. And that issue of jurisdiction is precisely what the exhaustion doctrine is intended to leave, in the first instance, to the tribal rather than the federal courts. *See National Farmers*, 471 U.S. at 856 & n.21; *cf.* Espil v. Sells, 847 F. Supp. 752, 758 n.3 (D. Ariz. 1994) (noting the same problems with the "patently violative of express jurisdictional prohibitions" exception to the exhaustion rule).

In order not to entirely overwhelm the exhaustion rule, footnote 14 must be confined to the facts of *A-1*. Under the ruling of *A-1*, it is "evident" that a tribal court lacks jurisdiction to adjudicate claims arising from a traffic accident on a state highway when all parties to the lawsuit are nonmembers of the tribe. *See A-1*, 117 S. Ct. at 1413. In all other instances that raise a colorable claim of tribal jurisdiction, the exhaustion rule should prevail. *But see* Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997) (holding that the tribal court lacked jurisdiction over state highway accident claim between member and nonmember).

22. This right of federal court review should not apply to those categories of lawsuits within the exclusive jurisdiction of the tribal courts. Exclusive tribal jurisdiction lies in cases arising on the reservation if both litigants are tribal members or if the lawsuit is brought against a tribal member. *See* Fisher v. District Court, 424 U.S. 382, 382 (1976) (adoption proceeding involving only tribal members); Williams v. Lee, 358 U.S. 217, 223 (1959) (collection action by a non-Indian reservation business against a tribal member). *See generally* Laurie Reynolds, *Adjudication in Indian Country: The Confusing Parameters of State, Federal, and Tribal Jurisdiction*, 38 WM. & MARY L. REV. 539, 544-50 (1997). Although both *Fisher* and *Williams v. Lee* involved determinations that tribal court jurisdiction was exclusive of the state courts, the Supreme Court has expressly recognized that federal adjudication of these lawsuits would infringe on tribal sovereignty to the same extent that state adjudication would. *See Iowa Mut.*, 480 U.S. at 16; *see also* Littell v. Nakai, 344 F.2d 486, 488-89 (9th Cir. 1965).

The exhaustion doctrine is well-established in federal Indian law, but it is highly complex and surprisingly unsettled in its details. As a result, the exhaustion doctrine has received extensive attention from both courts and scholars.[23] However, the post-exhaustion review process has received relatively little attention, and yet the issues inherent in post-exhaustion review are crucial ones if tribal exhaustion is to mean anything other than delay and additional expense for the litigants.

This Article examines the central issues of post-exhaustion review. Two specific issues exist within the overriding issue of the scope of post-exhaustion review in federal courts. First, what standard of review should the federal courts employ in reviewing tribal court determinations? And second, what exactly are the federal courts entitled to review once tribal remedies have been exhausted?

The issue of differentiating between tribal law and federal law underlies these questions on the scope of post-exhaustion review. As this Article demonstrates, the existing standard of review between the two varies dramatically: tribal court determinations of tribal law are entitled to absolute deference while tribal court determinations of federal law are generally entitled to none.[24] Similarly, this Article contends that although federal courts may redetermine at least some issues of federal law on post-exhaustion review, proper respect for tribal courts and legislatures mandates that federal courts not review issues of tribal law.[25]

Because of the vast gulf between federal court treatment of federal law and tribal law, this Article argues that proper deference to the sovereign powers of Indian tribes and tribal courts requires the federal courts, on post-exhaustion review, to scrupulously distinguish tribal court rulings on tribal law from rulings on federal law. Given that the federal courts have apparently taken de novo review powers over all questions of federal law

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In addition, actions brought pursuant to the Indian Civil Rights Act of 1968 are primarily within the exclusive jurisdiction of the tribal courts. *See* Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1994) [hereinafter ICRA]. In those cases, involving allegations that the tribal government violated an individual's statutory rights under ICRA, the federal courts retain no review power except that of habeas corpus in instances where the tribal court defendant is in custody. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978). Professor Laurence has written extensively on the *Martinez* case and the issue of federal court review. *See, e.g.*, Robert Laurence, *A Quincentennial Essay on* Martinez v. Santa Clara Pueblo, 28 IDAHO L. REV. 307 (1991-92); Robert Laurence, *Federal Court Review of Tribal Activity Under the Indian Civil Rights Act*, 68 N.D. L. REV. 657 (1992); Robert Laurence, Martinez, Oliphant *and Federal Court Review of Tribal Activity Under the Indian Civil Rights Act*, 10 CAMPBELL L. REV. 411 (1988).

23. *See, e.g.*, Joranko, *supra* note 21; Melissa Koehn, *Civil Jurisdiction: The Boundaries Between Federal and Tribal Courts*, 29 ARIZ. ST. L.J. 705 (1997); Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C. L. REV. 1091 (1995).

24. *See infra* Part III.

25. *See infra* Part IV.

decided by tribal courts,[26] tribal courts are in danger of serving merely as preliminary factfinders for federal district courts. This Article thus proposes that federal courts can preserve the rights and values of tribal courts as instruments of tribal self-government only by carefully limiting questions of federal law to appropriate issues.[27]

II. DISTINGUISHING TRIBAL FROM FEDERAL LAW

The foundational issue in post-exhaustion review is how—or how well—the federal courts distinguish questions of federal law from questions of tribal law. Although some clear areas exist, federal courts encounter the greatest difficulty with tribal court rulings in cases involving non-Indian litigants.

Certainly tribal laws are not federal laws. "[T]he mere fact that a claim is based upon a tribal ordinance consequently does not give rise to federal question jurisdiction."[28] Instead, tribal law—the development, interpretation, and application of tribal constitutions, statutes, common law, and customs—is a matter outside the jurisdiction of the federal courts.[29]

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26. *See infra* Part IV.B.2.

27. At this point a disclaimer is in order. I believe that the current post-exhaustion review standards in the federal courts are seriously misplaced. True respect for tribal courts, for the development of tribal law and legal institutions, and for the federal policy of tribal self-government requires the federal courts to forego further jurisdiction upon finding that tribal court jurisdiction over a lawsuit is proper. Accordingly, I think that the current federal court standard of de novo review for federal law questions decided by tribal courts, as well as the current federal court practice of reviewing all tribal rulings on federal law and not just those going to the tribal court's jurisdiction to decide the case, are wrong under *National Farmers* and *Iowa Mutual*.

Nonetheless, the standard and the practice are already well-established. The de novo standard for federal questions has now been expressly adopted by the Eighth, Ninth, and Tenth Circuits, the three circuits that decide the vast majority of Indian law cases. *See infra* Part III.C. It was also implicitly adopted by the Supreme Court in *A-1*. *See infra* Part III.C. Similarly, the Eighth, Ninth, and Tenth Circuits all engage in post-exhaustion review of the merits of federal questions other than tribal court jurisdiction. *See infra* Part IV.B.2. Both problems, in other words, are essentially done deals.

Given that reality, I have chosen to focus here not on what is wrong with the existing law (and, as noted, I think a great deal is), but rather on what happens next. My primary concern is that if the federal courts continue on their present track, post-exhaustion review may entirely overwhelm any real decision-making power of the tribal courts in any case in which the parties have a basis for federal jurisdiction. Accordingly, this Article accepts the post-exhaustion jurisprudence as it presently exists and proposes limits on any further extension of federal court review in order to give effect to *Iowa Mutual*'s admonition that if a federal court affirms tribal court jurisdiction, it is precluded from relitigating the merits. *See Iowa Mut.*, 480 U.S. at 19.

28. Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1077 (9th Cir. 1990); *see also* Chilkat Indian Village v. Johnson, 870 F.2d 1469, 1476 (9th Cir. 1989).

29. *See* Talton v. Mayes, 163 U.S. 376, 380 (1896) (holding that interpretation of tribal law is solely within the competence of the tribal courts); R.J. Williams Co. v. Fort Belknap Hous. Auth., 719 F.2d 979, 982 (9th Cir. 1983) (holding that plaintiffs stated no federal claim for relief because

If tribal courts are to have the "vital role in tribal self-government" that the Supreme Court has envisioned,[30] then the tribes' ability to develop and interpret this body of tribal law must be protected. As Professor Pommersheim notes, "Tribal courts do not exist solely to reproduce or replicate the dominant canon appearing in state and federal courts. If they did, the process of colonization would be complete and the unique legal cultures of the tribes fully extirpated."[31] Instead, it is the distinctive legal principles derived from tribal law and applied in the tribal courts that both justify and distinguish a separate tribal court jurisprudence.

The sources of tribal law include the tribe's treaties and agreements, tribal law codified in the form of constitutions and statutes, and published decisions of the tribal courts.[32] Beyond these textual sources, however, lies the special nature of tribal law: tribal custom and tradition.[33] The use of tribal custom in the development of tribal common law incorporates tribal beliefs and values into tribal court decision-making.[34] Although a tribal court decision based on tribal custom may result in an opinion identical to one reached under state or federal law,[35] the "fundamentally different view" inherent in tribal custom may also produce results that vary from state and federal outcomes.[36] For example, Professor Valencia-Weber has identified certain differences in tribal tort law: Tribal law may apply a standard of "carelessness" rather than the state law standard of "negligence," and tribal custom may not recognize certain state-law concepts such as contributory or comparative negligence.[37] In any given tort case, then, application of the tribal law standards may or may not reach results consistent with those reached under state law.

"this case involves a genuine issue of tribal ordinance construction which must be left to the tribal court for resolution").

30. *Iowa Mut.*, 480 U.S. at 14; *see also* United States v. Wheeler, 435 U.S. 313, 332 (1978) ("[T]ribal courts are important mechanisms for protecting significant tribal interests.").

31. Frank Pommersheim, *Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411, 420; *cf.* Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 238 (1997) (arguing that although tribal courts modeled on Anglo-American courts may strengthen tribes' sovereign capacities to resolve disputes, they nonetheless ultimately undermine sovereignty by contributing to the assimilation of tribes into American society).

32. *See* POMMERSHEIM, *supra* note 1, at 85.

33. *See id. See generally* Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225 (1994); James W. Zion, *Harmony Among the People: Torts and Indian Courts*, 45 MONT. L. REV. 265 (1984).

34. *See* Zion, *supra* note 33, at 275.

35. *See* Valencia-Weber, *supra* note 33, at 250.

36. *See id.* at 254.

37. *See id.* at 255-56; *see also* Zion, *supra* note 33, at 277-79 (discussing the development of tort law in the tribal courts).

There is thus for each tribe a unique body of tribal law, incorporating both textual and traditional sources, that is distinct from federal or state law. The development and protection of this tribal law are important aspects of tribal self-government.[38]

As a tribe works to identify and develop a body of law that reflects the values and beliefs of the tribe, that law—whether legislative, regulatory, procedural, or decisional—is applied to tribal members and nonmembers of the tribe. The next question, then, is whether that extension of tribal law to particular categories of persons raises issues of tribal law, federal law, or both.

In the absence of a federal statute or treaty provision to the contrary, the question of whether tribes may extend tribal law to tribal members is solely a matter of tribal law and does not implicate any federal concerns.[39] Tribes generally have full civil jurisdiction over their members within their Indian country, including not only the sovereign authority to legislate and regulate,[40] but the power to adjudicate disputes as well.[41]

But the question of whether tribes may extend their civil laws to nontribal members is more complicated. Whether a tribe possesses the sovereign authority to legislate for and regulate nonmembers is a question of federal law. The Supreme Court has assumed in case after case that federal question jurisdiction exists over challenges to a tribe's power to apply its regulatory laws to nonmembers.[42] Lower federal courts have made that implicit holding explicit, ruling that a tribe's ability to extend its substantive law to nonmembers is a question of federal law.[43] Similarly, the Supreme Court has expressly held that the question of whether a tribal court may exercise adjudicatory jurisdiction over a nonmember party is a federal law issue.[44] In fact, most recently the

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38. *See* Valencia-Weber, *supra* note 33, at 260.

39. *See, e.g.*, Chilkat Indian Village v. Johnson, 870 F.2d 1469, 1475 (9th Cir. 1989) ("In the overwhelming majority of instances, a tribe's enforcement of its ordinances against its members will raise no federal questions at all."); Boe v. Fort Belknap Indian Community, 642 F.2d 276, 279 (9th Cir. 1981) (finding no federal question in the allegation by an Indian plaintiff that tribal election violated tribal law).

40. *See, e.g.*, Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 445 (Stevens, J.), 460 (Blackmun, J.) (1989); Montana v. United States, 450 U.S. 544, 563-64 (1981).

