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Introduction

Litigation involving individual Indians, Indian tribes, or controversies arising within the exterior boundaries of an Indian reservation raise potential jurisdictional concerns which may involve federal, state, and tribal courts. While litigants desire the most favorable forum in which to adjudicate their claims, courts require a jurisdictional basis upon which to resolve the controversy. Frequently, however, the desires of the litigants to be heard in a given forum and the need of the courts to first establish jurisdiction are in conflict. Courts must resolve jurisdictional conflicts before any decision on the merits can be made.

While the jurisdictional conflicts involving federal and state courts have been addressed over the past two centuries, conflicts involving federal or state courts with Indian tribal courts are relatively recent. Typically, these conflicts involve a non-Indian litigant seeking to invoke federal jurisdiction based on grounds that the claim involves a federal question or that there is diversity of citizenship. Federal courts, however, have not readily accepted jurisdiction if it can be shown that the court's assumption of jurisdiction would conflict with tribal self-government.

Recently, federal jurisdiction in Indian Country[1] has become subject to major reevaluation as a result of a United States Supreme Court decision that requires all potential federal court controversies initially be heard in tribal court and that the litigants must exhaust all tribal court remedies before federal district court authority can be invoked. The case, *National Farmers Union Ins. Co. v. Crow Tribe of Indians*,[2] further provides that the nature

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1. Indian Country is defined in 18 U.S.C. § 1151 (1982) and generally applies to all lands within an Indian reservation notwithstanding the issuance of any patents.

2. National Farmers Union Ins. Co. v. Crow Tribe of Indians, 105 S. Ct. 2447, 2454 (1985).

of federal district court authority, after the parties have exhausted tribal court remedies, is limited to a review of tribal jurisdiction. While this newly created federal review power appears benign, it will be argued that such a change improperly usurps tribal authority of self-government and, in effect, creates a new concept of federal judicial authority. Furthermore, the practical effect of *National Farmers Union* is to impose additional burdens on an already strained tribal court system.

This note will examine the application of federal jurisdiction in general. From this beginning, an analysis will be made of representative circuit courts of appeals cases, demonstrating some of the problems which result from imposing federal jurisdiction in Indian Country. These cases will be contrasted with the present Supreme Court interpretation of federal jurisdiction in Indian Country as first enunciated in *National Farmers Union*. Finally, an argument will be made which suggests that the effect of *National Farmers Union* on tribal institutions is to usurp tribal court authority and relegate tribal courts to the status of adjuncts to the federal judiciary.

Background

The United States judicial system is based upon a legislative scheme which tends to promote conflicts between the sovereigns of nation and state.[3] The nature of this conflict is a major theme in constitutional law.[4] Sovereign authority requires that a court have the ability to assume jurisdiction over litigants seeking to avail themselves of its judicial power to enforce laws created by the sovereign. The conflict between sovereigns arises when a citizen of one nation or state seeks judicial enforcement of its laws against the citizen of a different nation or state.[5]

Litigation involving Indians raises the additional concern of preserving tribal sovereignty. While Indians are citizens of the United States[6] and of the states where they reside,[7] they are also subject to tribal sovereign authority which raises different concerns for litigants, both Indian and non-Indian. Thus, many litigants desire a neutral forum to hear their claims and accordingly

3. *See generally* Younger v. Harris, 401 U.S. 37, 43-44 (1971).
4. *Id.*
5. KICKINGBIRD, KICKINGBIRD, CHIBITTY & BERKLEY, INDIAN SOVEREIGNTY (1977).
6. 8 U.S.C. § 1401(b) (1982).
7. U.S. CONST. amend. XIV, § 1.

turn to the federal courts. However, the federal role in resolving civil disputes in Indian Country has been limited to its jurisdictional basis of federal question and diversity of citizenship.

A. Federal Question Jurisdiction Generally

Section 1331 of the Judicial Code provides that federal courts "shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[8] Justice Holmes adopted a narrow test for determining federal question jurisdiction, holding that a case arises under the law of the sovereignty which creates the cause of action.[9] Thus, according to Holmes, if a case arises under a cause of action created by state law, the case arises under state law and federal jurisdiction will not lie. However, the application of this test has been expanded to allow federal question jurisdiction when the plaintiff's complaint establishes that the claimed right to relief depends on the construction or application of the Constitution or federal laws.[10] Therefore, a case may arise under federal law even if the cause of action is state-created.[11]