41. *See, e.g.*, Fisher v. District Court, 424 U.S. 382, 387-89 (1976); Ware v. Richardson, 347 F. Supp. 344, 347 (W.D. Okla. 1972) (finding claim by Kiowa members against Kiowa Housing Authority was "an intratribal dispute and as such without the Court's jurisdiction").

42. *See, e.g.*, *Brendale*, 492 U.S. at 425-26; *Montana*, 450 U.S. at 564-66.

43. *See, e.g.*, Arizona Pub. Serv. Co. v. Aspaas, 77 F.3d 1128, 1134 (9th Cir. 1995); Native Village of Tyonek v. Puckett, 957 F.2d 631, 634 (9th Cir. 1992); Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1077 (9th Cir. 1990); *Chilkat Indian Village*, 870 F.2d at 1474-75; Superior Oil Co. v. United States, 798 F.2d 1324, 1329 (10th Cir. 1986).

44. *See* National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 852 (1985).

Court has held that the federal law question of a tribe's legislative or regulatory jurisdiction over nonmembers and the federal law question of a tribe's adjudicatory jurisdiction are functionally the same federal question.[45] The Court specifically found that, as to tribal sovereign authority over nonmembers, "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction."[46]

A tribe's extension of its jurisdiction to nonmembers thus involves both federal and tribal law issues. Whether the tribe has the sovereign authority to bring nonmembers within its judicial, legislative, or regulatory jurisdiction is a question of federal law. If that federal law question is answered affirmatively, however, the actual application of tribal statutes, regulations, or decisional law to the nonmembers is solely a matter of tribal law and does not raise a federal question.[47]

For example, in *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*,[48] the Court held that the Yakama Nation[49] retained, as a matter of federal law, the sovereign right to zone all lands, including lands owned in fee by nonmembers, within the "closed" area of the reservation.[50] Once the tribe's zoning authority has been confirmed under federal law, then the application of the Yakama zoning laws to nonmember land owners in the closed area should be purely a matter of tribal law. That is, the uses that the zoning law does or does not permit, and therefore the uses that the nonmember owners may make of their fee lands, are matters of tribal law for the tribal legislature or zoning board, or, if a dispute arises, the tribal court. No federal question is raised by the tribe's interpretation and application of its zoning laws.

A similar situation arises under the *Williams v. Lee*[51] analysis. In *Williams*, the Court held that state courts did not have jurisdiction over a lawsuit between an Indian defendant and a non-Indian plaintiff arising out of a transaction that occurred on the reservation.[52] Exclusive

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45. *See* Strate v. A-1 Contractors, 117 S. Ct. 1404, 1413 (1997).

46. *Id.*

47. Tribes may, of course, seek to enforce federal law rights against nonmembers as well. In those cases, the application and enforcement of the law will raise federal questions and may be litigated in federal court. *See, e.g.*, Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 553 (9th Cir. 1991). Similarly, tribal claims to possessory rights in property under treaties, statutes, and federal Indian common law raise federal questions. *See, e.g.*, County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234-35 (1985); Pit River Home & Agric. Coop. Ass'n v. United States, 30 F.3d 1088, 1097 (9th Cir. 1994); Nez Perce Tribe v. Idaho Power Co., 847 F. Supp. 791, 799-800 (D. Idaho 1994).

48. 492 U.S. 408 (1989).

49. The Yakama Nation officially changed the spelling from "Yakima" in 1994. *See "Yakamas" Alter Spelling of Tribe*, SEATTLE TIMES, Jan. 26, 1994, at B2.

50. *See id.* at 434 (Stevens, J.).

51. 358 U.S. 217 (1959).

52. *See id.* at 223.

jurisdiction, the Court determined, belonged to the tribal court.[53] By holding that the tribal court had exclusive jurisdiction over the lawsuit, the Court necessarily contemplated that the merits of the lawsuit—whether the non-Indian plaintiff could collect a debt that the Navajo defendants allegedly owed—would be determined under Navajo law. In a case in which the state court has no jurisdiction, on the ground that state court jurisdiction would infringe on tribal self-government,[54] state substantive law is manifestly inapplicable. Tribal law must control the substantive determination of the tribal lawsuit.

In the process, of course, the Court approved the application of tribal substantive law to the resolution of disputes between Indians and non-Indians in tribal court. The Court noted that proper respect for tribal sovereignty demanded that a lawsuit against a tribal member for a cause of action arising in Indian country be within the exclusive jurisdiction of the tribal court.[55] In order to preserve the right of the tribe "to make its own laws and be ruled by them,"[56] the Indian defendant could only be subject to tribal court jurisdiction. And thus, as noted, the Indian defendant could only be subject to tribal substantive law. But it is impossible to apply tribal law to the Indian defendant without also applying tribal law to the non-Indian plaintiff. The Court thus necessarily determined that a nonmember plaintiff in the *Williams v. Lee* situation is subject to both tribal court adjudicatory jurisdiction and tribal decisional law.[57]

Thus, the right of the non-Indian to collect on the debt would be determined under tribal law. If the tribal court ruled against the non-Indian plaintiff, the creditor could not seek review in federal court under a federal question theory. Once the sovereign right of the tribe to extend its laws to nonmembers is established as a matter of federal law, as it was in *Williams v. Lee*, only tribal law determinations remain in the resolution of the lawsuit.

Tribal court adjudications involving nonmember parties are thus messy affairs. Any given case may raise the issue of whether tribal court

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53. *See id.*

54. *See id.* at 218-20. The Court also remarked at several points in the opinion that Congress had neither interfered with the power of the tribal courts nor given judicial jurisdiction to the states. *See id.* at 221-23.

55. *See id.* at 223.

56. *Id.* at 220.

57. The Court focused on the locus of the cause of action and the status of the defendant. "It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." *Id.* at 223. Nonetheless, the clear implication of the case is that because tribal law applies in those situations, it applies to non-Indian as well as Indian parties. *See supra* text accompanying notes 51-57.

jurisdiction is proper as a matter of federal law.[58] It may also raise the issue of whether tribal court jurisdiction over the nonmember is proper as a matter of tribal law, depending upon the wording and reach of tribal constitutional provisions and statutes.[59] In addition, the case may raise the issue of whether tribal legislative or executive power over the nonmember party is proper as a matter of federal law.[60] And finally, the case may raise the tribal law issues inherent in the application of tribal constitutional provisions, statutes, common law, and custom to the resolution of the dispute.

When a federal court on post-exhaustion review fails to conscientiously distinguish between these issues of federal law and tribal law, the result is not only doctrinal confusion but serious encroachment upon the proper role of the tribal courts. The prime example is *Arizona Public Service Co. v. Aspaas*,[61] in which the federal court said it was deciding a federal question but in fact relitigated an issue already decided under tribal law.[62]

The substantive issue in *Aspaas* was whether the Navajo Preference in Employment Act (NPEA) applied to a lessee's power plant located on tribal trust land.[63] The lessee, Arizona Public Service, claimed that the Navajo Nation had waived its right to regulate employment at the plant under the express terms of the lease documents.[64] The Navajo Labor Relations Board ruled against the lessee, and the Navajo Supreme Court affirmed.[65] On post-exhaustion review, the Navajo Nation argued that the tribal courts had decided, as a matter of tribal law, the meaning of the

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58. As noted, however, that federal question has been resolved in favor of tribal court jurisdiction in lawsuits between members of the tribe and in *Williams v. Lee*-type adjudications. *See supra* text accompanying notes 39-41.

59. Although most tribal courts are courts of general jurisdiction, some tribes have jurisdictional limits in their governing laws. See the discussion of *Heinert v. Oglala Sioux Tribe*, 14 Indian L. Rep. 3033 (D.S.D. 1985) and *Twin City Construction Co. v. Turtle Mountain Band of Chippewa Indians*, 866 F.2d 971 (8th Cir. 1989) *infra* at text accompanying notes 111-22.

60. As noted earlier, the Court in *A-1* may have simplified this inquiry. *See supra* note 20. Under the Court's ruling that a tribe's adjudicatory jurisdiction over a nonmember party is coterminous with the tribe's legislative jurisdiction over that same person, the federal question component of tribal court proceedings may have been compressed into a single inquiry.

61. 77 F.3d 1128 (9th Cir. 1996).

62. *See id.* at 1129.

63. *See id.* at 1130.

64. *Id.*

65. *See id.* at 1131 (citing Arizona Pub. Serv. Co. v. Office of Navajo Labor Relations, 17 Indian L. Rep. 6105 (Navajo 1990)). The Navajo Supreme Court decision addressed two major issues. First, the court held that the Navajo Nation retained the sovereign power to regulate employment practices. *See Arizona Pub. Serv.*, 17 Indian L. Rep. at 6106-11. Second, the court ruled that the Navajo Labor Relations Board properly interpreted Navajo statutes to prohibit discrimination on the basis of marital status. *See id.* at 6111-13. The Navajo Supreme Court thus dealt with both federal law and tribal law questions.

lease terms between the tribe and its lessee.[66] The federal court, however, expressly rejected the tribe's assertion and stated instead that the issue was the extent to which a tribe "can apply tribal law to regulate the activities of a non-Indian."[67] And that issue, the court held, was a federal question within the jurisdiction of the federal court.[68]

The primary problem with the court's approach is that its statement of the federal question issue did not reflect the issue it actually decided. The precise issue the federal court decided was "whether the Navajo Nation has agreed to a valid waiver of such a right" to regulate the lessee's employment practices.[69] The court thus transformed a simple contract interpretation issue—whether the lease documents contained a clear waiver—into a question of federal law.

That transformation of a tribal law issue into a federal law issue has three possible explanations. The first, that federal approval of the lease documents transformed any interpretation of those documents into a federal law issue, was partially rejected by the federal court itself.[70] The Navajo Nation pointed to existing Ninth Circuit precedent that federal approval of a lease does not create federal jurisdiction.[71] Although the *Aspaas* court did not overrule its existing caselaw, it distinguished its prior case as involving a "distinctly tribal issue," whereas the current dispute did "not concern tribal self-governance."[72] Accordingly, it found the federal nature of the lease "highly probative," but not dispositive of the federal question issue.[73]

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66. *See Aspaas*, 77 F.3d at 1132-33. Because the issue was one of "tribal contract law" already addressed by the Navajo courts, the tribe contended that the federal court lacked subject matter jurisdiction to relitigate the lessee's claim. *Id.* at 1132.

67. *Id.* at 1131; *see also* Nevada v. Hicks, 944 F. Supp. 1455, 1461 (D. Nev. 1996) (noting that a federal court defers to determinations of tribal law "unless they implicate substantial federal questions").

68. *See Aspaas*, 77 F.3d at 1134. Part IV.B. of this Article addresses the legitimacy of federal courts, on post-exhaustion review, reaching the merits of the tribal court's decision.

69. *Id.*

70. The Secretary of the Interior approved the lease documents. *See id.* at 1130.

71. *See id.* at 1133 (citing Littell v. Nakai, 344 F.2d 486 (9th Cir. 1965)).

72. *Id.* The court's assertion that the applicability of tribal law to a lessee of tribal trust land "does not concern tribal self-governance" is extraordinary. *Id.* The Supreme Court has time and time again, including at least one case involving the Navajo Nation, affirmed the inherent right of Indian tribes to regulate lessees of their lands. *See, e.g.*, Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). As the Court expressly noted in *Montana v. United States*, 450 U.S. 544, 565 (1981): "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."

73. *See Aspaas*, 77 F.3d at 1133.

A second possible explanation is that the federal court believed the situation in *Aspaas* paralleled that in *Merrion v. Jicarilla Apache Tribe*,[74] because in both cases the tribe imposed on a non-Indian lessee a tribal law enacted after the lease was approved.[75] But the parallel does not hold. In *Merrion*, the issue was whether an Indian tribe retains its regulatory authority over non-Indian lessees of tribal lands or whether the lease terms govern the totality of the relationship.[76] The Supreme Court held that tribes retain their sovereign power to regulate lessees even after the tribe had entered into the lease.[77] But in *Aspaas*, as noted above, the question of the Navajo Nation's authority to enact the NPEA and apply it to lessees of tribal lands was not at issue. The question decided by the federal court, rather, was whether the lease contained a clear waiver of the tribe's right to apply the NPEA to that particular lessee.[78] In fact, the *Aspaas* court expressly declined to rule on "the Navajo Nation's inherent power to regulate employment relations of a non-Indian employer and Indian employees"—the *Merrion* issue—because it found "the dispositive question in this case" was whether the lease documents contained a waiver.[79]

The third possible explanation is more unprincipled, even if more likely and perhaps more understandable. The federal court in *Aspaas* obviously believed that the tribal court was simply and willfully wrong in its interpretation of the lease terms.[80] But the federal court could only "correct" the tribal court, without doing violence to the established standard of review,[81] if it transformed the issue into one of federal law. That explanation, however, leaves federal courts able to defer to tribal determinations of tribal law only when the federal court agrees with the tribal court determination. When the federal court disagrees, it can create a federal question to review de novo. And that is no deference at all.