Federal question jurisdiction will not lie if a plaintiff anticipates a federally-created defense by addressing this defense in the complaint.[12] Stated another way, federal question jurisdiction will not be found, even if the case will ultimately be decided under federal law, if the issue of federal law was raised initially in the defense. This rule, commonly known as the well-pleaded complaint rule, cannot be used to circumvent federal question jurisdiction when a plaintiff's well-pleaded complaint would fail to demonstrate the presence of an issue of federal law.[13]

Until recently, invoking federal question jurisdiction has been the same in Indian Country as in any state. As long as the requirements for invoking federal court jurisdiction were met, actions could effectively be brought before a federal court. The mere fact that a party was an Indian or an Indian tribe did not automatically create a federal question.[14] In addition, the fact that

8. 28 U.S.C. § 1331 (1982).
9. American Well Works Co. v. Layne and Bowler Co., 241 U.S. 257, 260 (1916).
10. Smith v. Kansas City Title and Trust Co., 255 U.S. 180 (1921).
11. M. REDISH, FEDERAL JURISDICTION 59 (1985).
12. Louisville & Nashville Railroad Co. v. Mottley, 211 U.S. 149 (1908).
13. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 672 (1950).
14. Schantz v. White Lightning, 502 F.2d 67, 69 (8th Cir. 1974).

the controversy arose in Indian Country did not necessarily create federal question jurisdiction.[15] However, *National Farmers Union*[16] now establishes that federal question jurisdiction involving Indians or matters arising on the reservation are subject to an initial jurisdictional determination in tribal court.[17] This case reflects the federal policy that the forum whose jurisdiction is being challenged must be given the initial opportunity to determine the validity of the jurisdictional challenge.[18]

B. Diversity Jurisdiction Generally

Section 1332 of the Judicial Code provides that the federal district courts shall have original jurisdiction in civil cases where the matter in controversy exceeds the value of $50,000 and is between citizens of different states; citizens of a state, and subjects of a foreign state; and subjects of a foreign state as a plaintiff against citizens of a state.[19] Additionally, corporations are deemed citizens of the state of incorporation and of the state where they have their principal place of business.[20]

Traditionally, the purpose of diversity jurisdiction in federal courts has been to avoid possible prejudice against citizens of other states or nations.[21] For diversity jurisdiction to lie in federal court, complete diversity between the parties is required.[22] This requirement of complete diversity has developed as a result of statutory construction, rather than as a requirement under the diversity clause of Article 3, section 2 of the Constitution.[23] Because the Constitution does not mandate the existence of complete diversity, Congress is empowered to abolish or expand the requirement as it sees fit.[24] Only in the context of interpleader has Congress not required complete diversity between the parties.[25]

Because diversity jurisdiction requires that a plaintiff and a defendant be citizens of different states, questions arise concern-

15. *Id.*
16. *National Farmers Union*, 105 S. Ct. at 2447.
17. *Id.* at 2454.
18. *Id.*
19. 28 U.S.C. § 1332(a) (1982).
20. 28 U.S.C. § 1332(c) (1982).
21. *See* REDISH, *supra* note 11, at 62.
22. *Id.*
23. *See* State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523 (1967).
24. *See* REDISH, *supra* note 11, at 62.
25. *See State Farm*, 386 U.S. 523 at 23.

ing what constitutes citizenship of a given sovereignty. Accordingly, Congress has determined that persons born in the United States are American citizens, including persons who are born "to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe . . . ."[26] Furthermore, by way of the fourteenth amendment, persons born in the United States also became citizens of the states in which they are born.[27] In making citizenship determinations, courts generally have found that the concept of domicile refers to one's home while residence refers to the place where a person presently lives but intends to leave in the foreseeable future.[28]

In anticipation of parties seeking to create diversity where diversity otherwise would not normally exist, Congress added to the Judicial Code in 1948 that "[a] district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."[29] Therefore, it is not permissible to "manufacture" diversity jurisdiction in federal courts.

Because Indians who reside on a reservation are citizens of the state where the reservation is located, non-Indian parties domiciled in the same state cannot invoke diversity jurisdiction on the basis that tribal reservations are accorded quasi-sovereign status by the federal system. Reservations are not foreign states within the meaning of Article III, Section 2 of the Constitution.[30] However, the United States, through its trust responsibility, can invoke federal court original diversity jurisdiction on behalf of Indians.[31]

When diversity jurisdiction is invoked in Indian Country, federal courts are more limited than elsewhere.[32] Because federal courts acting through diversity jurisdiction are obliged to apply state law in their adjudication of the controversy,[33] they are, in essence, sitting as an adjunct to state courts. In the context of Indian law, however, problems are raised by the potential of the federal courts to interfere with tribal self-government by assuming jurisdiction, just as a state court's assumption of jurisdiction in tribal matters

26. 8 U.S.C. § 1401(b) (1982).