The *Aspaas* approach thus undermines every reason for the development and protection of the tribal courts. It reduces the tribal courts to

74. 455 U.S. 130 (1982).

75. *See Merrion*, 455 U.S. at 135-37; *Aspaas*, 77 F.3d at 1131.

76. *See Merrion*, 455 U.S. at 147-48.

77. *See id.* at 144-45. The contrary argument, the Court noted, confused the tribe's dual roles as mineral owner and as government. *See id.* at 145. An Indian tribe does not abandon its sovereign powers by failing to reserve them in a commercial contract, and the lessees thus remain subject to subsequent governmental action such as the levy of severance taxes in *Merrion*. *See id.* at 146-47.

78. *See Aspaas*, 77 F.3d at 1134-35.

79. *Id.* at 1134. The court assumed for purposes of its decision that such tribal authority did exist. *See id.* Under *Merrion*, the tribal authority to regulate lessees of tribal lands appears well-established. *See Merrion*, 455 U.S. at 144. The *Aspaas* court's waffling on the issue is therefore puzzling.

80. *See Aspaas*, 77 F.3d at 1134-35.

81. *See infra* Part III.

little more than factfinders for the federal courts on post-exhaustion review. It discourages tribal courts from interpreting and creating a distinct body of tribal law. And it treats tribal court decisions as all but irrelevant if the federal court disagrees with the outcome.

Federal courts must do a better job of differentiating between tribal law and federal law than the Ninth Circuit did in *Aspaas*. In particular, federal courts must resist the temptation to turn tribal law issues into federal questions when they disagree with the tribal court's ruling on tribal law. Without that restraint, tribal court jurisprudence cannot prosper. Without the willingness of the federal courts to meticulously distinguish between tribal law and federal law, the "process of colonization" will indeed be complete.[82]

III. STANDARD OF REVIEW

As noted, the tribal exhaustion doctrine contemplates some level of federal court review.[83] Tribal court decisions are thus not treated like state court decisions in cases where federal courts abstain in favor of state courts. As Professor Clinton explains:

> If a state court had ruled that it had subject matter jurisdiction over a controversy, the question might be reviewed on direct appeal to the United States Supreme Court if the alleged subject matter jurisdiction defect raised a federal question. Since the final judgment would be accorded full faith and credit, there would be absolutely no possibility of initiating a new action in federal court to attack that ruling.[84]

The same is not true of tribal court decisions. A dissatisfied litigant may go to federal district court to seek review at least of the question whether the tribal court's exercise of jurisdiction was proper under federal law.[85] To that extent, then, the federal district courts act as appellate courts for tribal judicial decisions.

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82. *See* Pommersheim, *supra* note 31, at 420.

83. *See* National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856-57 (1995).

84. Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 150 (1993).

Some scholars call for a similar approach to tribal court decisions: review only on a writ of certiorari to the Supreme Court of the United States on the ground that certiorari review most respects tribal sovereignty. *See* Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 893 (1990); Reynolds, *supra* note 22, at 601. Others argue for the elimination of Supreme Court jurisdiction over Indian law cases, presumably including review of tribal court decisions, and the creation of a federal Indian Court of Appeals. *See* Michael C. Blumm & Michael Cadigan, *The Indian Court of Appeals: A Modest Proposal to Eliminate Supreme Court Jurisdiction over Indian Cases*, 46 ARK. L. REV. 203, 232 (1993).

85. Part IV, *infra*, explores the scope of the federal courts' review power.

At the same time, however, the exhaustion doctrine also contemplates some level of federal court deference to tribal court decisions. The Court in *Iowa Mutual* spoke of "proper deference to the tribal court system."[86] In *National Farmers*, the Court noted that one reason for the exhaustion doctrine was to allow tribal courts to "provide other courts with the benefit of their expertise."[87] The Court thus could not have intended federal courts to ignore tribal court rulings and simply hear post-exhaustion cases anew.

In response to the paradoxical demands for both "proper deference" and review, a consensus has begun to emerge in the federal courts regarding the appropriate standard of review for tribal court decisions. Based largely on the leading case of *FMC v. Shoshone-Bannock Tribes*,[88] federal courts have adopted a three-part approach to post-exhaustion review. In descending order of deference, federal courts apply different standards of review to tribal court determinations of tribal law, facts, and federal law.[89]

The standard of review for tribal law questions is full deference, for findings of fact, slightly less deference, and for federal law questions, no deference at all.[90] Although the latter two standards are subject to the well-deserved criticisms that they avoid traditional rules of finality of judgments[91] and wrest from tribes the authority to fully determine the governing law in tribal courts,[92] they now appear well-established in federal court jurisprudence.

A. *Tribal Court Determinations of Tribal Law*

The highest degree of federal court deference is given to tribal court determinations on questions of tribal law. "[B]ecause tribal courts are best qualified to interpret and apply tribal law,"[93] the general standard in the lower courts is that tribal court interpretations of tribal law are "bind-

86. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987).

87. *National Farmers*, 471 U.S. at 857.

88. 905 F.2d 1311 (9th Cir. 1990).

89. In so doing, the federal courts presume that all tribal court determinations fall within one category or another. No federal court has addressed the issue of the appropriate standard of review for mixed questions of law and fact. Professor Skibine has argued that federal courts should apply the same standard of review given to federal agency determinations: whether the tribal court's ruling on mixed questions is reasonable or rational. *See* 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, 218-21 (1994).

90. *See infra* notes 93-97, 133-37, 151-56 and accompanying text.

91. *See* Clinton, *Tribal Courts*, *supra* note 84, at 880.

92. *See* POMMERSHEIM, *supra* note 1, at 96.

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

ing" on the federal courts.[94] In *City of Timber Lake v. Cheyenne River Sioux Tribe*,[95] for example, the appellees alleged the tribal court did not have authority under the tribal constitution to exercise personal jurisdiction over them.[96] The tribal courts, however, interpreted the tribal constitution to permit the exercise of personal jurisdiction, and the Eighth Circuit held that "we defer to the tribal courts' interpretation" of tribal laws.[97] The court specifically noted that the standard of review is unaffected by the fact that the tribal law applies to non-Indians.[98] Tribal court determinations of tribal law thus are binding on federal courts whether tribal law is interpreted relative to tribal members, nonmember Indians, or non-Indians.

The standard of absolute deference to tribal court rulings on tribal law is fully consistent with the policies articulated in *National Farmers* and *Iowa Mutual*. In both cases, the Supreme Court relied upon the congressional commitment to tribal self-government and self-determination.[99] In *Iowa Mutual*, the Court stated that tribal courts are "vital" to the exercise of tribal self-government,[100] noting specifically that the exercise of federal jurisdiction "over matters relating to reservation affairs" may adversely affect the role of tribal courts in furthering tribal sovereignty.[101]

Moreover, in counseling deference to rulings on tribal law, the Court did not create new doctrine but adhered to a century-old principle. In

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94. *See* Sanders v. Robinson, 864 F.2d 630, 633 (9th Cir. 1988); Nevada v. Hicks, 944 F. Supp. 1455, 1464 (D. Nev. 1996). Other federal courts do not use the word "binding," but speak instead of the necessity to defer to tribal court determinations of tribal law. *See* City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554, 559 (8th Cir. 1993); *see also* Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294, 1300 (8th Cir. 1994) (stating that "determinations of Tribal law should be accorded more deference" than de novo review).

95. 10 F.3d 554 (8th Cir. 1993).

96. *See id.* at 558-59. The appellees consisted of an American Legion club, a non-Indian individual, and three South Dakota cities, all of which operated liquor establishments on fee lands within the Cheyenne River Sioux Reservation. *See id.*

97. *Id.* at 559; *see also Hicks*, 944 F. Supp. at 1461 (deferring to the ruling of the Intertribal Court of Appeals that service of process on a non-Indian, off-reservation defendant was proper under tribal law).

98. *See City of Timber Lake*, 10 F.3d at 559. This is consistent with *Iowa Mutual*. In *Iowa Mutual*, one of the parties to the tribal litigation was a non-Indian (the insurance company), and yet the Court clearly contemplated that tribal law would apply in the resolution of the tribal lawsuit. *See Iowa Mut.*, 480 U.S. at 19; *see also* Williams v. Lee, 358 U.S. 217, 223 (1959) (holding that jurisdiction over a non-Indian, who operates a store on an Indian reservation pursuant to federal statute, lies in the tribal court, not the state court).

99. *See Iowa Mut.*, 480 U.S. at 14-15; National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985).

100. *See Iowa Mut.*, 480 U.S. at 14.

101. *Id.* at 15; *see also supra* text accompanying notes 30-37.

Talton v. Mayes,[102] a defendant in a Cherokee court challenged his indictment on the ground that his grand jury was empaneled under a repealed tribal law.[103] He was indicted in December 1892 by a grand jury of five persons as provided by a May 1892 tribal law, even though a November 1892 law, which did not expressly repeal the May law, provided for grand juries of thirteen persons.[104] The Court explicitly held that interpretations of tribal law—including such questions as whether one tribal statute repealed another or "what was the existing law of the Cherokee nation"—are "solely matters within the jurisdiction of the courts of that nation."[105] The Court endorsed this principle again in 1959, when it ruled that adjudication in a nontribal forum of a claim against a tribal defendant arising in Indian country would infringe on the right of tribes "to make their own laws and be ruled by them."[106]

Nonetheless, the lower federal courts have not always adhered to the standard of deference to tribal court interpretations of tribal law. In two cases within the Eighth Circuit, non-Indian tribal court defendants challenged the tribal courts' exercise of jurisdiction over them.[107] In each case, the tribal laws provided for tribal court jurisdiction over non-Indian defendants who consented to litigation in the tribal courts.[108] In each case, the tribal courts interpreted the tribal laws to extend tribal court jurisdiction over the non-Indian defendants, even though the defendants had not consented to the exercise of judicial jurisdiction.[109] And in each case, the federal district courts overturned the tribal court interpretations of tribal statutes and constitutional provisions delineating the reach of tribal court jurisdiction.[110]

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102. 163 U.S. 376 (1896).

103. *See id.* at 379. The case is more famous, of course, for the defendant's contention that his grand jury was constituted in a manner not consistent with the Fifth Amendment guarantee of due process, and for the Court's holding that the Fifth Amendment does not apply to the Cherokee Nation. *See id.* at 384-85.

104. *See id.* at 378.

105. *Id.* at 385.

106. Williams v. Lee, 358 U.S. 217, 220 (1959).

107. *See* Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294, 1296 (8th Cir. 1994); City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554, 556 (8th Cir. 1993).

108. *See Duncan*, 27 F.3d at 1296; *City of Timber Lake*, 10 F.3d at 559.

109. *See Duncan*, 27 F.3d at 1296; *City of Timber Lake*, 10 F.3d at 559. Although the plain language of the statutes in the two cases seems to bar tribal court jurisdiction, other considerations could lead tribal courts to a different result. For example, language purporting to limit tribal court jurisdiction inserted in tribal constitutions by the Bureau of Indian Affairs rather than by the tribe itself "'ought not be given the force or respect of law.'" Pommersheim, *supra* note 31, at 430 (quoting Thorstenson v. Cudmore, 18 Indian L. Rep. 6051, 6053 (Chey. Riv. Sioux Ct. App. 1991)). Therefore, as Professor Pommersheim notes, tribal courts can legitimately "identif[y] and correct[]" the colonialist legacy remaining in tribal statutes and constitutions. *Id.*

110. *See Duncan*, 27 F.3d at 1295-96; *City of Timber Lake*, 10 F.3d at 559.

In *Heinert v. Oglala Sioux Tribe*,[111] the non-Indian federal plaintiffs argued that the tribal court lacked jurisdiction over them under the tribal constitution and statutes.[112] The tribal court denied their attempt to appear specially to challenge jurisdiction, the tribal appellate court affirmed, and the non-Indians filed suit in federal court to enjoin the tribal court proceedings.[113] The federal court engaged in de novo interpretation of the tribal laws, finding that statements in tribal statutes and the constitution that non-Indians must consent to jurisdiction deprived the tribal courts of jurisdiction in this case over the non-Indians, none of whom had consented.[114] The federal court noted that the tribe had declined to brief the merits of the federal court action, and thus "this court is simply without the benefit of their input on the issues in this case."[115] But the tribal court *had* given its input; by requiring the non-Indians to appear in tribal court, it had interpreted the Oglala laws to permit that exercise of jurisdiction. It may have declined to file a brief in federal court precisely because its ruling on tribal law should have been dispositive. Nonetheless, the federal district court engaged in its own interpretation, without ever explaining why the interpretation of tribal law created a federal question.[116]

The Eighth Circuit subsequently engaged in similar error in the *Twin City* cases.[117] A Turtle Mountain Chippewa statute, like the Oglala laws at issue in *Heinert*, provided for judicial jurisdiction over non-Indian defendants who submitted to the jurisdiction of the courts.[118] The tribal court held that the Twin City Construction Company had not submitted itself to tribal jurisdiction, but the tribal appellate court reversed, and Twin City sought an injunction in federal court.[119] The federal district court ruled that Twin City had not submitted itself to the jurisdiction of the tribe "within the meaning of the tribal code,"[120] and a divided en banc

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111. 14 Indian L. Rep. 3033 (D.S.D. 1985).

112. *See id.* at 3034. The federal plaintiffs consisted of an electric association and its officers and directors. *See id.* at 3033.

113. *See id.* at 3034.

114. *See id.* at 3034-35.

115. *Id.* at 3034.

116. *See id.* The court stated that it had federal question jurisdiction over the action under 28 U.S.C. § 1331. *See id.* at 3034. But the only issue raised or resolved in the federal court was the interpretation of the Oglala laws. Considerable authority supports the proposition that the interpretation of tribal law does not raise a federal question. *See supra* Part II.

117. *See* Twin City Constr. Co. v. Turtle Mountain Band of Chippewa Indians, 911 F.2d 137 (8th Cir. 1990) [hereinafter *Twin City II*]; Twin City Constr. Co. v. Turtle Mountain Band of Chippewa Indians, 866 F.2d 971 (8th Cir. 1989) [hereinafter *Twin City I*].

118. *See Twin City II*, 911 F.2d at 138.

119. *See id.*

120. *See id.* The en banc decision in *Twin City I* does not explain its reasoning, and the district court opinion was not published.

Eighth Circuit affirmed in *Twin City I*.[121] While the federal lawsuit was pending, the tribe amended its statutes to provide for jurisdiction in cases such as the Twin City litigation; the amendment provided that it applied to pending cases.[122] On a motion to alter or amend the judgment, the Eighth Circuit in *Twin City II* dissolved the injunction against proceedings in tribal court on the ground that the basis for the injunction no longer existed.[123]

Both *Heinert* and the *Twin City* cases predated the development of the "binding" standard for post-exhaustion review of tribal law determinations.[124] Moreover, more recent Eighth Circuit decisions deferred to the tribal courts' interpretations of tribal law.[125] One of the recent decisions was *City of Timber Lake*, in which the court deferred to the tribal court's interpretation of the tribal constitution as extending tribal adjudicatory jurisdiction over the non-Indian appellees.[126] The Eighth Circuit thus seems to have rejected its approach in the *Twin City* cases not only in theory, but also in a factual situation nearly identical to that in *Twin City*.

While it is therefore unlikely that the direct interpretation of tribal law contrary to tribal court rulings would occur today,[127] courts may nonetheless attempt to avoid deference by redefining the issue before them. In *Arizona Public Service Co. v. Aspaas*,[128] for example, the federal court reserved for itself the determination of whether a tribal court decision involved tribal or federal law.[129] By transforming an issue of lease interpretation under tribal law into an issue of tribal governmental authority under federal law, the *Aspaas* court avoided any need to defer to the tribal court's determinations.

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121. *See Twin City I*, 866 F.2d at 972.

122. *See Twin City II*, 911 F.2d at 139.

123. *See id.* at 139-40. The Eighth Circuit thus twice engaged in its own interpretation of tribal law: in the first instance contrary to the highest tribal court's interpretation and in the second instance before any tribal court could rule on the meaning of the amended tribal law. The fact that the second federal interpretation protected tribal jurisdiction makes it no less intrusive than the first.

124. The standard certainly existed in the law at the time *Twin City I*, *Twin City II*, and *Heinert* were decided. *See* Sanders v. Robinson, 864 F.2d 630, 633 (9th Cir. 1988). But in the post-exhaustion context, the standard that tribal court rulings on tribal law are binding on the federal courts surfaced in the mid-1990s. *See* cases cited *supra* note 94.

125. *See* Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294, 1300 (8th Cir. 1994); City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554, 559 (8th Cir. 1993).

126. *See City of Timber Lake*, 10 F.3d at 559. *See supra* text accompanying notes 95-98 for discussion of *City of Timber Lake*.

127. As one commentator notes, "it is a pure contradiction in terms for a federal court to declare that tribal law is not precisely what the tribe's high court announces." Joranko, *supra* note 21, at 298.

128. 77 F.3d 1128 (9th Cir. 1996).

129. *See id.* at 1132. *See supra* text accompanying notes 61-69 for discussion of the *Aspaas* decision).

Aspaas has obvious factors in common with *Heinert* and *Twin City I.* In each case the tribal court applied tribal law: in *Aspaas*, it was the tribal common law of contract;[130] in *Heinert* and *Twin City I*, it was the tribal statutory and constitutional law of judicial jurisdiction.[131] In each case the tribal court engaged in an interpretation of tribal law that the federal court manifestly thought was wrong.[132] And thus in each case, the federal court ignored the doctrine of deference to tribal decision-making and tribal determination of tribal law, and substituted its own "correct" interpretation of the law. In *Heinert* and *Twin City I*, the arrogation of power to the federal courts was overt. There was no pretense of deference. *Aspaas*, on the other hand, the only one of the three cases decided after the establishment of the post-exhaustion review standard of "binding," took a more subtle approach. In that case, the federal court bypassed the issue and hid the real agenda by defining the issue as one of federal rather than tribal law.

Aspaas is thus the more dangerous decision. There is no indication that federal courts today would follow the approach in *Heinert* and *Twin City I* of engaging in wholesale reinterpretation of tribal law in post-exhaustion review cases. But *Aspaas* opens the door to the same result: redefine the tribal law issue as one of federal law and all necessity to defer to the tribal court decision disappears. Under *Aspaas*, federal courts may thus engage in substantial de novo interpretation of tribal law while appearing to adhere to the articulated standard that tribal rulings on tribal law are binding on the federal courts.

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130. *See Aspaas*, 77 F.3d at 1134.

131. *See Twin City I*, 866 F.2d at 971; Heinert v. Oglala Sioux Tribe, 14 Indian L. Rep. 3033, 3034-35 (D.S.D. 1985).

132. In a recent article, Professor Getches argues that the Supreme Court has abandoned foundationalist principles of federal Indian law in a substantial number of cases impacting non-Indian interests and substituted a subjectivist approach. *See generally* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996). "These judicial attempts to anticipate and alleviate cultural conflict have succeeded in curbing the authority of tribal institutions whose actions appear to encroach upon the property interests or values of non-Indians." *Id.* at 1594.

Although Professor Getches was speaking of the Supreme Court, his insights may also explain the decisions in *Aspaas, Heinert*, and *Twin City I.* Rather than adhere to the foundationalist principle of deference to tribal courts on tribal law laid down from *Talton* through *National Farmers* and *Iowa Mutual*, the federal courts engaged in a subjectivist approach designed to protect the non-Indian cultural values and norms. The federal courts believed that the tribal courts reached the "wrong" decisions on the tribal law, and that those wrong decisions too greatly impacted the non-Indian litigants' rights. And so the foundationalist principle was abandoned in order to reach a result the federal courts perceived, subjectively if sincerely, as "correct."

B. Tribal Court Findings of Fact

Tribal court findings of fact are reviewed by federal courts for clear error.[133] In the leading case of *FMC v. Shoshone-Bannock Tribes*,[134] the Ninth Circuit ruled that a clearly erroneous standard would further one of the policies behind the exhaustion rule: "the orderly administration of justice in the federal court."[135] Adherence to this policy, the court explained, requires that tribal courts develop the factual record and that federal courts, in turn, "respect[] the factfinding ability of the court of first instance."[136] Moreover, the court noted, the clearly erroneous standard implements the rule, developed in *National Farmers* and *Iowa Mutual*, that "federal courts must show some deference" to tribal court determinations.[137]

In addition, the clear error standard complies in part, if only in part, with the Court's admonition in *Iowa Mutual* that unless a tribal court lacks jurisdiction to hear the lawsuit, the federal court should not relitigate the merits.[138] By restricting their review of factual matters to clear error, the federal courts refrain from, for example, conducting new trials, second-guessing tribal juries, determining the credibility of witnesses or the weight of the evidence, or deciding jurisdictional facts.[139] The standard of review helps ensure that federal courts act more as appellate review panels for federal questions than as trial courts looking anew at the lawsuit.

Finally, the clear error standard helps ensure federal court deference to tribal court determinations of tribal law.[140] It would be anomalous if a federal court could redetermine the factual underpinnings of a lawsuit, but was required to defer to the tribal court on tribal law. For example, suppose a tribal court in a tort case found the defendant careless and therefore liable for the plaintiff's injuries. Suppose further that the legal

133. *See* FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1313 (9th Cir. 1990). Relying on *FMC*, the Eighth and Tenth Circuits have adopted the identical standard. *See* Mustang Prod. Co. v. Harrison, 94 F.3d 1382, 1384 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1288 (1997); Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294, 1300 (8th Cir. 1994).

134. 905 F.2d 1311 (9th Cir. 1990).

135. *Id.* at 1313 (quoting National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985)).

136. *Id.*

137. *See id.* The court believed, however, that this policy of deference should extend only to tribal factfinding and not to tribal court determinations of federal law. *See id.* (noting that the proper review on federal questions is de novo); *see also infra* text accompanying notes 151-58.

138. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18-19 (1987).

139. *See* Alaska v. Babbitt, 75 F.3d 449, 451 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 70 (1996) (explaining that a district court's underlying factual findings on jurisdictional issues are accepted unless clearly erroneous).

140. *See supra* Part III.A.

holding was based on the tribal court's assessment of the parties' relative credibility: it found the plaintiff's version of the facts credible and the defendant's not credible. If the federal court could review the factual findings of the tribal court de novo, it could conceivably find the defendant's version more credible. Nonetheless, the federal court would be required to defer to the tribal court's ruling on liability, even though it rejected the factual basis for that conclusion of law.

The clearly erroneous standard adopted by the federal courts minimizes the potential for such incongruous outcomes, although it does not avoid them altogether. To truly defer to tribal courts, promote tribal court expertise and factfinding, and eliminate conflicts, the federal courts must adopt a standard that tribal court findings of fact, like tribal court determinations of tribal law, are binding on post-exhaustion review.[141] Nonetheless, the only federal court to suggest that tribal findings of fact are binding used that standard as a basis to reject tribal court exhaustion.[142]

In *Vance v. Boyd Mississippi, Inc.*,[143] the court refused to require the plaintiff to exhaust tribal court remedies.[144] In so holding, the court stated that if exhaustion were required, any factual issues determined by the tribal court could not be challenged in a post-exhaustion federal proceeding.[145] That in turn would lead to piecemeal litigation: the federal court could review questions of federal law, but would be bound by the tribal court's factual determinations.[146] Although the fear of piecemeal litigation was only one factor in the federal court's refusal to order exhaustion in *Vance*,[147] the court misperceived the entire basis of the tribal exhaustion doctrine. That doctrine is not intended to avoid

141. *See* Joranko, *supra* note 21, at 299-306 (strongly advocating this approach).
142. *See* Vance v. Boyd Miss., Inc., 923 F. Supp. 905 (S.D. Miss. 1996).
143. 923 F. Supp. 905 (S.D. Miss. 1996).
144. *See id.* at 911.
145. *See id.* at 912-13.
146. *See id.*
147. *See id.*

piecemeal litigation,[148] but to protect the integrity of tribal courts and their "vital role" in tribal self-government.[149]

The decision in *Vance* has less to do with the proper standard of federal court review of tribal court findings of fact than it does with the court's obvious hostility to the exhaustion doctrine. Nonetheless, the *Vance* decision serves as a reverse illustration of Professor Pommersheim's paradoxes:[150] because of its fear that it would not be able to review the tribal court's findings, the federal court refused to recognize the proper role of the tribal court under the exhaustion doctrine.