27. *See* REDISH, *supra* note 11, at 64.

28. *Id.*

29. 28 U.S.C. § 1359 (1982).

30. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

31. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 316 (1982).

32. *Id.* at 317.

33. *See* Erie Railroad Co. v. Thompkins, 304 U.S. 84 (1938), which requires federal courts to apply state law in actions based on diversity.

would do.[34] As a result, federal courts have been required to refuse diversity jurisdiction, even though diversity jurisdiction would normally lie, because of the potential of interfering with tribal self-government.[35]

C. *Federal Jurisdiction As Historically Applied in Indian Country*

Historically, Indian tribes have been regarded as distinct political communities[36] with a complex and anomalous character in their relationship with the federal government.[37] When litigation involves a non-Indian plaintiff against a tribal member or the tribe itself, the parameters of the Indian tribal relationship with the federal government are tested. For instance, in *Littell v. Nakai*,[38] the non-Indian General Counsel for the Navajo Tribe, who resided in Maryland, brought an action in federal district court in Arizona seeking an injunction against the Tribal Chairman for an alleged breach of contract. The Ninth Circuit affirmed the district court's dismissal of the action for lack of jurisdiction. The court found that strong congressional policy exists which vests responsibility for tribal affairs in tribal court and that the tribal court should remain free from outside interference.[39] The Ninth Circuit noted that the infringement test as enunciated in *Williams v. Lee*[40] further required its refusal to assume diversity jurisdiction, because the action was based on the construction of a contract between the parties which directly involved the tribe within the geographical limits of the reservation.[41]

Another case which tested the parameters of the Indian tribal relationship with the federal government is *Hot Oil Service, Inc. v. Hall*.[42] The plaintiff, a New Mexico corporation, sued a Navajo tribal member in federal court in Arizona seeking a permanent injunction and money damages against the Indian defendant. The

34. *See* Williams v. Lee, 358 U.S. 217 (1959), which prohibits state interference with tribal self-government.

35. *See, e.g.*, Little v. Nakai, 344 F.2d 486 (9th Cir. 1965), *cert. denied*, 382 U.S. 986 (1965).

36. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); United States v. Wheeler, 435 U.S. 313 (1978).

37. United States v. Kagama, 118 U.S. 375, 381-82 (1886).

38. *See Nekai*, 344, F.2d 486.

39. *Id.* at 489.

40. *See Lee*, 358 U.S. 217.

41. *See Nakai*, 344 F.2d 486 at 490.

42. 366 F.2d 295 (9th Cir. 1966).

court held that it could not have diversity jurisdiction unless an Arizona state court would also have subject matter jurisdiction.[43] Even though the action involved a lease of tribal land to a non-Indian non-resident corporation, the suit still involved reservation affairs and therefore, state subject matter jurisdiction could not be found.[44] Accordingly, the court applied the *Williams* infringement test and refused to find federal diversity jurisdiction.

Subsequent to the Ninth Circuit diversity cases of *Littell* and *Hot Oil*, the Eighth Circuit was confronted with two cases which challenged the validity of federal court jurisdiction over issues involving individual Indian residents of the Standing Rock Sioux Indian Reservation. In *Schantz v. White Lightning*,[45] non-Indian plaintiffs who were citizens of North Dakota brought a tort action against an Indian resident of the Standing Rock Sioux Indian Reservation in that portion of the reservation which is located in North Dakota. The plaintiffs based their claim that the federal court had jurisdiction on a federal statute which gave Indian tribes within various states the option to consent to state court jurisdiction over civil matters arising on the reservation.[46] Because the Standing Rock Sioux Tribe did not elect state court assumption of civil jurisdiction, the plaintiffs argued that both state and tribal court lacked a jurisdictional basis to hear their claim and that the federal court was the only forum properly suited to hear the case.[47] Both the district court and the Eighth Circuit disagreed with the plaintiffs and found that the action could only be litigated in tribal court.[48] Whether or not a tribe has consented to state court civil jurisdiction under 25 U.S.C. § 1322 does not, in itself, compel a federal court to assume jurisdiction.[49] The Eighth Circuit held that the action was properly dismissed by the district court for lack of federal question or diversity jurisdiction, since the underlying basis of the action was in tort, involving a motor vehicle collision, and all of the parties resided in North Dakota.[50]

While neither the elements for diversity nor federal question jurisdiction existed in *Schantz*, another case was decided the same

43. *Id.* at 297.
44. *Id.*
45. 502 F.2d 67 (8th Cir. 1974).
46. 25 U.S.C. § 1322 (1982).
47. 502 F.2d at 69.
48. *Id.*
49. *Id.* at 70.
50. *See supra* notes 8-18 and accompanying text.