C. *Tribal Court Determinations of Federal Law*

On post-exhaustion review, federal courts will review tribal court rulings on federal law de novo.[151] This standard, announced in the leading Ninth Circuit case of *FMC v. Shoshone-Bannock Tribes*,[152] has been expressly adopted by the Eighth and Tenth Circuits as well.[153] Moreover, the Supreme Court implicitly sanctioned the de novo standard of review in its only post-exhaustion opinion. Without stating a standard of review, the Court in *Strate v. A-1 Contractors*[154] engaged in de novo review of the federal law issues raised by the tribal court's assumption of jurisdiction.[155] Similarly, a number of lower federal courts within the

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148. The court in *Vance* took the piecemeal litigation factor from the standards for *Colorado River* abstention, which courts use to determine whether a federal court should stay proceedings when a parallel state court proceeding is pending. *See Vance*, 923 F. Supp. at 911 (citing Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976)). The discussion of *Colorado River* abstention factors in *Vance* and the court's use of those factors to avoid tribal court exhaustion, *see Vance*, 923 F. Supp. at 912-13, illustrate the dangers of importing state abstention law into the tribal exhaustion doctrine. *Cf.* Lynn H. Slade, *Dispute Resolution in Indian Country: Harmonizing* National Farmers Union, Iowa Mutual, *and the Abstention Doctrine in the Federal Courts*, 71 N.D. L. REV. 519 (1995) (arguing that federal-state abstention principles should be applied in the federal-tribal context).

149. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14-15 (1987); *see also* National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856-57 (1985).

150. The paradoxes involve the federal courts' insistence on greater review powers as they recognize an increased role for tribal courts. *See* POMMERSHEIM, *supra* note 1, at 95-96; *see also* Frank Pommersheim, *Tribal Court Jurisprudence: A Snapshot from the Field*, 21 VT. L. REV. 7, 19-20 (1996) ("[Y]ou're nobody until you're somebody.").

151. *See, e.g.*, FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1314 (9th Cir. 1990).

152. 905 F.2d 1311 (9th Cir. 1990); *accord* Nevada v. Hicks, 944 F. Supp. 1455, 1464 (D. Nev. 1996).

153. *See* Mustang Prod. Co. v. Harrison, 94 F.3d 1382, 1384 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1288 (1997); Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294, 1300 (8th Cir. 1994).

154. 117 S. Ct. 1404 (1997).

155. *See id.*

Eighth and Ninth Circuits have simply used a de novo approach without articulating a standard of review.[156]

The reasoning in *FMC* for the adoption of a de novo standard was sparse. Rejecting the tribes' proposed standards of clearly erroneous or arbitrary and capricious,[157] the court offered two reasons for choosing de novo review:

> As to legal questions, the *[National] Farmers Union* Court stated that the fact that a tribal court reviews a question first is helpful because other courts might "benefit [from] their expertise." This indicates that federal courts have no obligation to follow that expertise, but need only be guided by it. Moreover, federal courts are the final arbiters of federal law, and the question of tribal court jurisdiction is a federal question. Federal legal questions should therefore be reviewed *de novo*.[158]

Neither explanation is satisfactory. First, the *FMC* court stated that federal courts should be "guided" by tribal court rulings on federal law.[159] But a de novo standard that not only permits, but requires, federal courts to decide federal questions anew does not allow for guidance. On post-exhaustion review under a de novo standard, federal courts may agree with tribal courts on federal questions, but tribal court expertise and guidance are not part of the federal court's analysis.

Second, the *FMC* court noted that "federal courts are the final arbiters of federal law."[160] Although technically correct, that statement is overbroad. Basic federalism principles provide that state courts cannot interpret federal law inconsistently with the interpretations offered by the federal courts.[161] Similarly, the plenary power doctrine of federal Indian

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156. *See, e.g.*, Yellowstone County v. Pease, 96 F.3d 1169, 1170-71 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1691 (1997); City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554, 559 (8th Cir. 1993); Montana v. Gilham, 932 F. Supp. 1215, 1218-19 (D. Mont. 1996).

157. *See FMC*, 905 F.3d at 1313.

158. *Id.* at 1313-14 (alterations in original) (citations omitted).

159. *See id.* at 1314.

160. *Id.*

161. State courts do not always pay attention to this rule, especially in Indian law cases. In the Pacific Northwest fishing rights litigation, for example, the Washington Supreme Court ruled that state agencies could not comply with a federal court order issued to protect tribal treaty rights to fish. *See* Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson, 571 P.2d 1373, 1387-88 (Wash. 1977), *vacated by* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); Puget Sound Gillnetters Ass'n v. Moos, 565 P.2d 1151, 1157 (Wash. 1977), *vacated by* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979). In *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), the Supreme Court not only validated the federal courts' interpretation of the treaties, but was also at pains "to remove any doubts about the federal court's power to enforce its orders." *Id.* at 674.

More recently, however, the Supreme Court of the United States rewarded a state court for ignoring a federal court decision on the identical issue. In *Ute Indian Tribe v. Utah*, 773 F.2d 1087, 1093 (10th Cir. 1985), *cert. denied*, 479 U.S. 994 (1986), the federal court ruled that the town of

law provides that tribal courts are subject to the same constraint.[162] Litigants in state court who believe the state court improperly interpreted federal law can seek review in the Supreme Court. In that sense, certainly, federal courts serve as the "final arbiters" of federal questions. But litigants in state court do not have a right to seek review of the state court decision in the lower federal courts. Unless the Supreme Court grants review, the state ruling on federal law stands. Federal district courts are not empowered to review every state court ruling on federal law. But under the de novo standard, federal district courts *are* potentially empowered to review every tribal court ruling on federal law. Federal courts thus act as "final arbiters" of federal questions to a far greater extent when those federal questions are decided by tribal, rather than state, courts.

Nonetheless, it is difficult to imagine federal judges voluntarily giving up the right to determine federal questions de novo. When the Supreme Court does review a state court's determination of federal law, it does so de novo.[163] When a federal appeals court reviews a federal district court's ruling on a federal question, it does so de novo.[164] De novo review on federal law issues previously determined by another court is thus the only standard with which the federal courts are familiar and comfortable. Given that the Supreme Court has authorized lower federal court review of at least some federal questions decided by tribal courts,[165]

Myton had not been disestablished from the Uintah Reservation. Subsequently, the Utah Supreme Court held in the course of a criminal proceeding that the town had been disestablished. *See* State v. Perank, 858 P.2d 927, 953 (Utah 1992). The Supreme Court sided with the state, refusing to address the issue of collateral estoppel because the issue was not raised in the petition for certiorari. *See* Hagen v. Utah, 114 S. Ct. 958, 964 (1994). Eyeing Utah's success, the state of South Dakota recently tried the same end-run around a federal court decision holding that the Yankton Sioux Reservation has not been disestablished. *See* Yankton Sioux Tribe v. Southern Mo. Waste Management Dist., 99 F.3d 1439, 1457 (8th Cir. 1996) (concluding that the reservation has not been disestablished), *cert. granted*, 117 S. Ct. 2430 (June 9, 1997); State v. Greger, 559 N.W.2d 854, 867 (S.D. 1997) (concluding that the reservation has been diminished). In light of *Hagen*, the fact that the Supreme Court granted certiorari is not encouraging. For criticism of the *Hagen* decision, see Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 38-43 (1995).

162. *See, e.g.*, POMMERSHEIM, *supra* note 1, at 86.

163. *See, e.g.*, *Hagen*, 114 S. Ct. at 965 (using de novo review of state court determination of reservation diminishment); *Washington State Commercial*, 443 U.S. at 674 (using de novo review of both state and federal court decisions on Indian treaty fishing rights).

164. *See, e.g.*, Pit River Home & Agric. Coop. Ass'n v. United States, 30 F.3d 1088, 1095 (9th Cir. 1994).

165. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987). *See generally infra* Part IV.B.2.

As previously noted, some scholars argue that tribal court decisions on federal law should be reviewable only by the Supreme Court of the United States on a writ of certiorari. *See supra* note 84. Although that approach is far preferable, neither the Court nor Congress appears likely to adopt it.

it is probably unrealistic to expect federal courts to defer to tribal courts on those issues.

IV. EXTENT OF REVIEW

Once the federal courts determine the proper standard of review, they are faced with a more complex issue: what exactly are the federal courts entitled to review? When a case comes back into federal court on post-exhaustion review, the federal court is clearly entitled to review the federal question of the tribal court's jurisdiction to hear the lawsuit. But is the federal court also entitled to review other federal questions raised by the case? Is the federal court entitled to review non-federal questions if the case would be properly brought in federal court under diversity jurisdiction? The Supreme Court, in establishing the exhaustion doctrine, offered little coherent insight on these questions.

A. Review of Tribal Court Jurisdiction

The exhaustion doctrine created in *National Farmers* makes the issue of tribal court jurisdiction over nonmember litigants a federal question.[166] The Supreme Court stated that "whether a tribal court has exceeded the lawful limits of its jurisdiction" is a question arising under federal law.[167] Despite that federal question jurisdiction, however, the Court required exhaustion of tribal remedies "before such a claim may be entertained by a federal court."[168] Two years later, *Iowa Mutual* clarified the post-exhaustion review suggested by that statement. The Court expressly held that a tribal court's determination of its jurisdiction may be challenged in federal district court.[169] Thus, in the only post-exhaustion case to reach

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166. As noted earlier, tribal judicial jurisdiction over nonmembers may also raise questions of tribal law, such as the interpretation of tribal statutes and constitutional provisions. *See supra* notes 47-58 and accompanying text. A tribal court's determination of its jurisdiction as a matter of tribal law raises no federal question. *See, e.g.*, Sanders v. Robinson, 864 F.2d 630, 633-34 (9th Cir. 1988) (determining whether tribal court had jurisdiction over divorce and custody action as a matter of federal law, but holding itself bound by tribal court's ruling that tribal court had jurisdiction as a matter of tribal law).

167. *See* National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 853 (1985). Professor Reynolds called this an "astonishingly broad definition of federal question jurisdiction." Reynolds, *supra* note 22, at 599. She critiques it as "a jurisdictional bootstrap, creating federal question jurisdiction for many disputes previously found to be outside the purview of the federal courts." Reynolds, *supra* note 23, at 1135. As Part IV.B. demonstrates, however, federal court jurisdiction under the exhaustion doctrine should not extend beyond traditional questions of federal law.

168. *See National Farmers*, 471 U.S. at 857.

169. *See Iowa Mut.*, 480 U.S. at 19. Actually, a tribal court's *assumption* of jurisdiction may be challenged in federal court. In one case, the tribal court refused on the ground of tribal sovereign

the Supreme Court, *Strate v. A-1 Contractors*,[170] the issue before the federal courts was whether, under federal law, the tribal court had jurisdiction to hear a tort suit between two non-Indian parties arising out of a vehicle accident on a state highway passing through the reservation.[171]

Under *A-1*, the federal question of a tribal court's jurisdiction over a lawsuit involving nonmembers' conduct on fee lands is controlled by the decision in *Montana v. United States*.[172] In *Montana*, the Court outlined an approach to tribal regulatory jurisdiction nonmembers of the tribe conducting activities on nonmember-owned fee lands within reservations.[173] Although tribes may exercise full regulatory authority over tribal members and nonmembers on trust lands, the Court held that tribes are generally divested of regulatory jurisdiction over nonmembers on fee lands.[174] Nonetheless, the Court stated that tribes retain authority even over nonmembers on fee lands in three situations: where Congress has delegated authority to the tribes; where the nonmembers have entered into "consensual relations with the tribe[s] or [their] members;" or where the nonmember conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[175] Although scholars had long argued that a tribe's judicial authority over nonmembers is broader than its regulatory authority,[176] the Court in *A-1* collapsed the two conceptually distinct types of jurisdiction into one. "As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction."[177]

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immunity to take jurisdiction over a lawsuit. *See* Sulcer v. Davis, No. 92-6079, 1993 U.S. App. LEXIS 3457, at *6-8 (10th Cir. Feb. 18, 1993). The plaintiff alleged in federal court that the tribal court improperly dismissed her lawsuit. *See id.* at *6. The federal court held that it could not review the issue as a federal question because "[t]he tribal court did not exceed the lawful limits of its civil subject matter jurisdiction but rather refused to exercise jurisdiction." *Id.* at *7-8.

170. 117 S. Ct. 1404 (1997).

171. *See id.* at 1405-06.

172. 450 U.S. 544 (1981). As noted previously, tribal court jurisdiction over tribal members should not raise any federal question. *See supra* text accompanying notes 39-41.

173. The *Montana* approach to tribal regulatory jurisdiction has been severely criticized. *See, e.g.*, Royster, *supra* note 161, at 43-63. The application of that approach to tribal judicial jurisdiction only worsens its impacts on tribal government.

174. *See Montana*, 450 U.S. at 563-65.

175. *Id.* at 564-66.

176. *See, e.g.*, Frank Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329, 334-35 (1989) (explaining why "[t]ribal legislative and judicial jurisdiction are *not* the same thing").

177. Strate v. A-1 Contractors, 117 S. Ct. 1404, 1413 (1997). The common law rule announced in *A-1* applies in the absence of congressional action. Thus, in *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498 (10th Cir. 1997), the court held that although the Price Anderson Act "on its face provides the sole remedy" for nuclear torts, the Act did not necessarily strip the tribal courts of jurisdiction to adjudicate the nuclear tort claims of tribal members arising out of on-reservation injuries. *Id.* at

Applying the *Montana* test to tribal court jurisdiction on post-exhaustion review, the Court held that the tribal court had no jurisdiction to hear a personal injury action between two non-Indian parties arising out of a traffic accident on a state highway within the reservation borders.[178] Neither party had a consensual relationship with the tribe,[179] and the accident did not have a sufficient impact on tribal sovereign interests because jurisdiction in the case was not "needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them.'"[180] The Court, in other words, treated the lawsuit as a "commonplace state highway accident claim"[181] between two non-Indians, having no substantial relationship to tribal self-government.[182]

Where even "commonplace" actions do present a sufficient nexus to tribal interests, however, tribal jurisdiction should exist. In particular, where one party to the lawsuit is a tribal member, tribal judicial jurisdiction over the lawsuit is necessary to preserve the right of the tribe to make and be governed by tribal law. As the Court held in *Williams v. Lee*,[183] tribal courts must have judicial jurisdiction exclusive of state courts to hear "commonplace" claims against defendants who are tribal members in order to preserve tribal self-government.[184] If tribal court jurisdiction does not also extend to lawsuits brought by tribal members against nonmember defendants, then federal courts are encouraging a race to the courthouse.[185] And that race, because it would make the decisional law dependent on which party filed first, would undermine the right of tribes "to make their own laws and be ruled by them."[186]

Nonetheless, the Ninth Circuit recently held that tribal courts had no subject matter jurisdiction over a lawsuit brought by a member of the tribe against a non-Indian for injuries arising out of a traffic accident on a state highway within the boundaries of the reservation.[187] Seriously

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1504-05. The federal court consequently upheld a stay of the federal case pending the exhaustion of tribal remedies. *See id.* at 1509.

178. The Court held that a state highway right-of-way through the reservation was functionally "land alienated to non-Indians." *A-1*, 117 S. Ct. at 1414.

179. *See id.* at 1415.

180. *Id.* at 1416 (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)).

181. *Id.*

182. In so doing, of course, the Court further undercut the territorial jurisdiction of tribal governments. *See generally* Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1 (1993); Royster, *supra* note 161.

183. 358 U.S. 217 (1959).

184. *See id.* at 223 (collection action by non-Indian store owner for goods sold on credit to tribal members within reservation borders).

185. *See* Sanders v. Robinson, 864 F.2d 630, 634 n.4 (9th Cir. 1988).

186. *Williams*, 358 U.S. at 220.

187. *See Wilson v. Marchington*, 127 F.3d 805, 815 (9th Cir. 1997). *Wilson* was an action to

misreading *A-1*, which concerned only state highway accidents between two nonmembers of the tribe,[188] the court of appeals in *Wilson v. Marchington* apparently found irrelevant the tribal membership of the plaintiff. The court stated that the facts in *Wilson* were "almost precisely" the same as those in *A-1*: "an automobile accident between two individuals" on a state highway.[189] But an automobile accident between a member and a nonmember is not "almost precisely" the same as one between two nonmembers; it is substantially different. If the injured tribal member does not have a right to bring a suit in tribal court, as the Ninth Circuit held, then the tribe has no right to "make its own laws"[190] and apply them to its members.

In other cases, however, federal courts on post-exhaustion review have upheld tribal court jurisdiction over lawsuits between member and nonmember parties. Tribal court jurisdiction was affirmed, for example, in a divorce and child custody proceeding where the member-nonmember couple resided on the reservation during their marriage.[191] Similarly, even under the *Montana* tests, tribal courts retain jurisdiction to hear tort claims by a tribal member against state game wardens in their individual capacities, arising from the execution of search warrants on allotted land.[192] In *Nevada v. Hicks*,[193] the court found that the tribe had a governmental interest in the execution of state search warrants within its territory as well as an interest in providing its members with a forum in which to vindicate their rights.[194]

By contrast, the Ninth Circuit recently held that under the *Montana* approach, tribal courts lacked jurisdiction to hear a lawsuit by a tribal member against a county government. In *Yellowstone County v. Pease*,[195]

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enforce a tribal court judgment in federal court. *See id.* at 807. The federal court held that although tribal judgments are entitled to comity, *see id.* at 809, federal courts must not enforce tribal judgments under the principle of comity if the tribal court did not have subject matter jurisdiction over the lawsuit. *See id.* at 810. The court then determined that under *A-1*, the tribal court did not have jurisdiction to adjudicate the lawsuit. *See id.* at 815.

188. *See* Strate v. A-1 Contractors, 117 S. Ct. 1404, 1407 (1997). The Court expressly noted that a ruling on the consortium claim of the plaintiff's adult children, all of whom were members of the tribe, was not at issue. *See id.* at 1408 & n.3.

189. *Wilson*, 127 F.3d at 814.

190. Williams v. Lee, 358 U.S. 217, 220 (1959)..

191. *See* Sanders v. Robinson, 864 F.2d 630, 634 (9th Cir. 1988).

192. *See* Nevada v. Hicks, 944 F. Supp. 1455, 1464-68 (D. Nev. 1996) (presently on appeal to the Ninth Circuit).

193. 944 F. Supp. 1455 (D. Nev. 1996) (presently on appeal to the Ninth Circuit).

194. *See id.* at 1466. The court noted that *Montana* was not necessarily the applicable test because the nonmember actions were taken on allotted land belonging to a tribal member rather than the fee lands for which the *Montana* test was developed. *See id.* Nonetheless, the court analyzed tribal court jurisdiction under the *Montana* factors. *See id.* at 1466-67.

195. 96 F.3d 1169 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1691 (1997).

a Crow Indian brought suit in tribal court to enjoin the county from imposing its ad valorem property tax on his fee land within the Crow Reservation.[196] In an application of *Montana* remarkably short on analysis, the court rejected Pease's argument that the potential loss of land from foreclosure "could be devastating" to tribal governmental interests.[197] Pease's "speculation," the court held, did not establish a "*direct*" effect on "*the Tribe as a whole*."[198] The court failed to explain why the loss of land belonging to tribal citizens would not directly impact tribal governmental interests.

One explanation for the crabbed reading in *Pease* was the court's use of reformulations of the *Montana* test suggested by subsequent cases.[199] The court took the "as a whole" language from the court of appeals decision in *South Dakota v. Bourland*,[200] while failing to note that the Supreme Court decision in *Bourland* did not employ that language but merely quoted the *Montana* tests as written.[201] The *Pease* court also referenced Justice White's opinion in *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*,[202] which held that nonmember conduct should have "demonstrably serious" impacts and "imperil" tribal interests before tribes could retain jurisdiction.[203] Again, however, the *Pease* court failed to note that the Supreme Court's subsequent *Bourland* decision returned to the language of *Montana*: that nonmember conduct must "threaten[] or [have] some direct effect" on tribal governmental interests.[204]

196. *See id.* at 1170-71. In *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 269-70 (1992), the Court held that states could tax Indian-owned fee land patented under the General Allotment Act. *See id.* at 269-70. In the *Pease* litigation, the Crow Court of Appeal held that the county had no authority to tax land allotted and patented pursuant to the Crow Allotment Act of 1920 rather than the General Allotment Act. *See Pease*, 96 F.3d at 1171. For criticism of the *County of Yakima* decision, see Royster, *supra* note 161, at 20-29.

197. *See Pease*, 96 F.3d at 1176; *cf.* Royster, *supra* note 161, at 26 (arguing that tribes should have exclusive jurisdiction over fee lands owned by tribal members).

198. *Pease*, 96 F.3d at 1176-77.

199. *See id.* at 1177.

200. 39 F.3d 868, 870 (8th Cir. 1994).

201. *See* South Dakota v. Bourland, 508 U.S. 679, 695-96 (1993).

202. 492 U.S. 408 (1989).

203. *See id.* at 431. Justice White wrote the opinion of the Court as to tribal zoning authority within the open area of the Yakama Reservation. *See id.* at 432-33. The Ninth Circuit again referred to the *Brendale* language in *Wilson v. Marchington*, 127 F.3d 805, 815 (9th Cir. 1997). As in *Pease*, the court in *Wilson* neglected the Supreme Court's apparent rejection of Justice White's rewrite of the *Montana* test. *See infra* note 204.

204. *See* Montana v. United States, 450 U.S. 544, 566 (1981). Moreover, the Court in *A-1* also quoted *Montana* directly, implicitly rejecting the language used by Justice White in *Brendale*. *See* Strate v. A-1 Contractors, 117 S. Ct. 1404, 1409 (1997).

The decision in *Pease* that the tribal court lacked jurisdiction thus appears to rest on a restrictive reading of the *Montana* approach that the Court itself has rejected. The *Montana* tests more properly should be limited to the types of cases represented by *Montana* itself. First, the tests should apply only to situations that occur on nonmember fee lands, not on fee lands owned by members of the tribe.[205] Second, the *Montana* tests should be employed using the formulation from *Montana* itself, as subsequent opinions of the Court have indicated. Finally and most importantly, the federal courts must realize that one of the tribal governmental powers that the *Montana* approach was designed to protect was the power expressly recognized in *Williams v. Lee*:[206] the right of tribes "to make their own laws and be ruled by them."[207] *Montana* teaches that tribes retain jurisdiction over nonmembers in cases of direct effects on tribal "political integrity,"[208] and surely political integrity is broad enough to encompass the integrity of the law-making and law-applying institutions of tribal government.

Some aspects of post-exhaustion review of tribal court jurisdiction are thus settled. Federal courts may in fact review tribal court jurisdiction as a matter of federal law, and after *A-1*, in cases involving nonmembers on fee lands, that review is conducted under the *Montana* factors. Whether tribal courts retain their vitality in cases involving nonmember parties will now depend on the federal courts' willingness to recognize the impacts of those cases on the integrity of tribal legal institutions.

B. *Review on the Merits*

Once the federal court has reviewed tribal court jurisdiction to decide the case, may it continue and review the merits of the tribal court's substantive law decision? Judges and scholars have noted the inconsistencies of the Court's statements in *National Farmers* and *Iowa Mutual*.[209] In *National Farmers*, the Court remarked that the exhaustion rule provided tribal courts the opportunity to develop the record "before either the merits or any question concerning appropriate relief is addressed."[210]

205. As noted earlier, the Court in *A-1* held that a state highway was the equivalent of nonmember fee lands and therefore subject to the *Montana* tests. *See A-1*, 117 S. Ct. at 1414.

206. 358 U.S. 217 (1959).

207. *Id.* at 220.

208. *See Montana*, 450 U.S. at 566.

209. *See* Nevada v. Hicks, 944 F. Supp. 1455, 1469 n.27 (D. Nev. 1996) ("[T]hose two opinions seem to represent contradictory approaches to the question of post-exhaustion federal review of the substantive legal issues going to the merits of the underlying litigation."); Reynolds, *supra* note 22, at 562 n.126 ("The Supreme Court itself suggested two very different standards in its exhaustion opinions.").

210. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985).

Exhaustion also offered federal courts the benefit of tribal court expertise "in the event of further judicial review."[211] Although these statements hardly constitute a clear mandate for federal court review of the merits, they do arguably contemplate some federal court review beyond the federal question of tribal court jurisdiction. Two years later in *Iowa Mutual*, however, the Court asserted that federal courts may not review the merits of tribal court decisions: "Unless a federal court determines that the Tribal Court lacked jurisdiction, . . . proper deference to the tribal court system precludes relitigation of issues raised by the [tribal members'] bad-faith claim and resolved in the Tribal Courts."[212] In contrast to *National Farmers*, then, *Iowa Mutual* appears to forbid federal court review of the merits of a tribal court decision.