day the Eighth Circuit decided *Schantz*. It involved, once again, residents of the Standing Rock Sioux Indian Reservation. This time, however, diversity jurisdiction was found. In *Poitra v. Demarrias*[51] a wrongful death action was brought by an Indian resident of the Standing Rock Sioux Indian Reservation who resided on that portion of the Reservation located in North Dakota. The defendant was also a member of the Standing Rock Sioux Tribe but resided on that portion of the Reservation located in South Dakota. The court found that diversity jurisdiction was not precluded by reason of the absence of tribal consent to state court jurisdiction under 25 U.S.C. § 1322(a).[52] Therefore, even though the courts of North Dakota lacked subject matter jurisdiction over civil causes of action arising in Indian Country, federal court jurisdiction could still be found by reason of diversity.[53] The court further reasoned that federal courts sitting in diversity are not required to narrowly apply the *Erie* Doctrine in that it is not necessary to mirror state law.[54] Additionally, the court did not find a bar to its jurisdiction just because North Dakota lacked civil jurisdiction over the controversy, but due to the unique status of "Indians under *federal* [law], not because of any *state* policy consideration."[55]

Mindful of *Littell* and *Hot Oil*, which held that diversity jurisdiction was precluded in disputes arising on the Navajo Indian Reservation unless Arizona State courts also had subject matter jurisdiction, the Eighth Circuit distinguished these cases with *Poitra*. The court in *Poitra* found the Ninth Circuit cases were based on the *Williams* infringement test of non-interference with tribal affairs.[56] Both cases obviously had in issue whether or not the action interfered with tribal self-government, with *Littell* involving the tribal chairman and *Hot Oil* involving tribal trust lands. Furthermore, neither case involved a state created cause of action, such as North Dakota's wrongful death statute, under which an Indian sought recovery from another Indian.[57] Therefore, because the dispute involved a state-created wrongful death statute and did not in-

51. 502 F.2d 23 (8th Cir. 1974).
52. 502 F.2d at 24.
53. *Id.* at 25.
54. *Id.* at 26.
55. *Id.* at 27 (emphasis supplied).
56. *Id.* at 28.
57. *Id.*

volve issues of tribal lands or customs, the *Poitra* court finally concluded that "no possible interference with tribal or reservation self-government [can be found, and] there is no reason why *Hot Oil* or *Littell* should control this case."[58]

In 1982, the Ninth Circuit decided a case which involved over 200 disabled Navajo Indian miners and their families seeking damages incurred by long-term exposure to radon radiation in uranium mines owned by the defendants. The case, *Begay v. Kerr-McGee Corp.*,[59] once again brought into conflict the issue of whether federal or state courts should decide the claims asserted by the plaintiffs. The defendant, Kerr-McGee Corp., argued that the sole remedy provided by Arizona law for the alleged injuries was an administrative claim for worker's compensation vested within the exclusive jurisdiction of the Industrial Commission of Arizona.[60] The Ninth Circuit affirmed the District Court's dismissal of the action holding that their reliance on *Williams v. Lee*[61] in both *Hot Oil* and *Littell* supported their view that these cases

> are better viewed as decisions construing [28 U.S.C.] section 1332(a) to preclude a non-Indian plaintiff from obtaining federal judicial resolution of a dispute which *Williams v. Lee* vests in the tribe's exclusive jurisdiction. It would be inappropriate to permit a federal court to exercise its diversity jurisdiction over a state-law controversy which *Williams v. Lee* prohibits the state courts from entertaining.[62]

In *Begay* the Ninth Circuit also found that nothing in the principles of federalism suggest that a state statute can operate to divest a federal court of jurisdiction conferred by 28 U.S.C. § 1332(a).[63] Therefore, state law may not control or limit federal court diversity jurisdiction because federal law, pursuant to the Supremacy Clause, pre-empts any contrary state law.[64]

The Ninth Circuit resolved any apparent conflict between state and federal law by finding that state compensation laws are applicable to all United States territory within a state.[65] Therefore,

58. *Id.* at 29.
59. 682 F.2d 1311 (9th Cir. 1982).
60. *Id.* at 1314.
61. *See Lee*, 358 U.S. 217.
62. *Begay*, 682 F.2d at 1317.
63. *Id.* at 1316.
64. *Id.* at 1315.
65. *Id.* at 1319, citing 40 U.S.C. § 290 (1982).