Yet the two Supreme Court statements can be reconciled by focusing on the difference between federal law and tribal law. Any tribal court litigant who seeks federal court review may raise one federal question: the propriety of tribal court jurisdiction to hear the case. Once the federal court has reviewed that decision, however, any further review is on the merits. But in order for the federal court to even contemplate review on the merits, the federal court must have an independent basis for jurisdiction over the underlying lawsuit. That means the underlying lawsuit must be predicated on either federal question or diversity jurisdiction for the federal court to have any authority to consider it.

This principle of federal court jurisdiction, then, leads to three avenues for the federal courts to follow once the issue of tribal court jurisdiction has been reviewed. These avenues depend on whether the merits raise no issues within federal jurisdiction, are based on federal question jurisdiction, or fall within the courts' diversity jurisdiction.

1. No Independent Basis of Federal Jurisdiction

In many situations, the underlying lawsuit does not rest on either federal question or diversity jurisdiction. Although not post-exhaustion review cases, a number of decisions have held that no federal jurisdiction exists over non-diverse tort and contract actions involving Indians or Indian tribes.[213] Thus if the federal court finds that the tribal court

211. *Id.* at 857.

212. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987).

213. *See* Morongo Band of Mission Indians v. California State Bd. of Equalization, 858 F.2d 1376, 1385-86 (9th Cir. 1988) (breach of lease claim by tribal member against tribe, even though lease entered into under authority of federal law); Sac & Fox Tribe of Indians v. Apex Constr. Co., 757 F.2d 221, 223 (10th Cir. 1985) (breach of contract claims by tribe against contractor for on-reservation work); Gila River Indian Community v. Henningson, Durham & Richardson, 626 F.2d 708, 714 (9th Cir. 1980) (breach of contract claim for negligent design and construction of on-reser-

properly had jurisdiction to hear the case, the only federal law issue has been resolved and the federal court is without jurisdiction to determine the merits of a non-diversity action.

Because post-exhaustion lawsuits in federal court raise at least one federal question—that of tribal judicial authority—the ability of the federal courts to exercise supplemental jurisdiction over the nonfederal claims is at issue. When a federal court has original jurisdiction in a case, it also possesses supplemental jurisdiction "over all other claims that are so related to claims in the action within such original jurisdiction that they form part of same case or controversy under Article III of the United States Constitution."[214] Nonetheless, a federal court may decline to exercise its supplemental jurisdiction if "in exceptional circumstances, there are other compelling reasons for declining jurisdiction."[215] The language of the supplemental jurisdiction statute itself thus provides two reasons why federal district courts should not exercise supplemental jurisdiction over nonfederal issues in post-exhaustion cases.

First, the tribal law claims are not likely to be "so related" to the federal questions that they form part of the same case or controversy. Although federal courts may require "only a loose factual connection between the claims" to exercise supplemental jurisdiction,[216] there must nonetheless be "a common nucleus of operative fact" for the claims to be

vation building); Mescalero Apache Tribe v. Martinez, 519 F.2d 479, 481-82 (10th Cir. 1975) (breach of contract claim against construction company); Meeks v. McAdams, 390 F.2d 650, 651 (10th Cir. 1968) (wrongful death action arising from on-reservation accident involving only tribal members); Begay v. Kerr-McGee Corp., 499 F. Supp. 1317, 1322 (D. Ariz. 1980), *aff'd*, 682 F.2d 1311 (9th Cir. 1982) (personal injury action by tribal members against on-reservation employer); Blackfeet Tribe v. Wippert, 442 F. Supp. 65, 66 (D. Mont. 1977) (action to enforce contract); Ware v. Richardson, 347 F. Supp. 344, 347 (W.D. Okla. 1972) (claim alleging substandard housing by tribal member against tribal housing authority). Courts have adhered to this no-federal-jurisdiction rule even when neither state nor tribal courts would have jurisdiction over the merits of the lawsuit. Schantz v. White Lightning, 502 F.2d 67, 68-70 (8th Cir. 1974).

214. 28 U.S.C. § 1367(a) (1994). The supplemental jurisdiction statute, enacted in 1990, replaced the common law concepts of pendent and ancillary jurisdiction. *See* CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3567.1 (Supp. 1997).

215. 28 U.S.C. § 1367(c)(4). There are three other circumstances in which a federal court may decline to exercise supplemental jurisdiction: the claim presents a "novel or complex issue of State law;" the claim "substantially predominates over" the claims otherwise within the federal court's jurisdiction; and the claims within the district court's original jurisdiction have been dismissed. *Id.* § 1367(c)(1)-(3).

216. WRIGHT ET AL., *supra* note 214, § 3567.1 n.41.

tried together in one proceeding.[217] However, in most post-exhaustion cases, the "common nucleus" of facts will be missing.

For example, consider an ordinary personal injury case. The determination of the tribal court's jurisdiction to hear the lawsuit shares few, if any, facts with the decision as to which party is at fault for the underlying tort. By the same token, the determination of a tribal court's jurisdiction to hear a challenge to its authority to tax non-Indian companies operating on the reservation would share little "common nucleus" of fact with an assertion by the companies that the tribal tax code's definition of a taxable entity does not apply to them.

Even where the tribal claims may be sufficiently factually related to the federal law claims, however, there are "other compelling reasons for declining jurisdiction."[218] These reasons include tribal self-government, the federal policy promoting it, and the tribal exhaustion doctrine that helps implement that federal policy. The Supreme Court has noted the "vital role" of tribal courts in the exercise of tribal self-government[219] and has counseled the federal courts to accord "proper deference" to the decisions of the tribal courts.[220] The lower federal courts have achieved a consensus on how to show that deference. They review federal law questions de novo, but give "binding" effect to tribal court rulings on tribal law. If the federal courts could exercise supplemental jurisdiction over tribal law claims sufficiently factually related to the federal law claims, all deference to tribal court rulings would disappear. By permitting the federal courts to relitigate tribal law issues on post-exhaustion review, the exercise of supplemental jurisdiction would negate the doctrine and policies of tribal exhaustion.

Supplemental jurisdiction in these situations would also be thoroughly inefficient because the federal courts would be relitigating claims already decided by the tribal courts, which are the very courts "best qualified to interpret and apply tribal law."[221] Thus, supplemental jurisdiction over nonfederal questions would put the federal courts "in direct competition with the tribal courts, thereby impairing the latter's authority over

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217. These factors determined the federal courts' pendent jurisdiction under the pre-supplemental jurisdiction law. *See generally* United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966). The *Gibbs* factors are, however, generally used under the supplemental jurisdiction statute to determine whether claims are "so related" that the federal courts should exercise jurisdiction. *See, e.g.*, Roche v. John Hancock Mut. Life Ins. Co., 81 F.3d 249, 256 (1st Cir. 1996).

218. 28 U.S.C. § 3567(c)(4). Federal courts should consider "judicial economy, convenience, fairness and comity" in deciding whether to exercise supplemental jurisdiction. *See* Wright v. Associated Ins. Cos., 29 F.3d 1244, 1251 (7th Cir. 1994).

219. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987).

220. *See id.* at 19.

221. *Id.* at 16 ("Adjudication of such matters by any nontribal court also infringes upon tribal law-making because tribal courts are best qualified to interpret and apply tribal law.").

reservation affairs."[222] That competition is precisely what the exhaustion doctrine was created to avoid.

Federal courts thus should not assert supplemental jurisdiction over the merits of a case heard in tribal court if the merits would not support original jurisdiction in the federal district court. Once the federal court upholds tribal court jurisdiction in a nonfederal, non-diverse action, any further federal involvement should be restricted to action necessary to enforce the tribal court judgment outside the reservation.

2. Federal Question Jurisdiction

In the second situation, the underlying lawsuit is premised on federal question jurisdiction. As discussed in Part II, the issue of whether an Indian tribe retains the sovereign authority to extend its laws to nonmembers presents a question of federal law.[223] Several courts have raised and determined that federal question in the course of post-exhaustion review.[224]

The cases reviewing on the merits the federal question of tribal sovereign authority have followed a pattern. In no case has the federal court reviewed the federal question of the tribal court's jurisdiction to hear the case.[225] Instead, the federal courts have gone directly to the

222. *Id.*

223. *See supra* notes 42-46 and accompanying text.

224. *See* Mustang Prod. Co. v. Harrison, 94 F.3d 1382 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1288 (1997); Arizona Pub. Serv. Co. v. Aspaas, 77 F.3d 1128 (9th Cir. 1996); City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554 (8th Cir. 1993); FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311 (9th Cir. 1990).

In addition to the federal question of tribal authority over nonmembers, lawsuits adjudicated in tribal court may raise other issues arising under federal law. For example, issues arising out of gaming contracts may implicate federal question jurisdiction under the Indian Gaming Regulatory Act. *See* Tom's Amusement Co. v. Cuthbertson, 816 F. Supp. 403, 406 (W.D.N.C. 1993).

225. In *City of Timber Lake*, the court rejected a challenge to the tribal court's personal jurisdiction over the non-Indian parties on the ground that the federal court would defer to tribal court rulings on tribal law. *See City of Timber Lake*, 10 F.3d at 558-59. None of the federal cases that reviewed the merits of federal questions, however, addressed the federal issue of the tribal courts' subject matter jurisdiction.

Even though the federal courts have not ruled on tribal court jurisdiction in these cases, the federal courts apparently believed that tribal judicial authority did exist in each case. In three of the cases—*Mustang Production*, *City of Timber Lake*, and *FMC*—the federal courts of appeals agreed with the tribal courts that the tribes had regulatory jurisdiction. *See Mustang Prod.*, 94 F.3d at 1385; *City of Timber Lake*, 10 F.3d at 559; *FMC*, 905 F.2d at 1314. Under the Court's recent decision in *A-1*—that judicial jurisdiction is as broad as regulatory jurisdiction—the three circuit court opinions necessarily upheld the jurisdiction of the tribal courts that ruled on the merits of the cases. *See* Strate v. A-1 Contractors, 117 S. Ct. 1404, 1413 (1997). The fourth case, *Aspaas*, disagreed with the tribal court's ruling on the merits, although there is no indication in the opinion that the Ninth Circuit believed the tribal court lacked jurisdiction to hear the lawsuit. *See Aspaas*, 77 F.3d at 1134-35.

federal questions raised by the merits of the lawsuit, reviewing tribal court determinations de novo. In only one case has the federal court offered any explanation as to why federal courts are authorized under the *National Farmers* doctrine to review the merits of tribal court decisions on federal law issues. In *Arizona Public Service Co. v. Aspaas*,[226] the court stated that the issue before it, "whether the Navajo Nation retained its power to regulate the affairs of a non-Indian lessee, [is] a question whose federal nature is the same in all material respects as the question *National Farmers* posed in regard to property owners."[227] More commonly the federal courts simply refer to their ability under *National Farmers* to review federal questions of tribal "jurisdiction," without differentiating between tribal court jurisdiction and tribal legislative or regulatory jurisdiction.

The case of *Mustang Production Co. v. Harrison*[228] is typical. A group of oil companies challenged the Cheyenne-Arapaho Tribes' authority to impose severance taxes on their production from allotments held in trust for tribal members.[229] The tribal courts ruled that the Tribes retained that governmental authority, and the case came into federal court on post-exhaustion review.[230] The Tenth Circuit first stated the appropriate standard of review: "[W]hen reviewing tribal court decisions on *jurisdictional issues*," federal courts should review tribal courts' determinations of federal law de novo.[231] The federal court then identified the "jurisdictional issue" before it as whether the Tribes retained jurisdiction—that is, jurisdiction to tax non-Indian lessees—on allotted lands.[232] Because the merits involved a federal question of tribal "jurisdiction," the federal court did not distinguish that issue from the issue of the tribal court's jurisdiction to adjudicate the lawsuit.[233]

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226. 77 F.3d 1128 (9th Cir. 1996).

227. *Id.* at 1132; *see also* Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294, 1302 (8th Cir. 1994) (Loken, J., concurring) ("[T]ribal court jurisdiction is not at issue here—the tribal court of course has jurisdiction to enforce a tribal tax or employment law. The federal question here goes to the merits of the case—whether the Tribe has the sovereign power to enact the tax and employment laws being enforced."); Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians, 898 F. Supp. 1549, 1559-60 (S.D. Fla. 1994) (expressly rejecting argument that federal court's federal-question review is limited to tribal judicial power and does not include review of tribal regulatory or legislative power).

228. 94 F.3d 1382 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1288 (1997).