claims by Indian plaintiffs against non-Indian employers are not matters of self-governance subject to the *Williams* infringement test. "[T]he exercise of state jurisdiction over such claims does not, even minimally, infringe upon or frustrate tribal self-government."[66]

The final case to be discussed in this historical overview of federal jurisdiction as applied in Indian Country is *R.J. Williams Co. v. Fort Belknap Housing Authority*.[67] In this case, the initial plaintiffs were residents of the State of Washington and the defendant was a tribal corporation with its principal place of business in Montana.[68] The plaintiffs challenged a tribal court writ of attachment after the Housing Authority claimed that the plaintiffs failed to correct defects in their construction of housing for the tribe. The Circuit Court agreed with the District Court's finding that the court had proper jurisdiction under 28 U.S.C. § 1331[69] but found that the plaintiffs failed to state a federal claim for which relief could be granted.[70] However, whether or not diversity or a federal question existed was not controlling because the *R.J. Williams* court found that at the time of the initiation of the action, there was some question whether the Fort Belknap Tribe had exercised its right to assume exclusive jurisdiction under its tribal code. The Fort Belknap Code provided that the tribal court had jurisdiction to hear suits in matters where the defendant was a member of the Fort Belknap Indian Community.[71] Therefore, the court reversed and remanded and held that "any determination of whether diversity jurisdiction exists will have to await a decision by the Fort Belknap Community Court on jurisdiction over this controversy."[72]

As can be seen, federal courts have historically hesitated to assume federal jurisdiction over matters involving Indians, Indian tribes, or controversies arising on the reservation, whether or not the action is based on federal question jurisdiction or on diversity. Federal courts regularly divest themselves of diversity jurisdic-

66. *Id.* at 1319.

67. 719 F.2d 979 (9th Cir. 1983).

68. *See supra* note 20 and accompanying text. For another recent case which construes federal jurisdictional authority over a tribal corporation, see Weeks v. Oglala Sioux Housing Authority, 797 F.2d 668 (8th Cir. 1986).

69. *See supra* notes 8-18 and accompanying text.

70. *R.J. Wiliams*, 719 F.2d at 981.

71. *Id.* at 983.

72. *Id.* at 985.

tion whenever the dispute involves the exercise of tribal self-government as first demonstrated in *Williams v. Lee* and the cases previously discussed. Clearly, tribal courts are "generally the exclusive forum for the adjudication of disputes affecting the interests of both Indians and non-Indians which arise on the reservation."[73]

D. Federal Jurisdiction Presently Applied in Indian Country

A unanimous United States Supreme Court recently concluded in *National Farmers Union Ins. Co. v. Crow Tribe of Indians*,[74] that the question of whether a federal court has diversity or federal question jurisdiction over matters involving Indians, Indian tribes or controversies arising within a reservation, requires an initial determination by the tribal court of its jurisdictional authority.[75] However, a new requirement is imposed by the *National Farmers Union* court in that all tribal court remedies must first be exhausted before further federal court review is permissible.[76]

The controversy arose in *National Farmers Union* when a minor Indian resident was struck by a motorcycle while on the state owned schoolgrounds of a local elementary school within the Crow Indian Reservation. The Indian minor and his guardian brought an action in Crow Tribal Court seeking damages. Service of process was made on the Chairman of the School Board who subsequently failed to notify anyone of the suit. A default judgment was entered pursuant to the rules of the tribal court and a copy of the judgment was delivered to the school principal who forwarded it to the school's insurer, National Farmers Union. A few days later, National Farmers Union sought a temporary restraining order in Federal District Court in Montana claiming that a writ of execution issued by the tribal court would cause irreparable damage to the school district and would violate their constitutional and statutorily protected rights. The District Court agreed and ordered the tribal court not to issue a writ of execution. Approximately two months later, the district court granted National Farmers Union's request for a permanent injunction on the basis that the Crow Tribal Court lacked subject-matter jurisdiction over the tort

73. *Id.* at 983.
74. *National Farmers Union*, 105 S. Ct. 2447 (1985).
75. *Id.* at 2454.
76. *Id.*

action that was the basis of the default judgment.[77] The Ninth Circuit disagreed and reversed, concluding that the district court's jurisdiction could not be supported on any constitutional, statutory, or common law basis.[78]

The Supreme Court found that the question whether or not the Crow Tribal Court had "the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under [28 U.S.C.] § 1331."[79] Therefore, the Court found that "[t]he District Court correctly concluded that a federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction."[80]

Interestingly, the Court enunciated a standard for review:

> [T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions. [footnote omitted][81]

After this enunciated standard of review, the Court announced that the examination of the tribal court's jurisdiction should be made by the tribal court on the policy basis which

> favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover [sic] the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed. [Footnotes omitted][82]

National Farmers Union is similar to its predecessor cases, which explore the parameters of federal jurisdiction in matters involving Indians or Indian tribes, in that all recognize the importance

77. National Farmers Union Ins. Co. v. Crow Tribe of Indians, 560 F. Supp. 213, 214 (D. Mont. 1983).
78. *National Farmers Union*, 560 F. Supp. at 2450.
79. *Id.* at 2452.
80. *Id.*
81. *Id.* at 2453-54.
82. *Id.*

of maintaining tribal authority to decide controversies which affect tribal interests. *National Farmers Union*, however, imposes a new element in the factors which are determinative of whether or not a federal court can accept jurisdiction over the controversy. Now federal courts must ask if all appropriate tribal court remedies have been exhausted[83] prior to any further federal judicial review.[84]

The scope of *National Farmers Union* was further developed in *Iowa Mutual Ins. Co. v. La Plante*.[85] The plaintiff, Iowa Mutual, sought a declaration in Federal District Court that it had no duty to defend and indemnify its insured against the personal injuries asserted by La Plante. This action was filed after La Plante, a member of the Blackfeet Indian Tribe, initiated a suit in Blackfeet Tribal Court against Iowa Mutual's insured for the personal injuries La Plante incurred on a ranch located within the Blackfeet Indian Reservation.

Iowa Mutual sought federal court intervention over the pending Blackfeet Tribal Court proceeding alleging diversity of citizenship under 28 U.S.C. § 1332(a).[86] La Plante moved to dismiss the action for lack of subject matter jurisdiction. The district court agreed with La Plante and held that the Blackfeet Tribal Court must first be given the opportunity to determine its own jurisdiction.[87] The district court further noted that only if the Blackfeet Tribal Court refused to exercise its exclusive jurisdiction would the federal court be free to entertain the case under 28 U.S.C. § 1332.[88]

The Supreme Court took the opportunity in *Iowa Mutual* not only to reiterate its position as enunciated in *National Farmers Union*, but also to expand upon the scope of that decision. Recognizing that *National Farmers Union* was based on whether or not a federal question existed, the Court held in *Iowa Mutual* that issues of diversity jurisdiction were also subject ot the exhaustion of tribal court remedies requirement. The *Iowa Mutual* Court stated, "[i]n diversity, as well as federal-question cases, unconditional access to the federal forum would place it in direct

83. *See supra* note 76 and accompanying text.
84. *See infra* notes 94-111 and accompanying text.
85. Iowa Mutual Ins. Co. v. La Plante, 107 S. Ct. 971 (1987).
86. *See supra* notes 19-35 and accompanying text.
87. *Iowa Mutual*, 107 S. Ct. at 975.
88. *Id.*

competition with the tribal courts, thereby impairing the latter's authority over reservation affairs."[89]

The Court disagreed with Iowa Mutual's assertion that diversity jurisdiction was justified to protect "against local bias and incompetence."[90] In rejecting this argument, the Court stated that "[t]he alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement established in *National Farmers Union*."[91] The Court clearly reaffirmed its position that tribal courts are initially the proper forum to evaluate any challenge made against its jurisdiction.[92]

The *Iowa Mutual* Court upheld the parameters of *National Farmers Union* by stating:

> Although [Iowa Mutual] must exhaust available tribal remedies before instituting suit in federal court, the Blackfeet Tribal Court's determination of tribal jurisdiction is ultimately subject to review. If the Tribal Appeals Court upholds the lower court's determination that the tribal courts have jurisdiction, [Iowa Mutual] may challenge that ruling in the District Court . . . 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 La Plantes . . . ."[93]

Analysis

All courts, whether they are federal, state or tribal, must initially ascertain the court's jurisdiction over the subject matter and the litigants. A court which makes a decision where jurisdiction is lacking renders such decision useless and ineffective. However, challenges to a particular court's jurisdiction are often made where a state or tribal court has assumed jurisdiction and a litigant feels the proper forum should be the federal courts. Under these circumstances, a federal court is concerned that by assuming jurisdiction, it will interfere with either a state or tribal court's exclusive right to adjudicate the cause of action giving rise to the controversy.[94] However, federal courts are often asked to hear

89. *Id.* at 977.
90. *Id.* at 978.
91. *Id.* (citations omitted).
92. *See generally National Farmers Union*, 105 S. Ct. at 2454.
93. *Iowa Mutual*, 107 S. Ct. at 978.
94. For further discussion, see *supra* notes 8-18 and accompanying text.

cases which normally would be heard in a state or tribal court. If the parties are from different states or nations, the federal forum best protects against local bias.[95] Because of this unique role provided by the federal courts, many litigants have sought federal court forums they believe will be more conducive to their interests.