229. *See id.* at 1383.

230. *See id.* at 1383-84.

231. *Id.* at 1384 (emphasis added).

232. *See id.* at 1384-86.

233. *See* FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1314-15 (9th Cir. 1990) (federal question was tribal jurisdiction to regulate employment at plant located on fee land within reservation); *see also* City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554, 558 (8th Cir. 1993) (federal question was whether Congress delegated authority to tribe to regulate liquor

Post-exhaustion lawsuits of the *Mustang Production* type thus raise questions of tribal legislative or regulatory authority, which the federal courts will review de novo under federal question jurisdiction. Whether the federal courts should review the merits of federal questions is probably a moot issue; the fact is that the federal courts already do so. Given the federal courts' insistence that they are the "final arbiters" of federal law, federal judges will be loathe to avoid deciding any federal questions inherent in the cases before them.[234] Moreover, that approach is arguably justified under the Supreme Court's recent ruling in *Strate v. A-1 Contractors* that a tribe's judicial jurisdiction "does not exceed" its legislative and regulatory jurisdiction.[235] After *A-1*, if a federal court determines on post-exhaustion review that the tribe properly exercised regulatory jurisdiction, it has necessarily determined that the tribe's judicial jurisdiction to adjudicate the lawsuit was also proper as a matter of federal law.[236]

Post-exhaustion review cases that include federal questions on the merits may also raise questions of tribal law. For example, assume that Mustang Production challenged not only the tribes' sovereign authority to tax its activities on trust allotments, but also a ruling of the tribal court that Mustang Production came within the definition of a taxable entity under the tribal tax code.[237] That issue does not present a federal question. It presents purely a tribal law question involving the proper interpretation of a tribal statute. Because the federal courts defer to tribal court decisions on tribal law, the federal court on post-exhaustion review would not redetermine the statutory interpretation issue.[238]

As a matter of practice, then, the federal courts on post-exhaustion review will redetermine de novo any federal questions raised by the merits of the lawsuit, as well as the federal question of the tribal courts' jurisdiction. However, the federal courts may not relitigate any tribal law

traffic on fee lands within reservation).

234. *See FMC*, 905 F.2d at 1314. Similar reasoning explains the federal courts' insistence on de novo review of all federal questions decided by tribal courts. *See supra* text accompanying notes 225-33.

235. *See* Strate v. A-1 Contractors, 117 S. Ct. 1404, 1413 (1997).

236. As noted earlier, in three of the four post-exhaustion cases in this category, the federal court upheld tribal jurisdiction. *See* Mustang Prod. Co. v. Harrison, 94 F.3d 1382, 1386 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1288 (1997); *City of Timber Lake*, 10 F.3d at 558; *FMC*, 905 F.2d at 1315. In the fourth case, *Aspaas*, the court in fact redetermined the nonfederal question of whether the lease documents contained a waiver of tribal regulatory authority, all the while maintaining that it relitigated a federal question. *See* Arizona Pub. Serv. Co. v. Aspaas, 77 F.3d 1128, 1132-35 (9th Cir. 1996). The *Aspaas* decision is discussed *supra* at text accompanying notes 61-81.

237. Note that *Mustang Production* did *not* raise this issue. The issue is discussed here solely by way of illustration.

238. Nor should the federal courts take supplemental jurisdiction over the non-federal-question claims. *See supra* Part IV.B.1.

questions that were decided as part of the same lawsuit in the tribal courts. That difference in the review authority of the federal courts requires those courts, as discussed previously, to scrupulously distinguish between issues of federal law and issues of tribal law.[239]

3. Diversity Jurisdiction

In the third post-exhaustion review situation, the underlying lawsuit is premised on diversity jurisdiction. The paradigm case is *Iowa Mutual* itself. The insurance company filed suit in federal district court against its insured and the injured employee seeking a ruling that it had no duty to defend or indemnify its insured because the employee sustained the injuries outside the scope of the insurance policy.[240] The federal lawsuit, based on diversity, was intended to bypass a pending tribal court action by the injured employee against the insured for compensation for injuries and against the insurance company for bad faith refusal to settle.[241] The Supreme Court, of course, ordered Iowa Mutual to exhaust all available tribal court remedies before it could request federal court review of the tribal court's jurisdiction to hear the lawsuit.[242] At that point, the Court noted, unless the federal court determined that the Blackfeet courts lacked jurisdiction to hear the claim against Iowa Mutual, "proper deference to the tribal court system precludes relitigation of issues raised by the [injured employee's] bad-faith claim and resolved in the Tribal Courts."[243]

The reason the federal courts are precluded from relitigating the merits on post-exhaustion review is inherent in the type of lawsuit brought in federal court under diversity jurisdiction. In those cases, tribal law determines the merits of the claims litigated in tribal court, and the federal courts defer to tribal court determinations of tribal substantive law. Although Justice Stevens was skeptical of that approach in *Iowa Mutual*,[244] in fact it is only logical.

A federal lawsuit premised on diversity jurisdiction has, by definition, no federal law available to apply. A diversity case that involves an Indian party that could not properly be heard in tribal court would likely be determined according to state law. But a diversity case which is properly heard in tribal court is *not* generally decided under state law, but

239. *See supra* Part II.

240. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 12-13 (1987).

241. *See id.* at 11-13.

242. *See id.* at 16-19. The Blackfeet Tribal Code did not authorize interlocutory appeals, and so Iowa Mutual was required to litigate the merits in tribal court before seeking post-exhaustion review of the tribal court's jurisdiction. *See id.* at 12.

243. *Id.* at 19.

244. *See id.* at 22 n.* (Stevens, J., concurring).

under tribal law. The Court's recent decision in *Strate v. A-1 Contractors* makes that clear.[245] In *A-1*, the Court collapsed the questions of tribal judicial and tribal legislative/regulatory authority over nonmembers, holding that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction."[246] In essence, then, after *A-1* a tribal court may only hear cases involving nonmembers if the tribe possesses the sovereign authority to apply its substantive law to those nonmember parties.[247] If the tribal courts may only adjudicate lawsuits in which the tribe possesses legislative authority, then the tribal courts will necessarily be applying tribal, not state, law to the non-federal issues raised.

Certainly tribal courts may refer to state law in their decisions. Like the courts of sister states, tribal courts may borrow freely from state law as they find appropriate,[248] but the law that tribal courts apply is tribal, not state, law.[249] As a result, if the tribal court has jurisdiction, then the substantive law determination is one of tribal law, and proper deference to tribal court determinations of tribal law "precludes relitigation of issues raised . . . and resolved in the Tribal Courts."[250] The lower federal courts have recognized this principle in the "binding" deference that they accord tribal court decisions of tribal law on post-exhaustion review.[251] Thus in a diversity case, on post-exhaustion review, the federal courts do not relitigate the merits because the merits involve questions of tribal law.[252]

Again, *Iowa Mutual* itself is a prime example. In tribal court, the injured employee alleged that the insurance company had refused in bad faith to settle.[253] As an affirmative defense, the insurance company asserted that its policy did not cover the injuries sustained.[254] In litigating

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245. *See* Strate v. A-1 Contractors, 117 S. Ct. 1404, 1413 (1997).

246. *Id.*; *see also supra* text accompanying notes 170-82.

247. *See A-1*, 117 S. Ct. at 1413.

248. Tribal codes, for example, may provide that in civil matters the laws of the surrounding state may be used as a guide. *See* POMMERSHEIM, *supra* note 1, at 85-86 (referencing the Tribal Code of the Sisseton-Wahpeton Tribe, ch. 33 § 1 (1982)); Peter B. Kutner, *Can Federal Courts Remain Open When State Courts Are Closed?:* Erie R. Co. v. Tompkins *on the Indian Reservation*, 52 N.D. L. REV. 647, 680 n.259 (1976) (quoting the Standing Rock Sioux Tribe Code of Justice, § 2.1 (July 1973)).

249. *See* R.J. Williams Co. v. Fort Belknap Hous. Auth., 719 F.2d 979, 982 (9th Cir. 1983) ("The tribe has chosen to adopt the framework of state law to cover gaps in the tribal code. In doing so, however, it has not relinquished its own sovereignty, and it has not involved the state in any way in the enforcement of interpretation of tribal law.").

The same principle applies to states. If Oklahoma uses Kansas law as a guide, it is not applying Kansas law to the resolution of the issue but rather creating Oklahoma law to apply.

250. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987).

251. *See supra* note 94 and accompanying text.

252. *See Iowa Mut.*, 480 U.S. at 16.

253. *See id.* at 11.

254. *See id.* at 13 n.3.

the merits of the lawsuit, the tribal court must decide the issue of bad faith and interpret the terms of the insurance policy. Absent a choice of law provision in the policy that would be binding on the tribal court, that court would apply tribal law to the questions of bad faith and contract interpretation. On post-exhaustion review, then, those tribal law determinations of the tribal court should be binding on the federal courts.

The admonition of the Supreme Court in *Iowa Mutual* that federal courts are precluded from relitigating the merits on post-exhaustion review[255] can thus be taken literally. *Iowa Mutual* was a diversity case, and the Court's holding applies to post-exhaustion review of cases in which the federal district court could exercise original jurisdiction over the merits under its diversity jurisdiction. Any diversity case raising a colorable claim of tribal jurisdiction should be sent to tribal court for exhaustion of tribal remedies. In tribal court, the merits will be determined according to tribal law, and on post-exhaustion review the federal courts will be precluded from relitigating those tribal court determinations of tribal law.[256]

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255. *See id.* at 19.

256. This approach is not only consistent with the exhaustion doctrine and with proper respect for tribal courts, but it avoids complex choice of law issues in the federal courts.

First, prior to *Iowa Mutual*, the federal courts split as to whether a federal court sitting in diversity could hear a lawsuit when the state court could not because of exclusive tribal court jurisdiction. *Compare* R.J. Williams Co. v. Fort Belknap Hous. Auth., 719 F.2d 979, 982 (9th Cir. 1983) (holding diversity jurisdiction, like state court jurisdiction, would interfere with tribal self-government), *with* Poitra v. Demarrias, 502 F.2d 23, 27-28 (8th Cir. 1974) (holding diversity jurisdiction will not interfere with any state policy). *See generally* Kutner, *supra* note 248 (arguing that federal courts should retain diversity jurisdiction).

Second, the Rules of Decision Act, 28 U.S.C. § 1652 (1994), provides that in a non-federal-law case, "[t]he laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." *Id.* As interpreted in *Erie Railroad v. Tompkins*, 304 U.S. 64, 78 (1938), the "laws of the several states" include not only state statutes and regulations, but also state common law. The difficulty with applying this doctrine on post-exhaustion review is that the laws of the states do not apply; the laws of the tribes do. The *Erie* doctrine thus seems inapplicable to diversity cases decided by tribal courts.

Third, even if the federal courts did redetermine the merits of diversity cases, should they apply state law or tribal law? If the federal court uses state law, it undermines tribal self-government and the role of tribal courts as well as the purposes of the exhaustion doctrine. But if the federal court applies tribal law, it should be bound by the decision on that law of the tribe's highest tribunal, which means it should be bound by the tribal court's decision on the merits.

The exhaustion doctrine for diversity cases avoids these complicated questions. The question is not whether federal courts may exercise their diversity jurisdiction when state courts cannot hear the lawsuit (a question of subject matter jurisdiction), but rather whether the federal courts should abstain in favor of tribal courts (a question of comity). *See* Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1230 (9th Cir. 1989); Wellman v. Chevron U.S.A., Inc., 815 F.2d 577, 578 (9th Cir. 1987). If the federal court sends the case to tribal court, the tribal court will rule on the merits. And then on post-exhaustion review, that tribal court ruling on tribal law will be binding on the federal court.

V. CONCLUSION

The contours of the federal courts' post-exhaustion review of tribal court decisions are beginning to emerge. Federal courts will review tribal court determinations of federal law de novo, but will accord total deference to tribal court determinations of tribal law. In addition, the federal courts will review any question of federal law that raises the issue of tribal sovereign authority over nonmembers, whether that question concerns a matter of the tribal court's authority to adjudicate the lawsuit or of the tribe's authority to regulate or legislate.

Nonetheless, despite the broad review power this approach vests in the federal courts, federal courts cannot review all cases on the merits. If the merits of the lawsuit heard in tribal court have been determined under tribal rather than federal law—as in cases in which the merits do not raise a federal question—then the federal courts must defer to the tribal courts' conclusions of law. Where the merits of a case have been decided by tribal law, then federal courts are truly precluded from relitigating the merits on post-exhaustion review.