A. *Federal Jurisdiction Under National Farmers Union*

In *National Farmers Union*[96] and *Iowa Mutual*[97] the United States Supreme Court clearly established that litigants who are individual Indians or Indian tribes, or controversies which arise on a reservation, are subject to exhaustion of all tribal court remedies before federal courts can review the case. This requirement, according to the Court, properly reflects the Congressional policy of fostering Indian self-government. While this exhaustion requirement is meritorious with regard to the Supreme Court's understanding of Congressional policy,[98] a new federal relationship with Indian tribal courts has been created by the parameters of *National Farmers Union* and *Iowa Mutual*.

Prior to these two recent cases, litigants in cases such as *Littell*[99] and *Poitra*[100] sought federal court adjudication of their claims based on diversity jurisdiction. Even though diversity was denied in *Littell* and found in *Poitra*, under *National Farmers Union* and *Iowa Mutual* the federal court could not have even considered the parties' attempts to obtain federal jurisdiction. Instead, the parties would have been required to exhaust all tribal court remedies. Under these circumstances, cases such as *Poitra* would never have been allowed to continue in federal court. However, prior to *National Farmers Union*, once the tribal court in such a case had reached the merits further appellate review in federal court was precluded. Simply, federal review of tribal court decisions was not possible unless such review was claimed under the habeous corpus provisions of the Indian Civil Rights Act.[101]

As a result of *National Farmers Union* and *Iowa Mutual*, tribal courts are now subject to federal district court review.[102] Although

95. For further discussion, see *supra* notes 17-33 and accompanying text.
96. *See National Farmers Union*, 105 S. Ct. 2447.
97. *See Iowa Mutual*, 107 S. Ct. 971.
98. *Id.* at 975-76.
99. *See supra* notes 35-41 and accompanying text.
100. *See supra* notes 51-58 and accompanying text.
101. 25 U.S.C. § 1303 (1982).
102. *See supra* notes 74-92 and accompanying text.

the language of *National Farmers Union* suggests that such review is limited only to whether or not the tribal court had proper jurisdiction,[103] these cases signal a significant incursion into tribal sovereignty. Even though there may be some legitimate concerns over the possible unfair treatment by tribes of both Indians and non-Indians, the "second-guess" intrusion into tribal sovereignty by federal courts outweighs the need for subsequent federal judicial review.[104]

B. A New Federalism

The Supreme Court in *National Farmers Union* and *Iowa Mutual* interpreted the Congressional policy of tribal self-determination to include tribal sovereignty, as exercised through its judiciary, but with such sovereignty now subject to federal district court review. Interestingly, the Court never cited to a federal statute, regulation or to any legislative history which would support their view of Congressional policy in this area. Furthermore, the Court's decisions create a paradox. On one hand, Congressional policy is to facilitate tribal self-governance under notions of tribal sovereignty but, on the other hand, this "self-governance" is now subject to federal judicial review.

Tribal courts have been accorded judicial authority to hear matters properly before them. In fact, ever since *William v. Lee*, tribes have exercised their authority whenever state incursion would infringe upon their soeverign right to make laws and to be governed by these laws. The effect of *National Farmers Union* on tribal courts arguably creates a new branch of the federal judiciary. Tribal courts are now quite similar to the courts created legislatively by Congress, such as territorial courts, local courts in the District of Columbia, military courts, and tax courts. Even though the substantive laws are largely supplied by Congress, legislative courts may still exercise at least a portion of the federal judicial power—[105] for instance, legislative courts may apply federal common-law doctrines. Although tribal courts apply substantive law as provided by their tribal code and common-law, tribal laws are still subject to the plenary authority of Congress, just as the laws of the legislative courts are subject to Congressional authority. In fact, many

103. *National Farmers Union*, 105 S. Ct. at 2453-54.
104. *Cf.* C. Wilkinson, *American Indians, Time, and the Law* 116 (1987).
105. *See* Glidden Co. v. Zdanok, 370 U.S. 530 (1962).

tribal codes are a reflection of direct Congressional creation of substantive law such as those codes created under the provisions of the Indian Reorganization Act of 1934.[106]

Finally, it may even be argued that *National Farmers Union*, and its creation of limited federal review authority, relegates tribal courts to adjuncts of the federal courts. While permitted to adjudicate matters as defined by their code, subject to Congress' plenary authority, tribal courts will facilitate "the orderly administration of justice in the federal court [which] will be served by allowing a full record to be developed in the Tribal Court before either the merits or any questions concerning appropriate relief is addressed."[107] The Court even supplies a standard of review which includes an examination of the extent [to which] tribal sovereignty has been altered, divested or diminished read in conjunction with treaties, administrative or judicial [federal] decisions.[108]

C. *National Famers Union Practically Applied*

The cost of litigation, whether the case is before a federal, state or tribal court, is expensive. However, these costs are particularly onerous for litigants who are confronted with economic problems such as poverty, unemployment or ill health.[109] These problems are particularly acute on Indian reservations.

National Farmers Union now requires that litigants must not only bear the expense of litigation in tribal court but must also undertake expensive federal court review. Undoubtedly, litigants such as National Farmers Union Insurance Company or Iowa Mutual Insurance Company will elect federal district court review of adverse decisions made by tribal courts. In doing so, these corporate entities will make it necessary for the other parties to the action to bear the costs of their required role in the review process. Unfortunately, there will be additional delays in the ultimate resolution of a controversy while a review action is docketed in the federal system. Parties, such as Edward La Plante,[110] who seek damages

106. 25 U.S.C. § 461, 464-479 (1982); 25 U.S.C. § 463 (Supp. 1986). For further discussion, see Hammerstein & Fechite, *Tribal Immunity, Tribal Courts, and the Federal System: Emerging Contours and Frontiers*, 31 S.D.L. REV. 553 (1986).

107. *National Farmers Union*, 105 S. Ct. at 2454.

108. *See supra* note 81 and accompanying text.

109. For a discussion on how these factors are burdensome on tribal economic development, see Pommersheim, *Economic Development in Indian Country: What Are the Questions?*, 12 AM. INDIAN L. REV. 195 (1987).

110. Edward La Plante is one of the parties in *Iowa Mutual*.

for injuries must now wait for the federal judiciary to perform its obligations as construed by *National Farmers Union* where before, La Plante's claims could be fully redressed by the tribal court.

Another practical effect of *National Farmers Union* is the uncertainty it raises in litigation involving regulatory issues before the tribal court. While some tribes may be in the same position as the Blackfeet Indian Tribe in *Iowa Mutual* where the Tribe's adjudicative jurisdiction was co-extensive with its legislative jurisdiction,[111] not all tribes are similarly structured. Therefore, whether *National Farmers Union* is applicable to regulatory matters in Indian Country remains to be decided.

Probably the most significant practical effect that *National Farmers Union* will have in Indian Country is the impetus it will give to tribes to update, enact or modify their tribal codes which will provide [or reject] a jurisdictional framework for civil litigation in tribal court. Tribes will also have to evaluate the consequences of providing [or refusing to provide] for an appellate procedure, since particular mention of the notion was made in *Iowa Mutual*: "At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts."[112] Regardless of whether a tribe desires to comply with these dictates, it is fiscally difficult for tribes already burdened with inadequate general revenues to create an additional level of tribal courts.

Finally, *National Farmers Union* does provide a clear indication, in spite of its failings, that the federal judiciary wants to provide support to newly emerging tribal courts. Perhaps the Supreme Court used *National Farmers Union* and *Iowa Mutual* as a policy statement for Congressional consideration. In any event, it is quite obvious that *National Farmers Union* and its progeny will have far-reaching effects on tribal court development.

Conclusion

In the past, federal court jurisdiction over litigants who were individual Indians or Indian tribes or when the controversy arose on the reservation, were asked by the parties to assume either federal question or diversity jurisdiction to allow the litigants a

111. *Iowa Mutual*, 107 S. Ct. at 974.
112. *Id.* at 977.

favorable forum to adjudicate their claims. Federal courts largely relied upon the *Williams v. Lee* infringement test and would refuse jurisdiction if they found that assumption of jurisdiction would infringe upon the tribe's right to self-government.

National Farmers Union and *Iowa Mutual* changed the approach litigants must take to avail themselves of federal court jurisdiction. Now litigants must exhaust all tribal court remedies before invoking federal judicial authority. However, it can be argued that this new federal court requirement usurps tribal authority and relegates tribal courts to some unclear status in a new notion of federalism.

At its best *National Farmers Union* clears up the uncertainty of whether or not federal jurisdiction lies in a particular case. Instead, litigants go directly to tribal court, assuming such court has jurisdiction, and exhaust all tribal court remedies. At its worst, *National Farmers Union* forces tribal courts and tribal councils to join the federal judicial system, regardless of whether or not this is an infringement of tribal self-government. The question presently remains whether Congress will be forced to become involved and codify the parameters of federal jurisdiction as enunciated in *National Farmers Union*.