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VALIDITY OF A STATE COURT'S EXERCISE OF CONCURRENT JURISDICTION OVER CIVIL ACTIONS ARISING IN INDIAN COUNTRY: APPLICATION OF THE INDIAN ABSTENTION DOCTRINE IN STATE COURT

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I. Introduction

"One of the clearest and most persistent themes involving Indian sovereignty has been the continuous struggle by the states to assert greater control over Indian reservations, either at the expense of the federal or tribal governments."[1] The states' objective of regulating conduct in Indian country[2] lies in direct conflict with all surviving notions of tribal sovereignty. This article examines whether the Indian Abstention Doctrine precludes a state court from exercising concurrent jurisdiction[3] over actions arising on the reservation.

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1. ROBERT CLINTON ET AL., AMERICAN INDIAN LAW 493 (3rd ed. 1991).
2. Indian country is a legal term of art defined by statute to encompass:
   (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. 1151 (1994). The United States Supreme Court has additionally held that Indian country includes land regarded as an "Indian colony" and land held in trust by the federal government for exclusive tribal use. Oklahoma Tax Comm'n v. Potawatomi Indian Tribe, 498 U.S. 505, 511 (1991). Throughout this article, the terms "Indian country" and "reservation" will be used interchangeably.

3. *Black's* defines "concurrent jurisdiction" as "[t]he jurisdiction of several different tribunals, each authorized to deal with the same subject matter at the choice of the suitor. Authority shared by two or more legislative, judicial, or administrative officers or bodies to deal with the same subject matter." BLACK'S LAW DICTIONARY 291 (6th ed. 1990).

This article is limited in scope to the discussion of civil judicial jurisdiction, and does not address the criminal jurisdiction of tribal courts which is limited to misdemeanors by the Major Crimes Act, 18 U.S.C. §§ 1153, 3242 (1994) (which created exclusive federal court jurisdiction for certain crimes committed on the reservation against Indian victims), and by the Supreme Court decisions of United States v. McBratney, 104 U.S. 621, 624 (1882) (upholding state court jurisdiction over reservation crimes committed by non-Indian defendant against non-Indian victim), and Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211 (1978) (holding that tribal

The status of the indigenous tribes of what is now the United States of America as sovereigns is well documented. American Indian nations were self-governing societies exerting exclusive control over their territories long before the invasion by the European nations.[4] When the New World was "discovered," England, France, and Spain all recognized the native tribes as sovereign nations.[5] This recognition continued with the formation of the United States.[6] However, the new republic placed a great amount of pressure upon Indian nations to become "civilized" by adopting Christian ways and republican forms of government.[7] Apparently, from the point of view of some states, tribes took this pressure to "civilize" too literally.

In the 1820s, the Cherokee Indian Nation published its first written laws and created a tribal constitution and its own Supreme Court, which was empowered with *exclusive* jurisdiction over all the Cherokee lands.[8] In response to the Cherokee Nation's expression of exclusive jurisdiction, the State of Georgia enacted its own legislation that outlawed the Cherokee tribal courts and opened the Cherokee lands to settlement, aiming to "annihilate [the Cherokee Nation's] political existence."[9] The United States Supreme Court overruled the Georgia laws, holding that the laws were repugnant to the United States Constitution, treaties, and laws of the United States.[10] Today, the Court continues to recognize exclusive tribal control over their territories and members;[11] nevertheless, similar state attempts to regulate Indian country persist through the acceptance of concurrent jurisdiction over actions arising in Indian country.[12]

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courts lack subject matter jurisdiction over reservation-based crimes committed by non-Indians).

4. FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 229 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN].

5. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 546-47 (1832) ("The English, the French, and the Spaniards, were equally competitors for their friendship and their aid. . . . [S]o long as their actual independence was untouched."); COHEN, *supra* note 4, at 47-58; Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 227 (1994).

6. American Indian tribes were recognized in several places in the United States Constitution, the most prominent of which is referred to as the Indian Commerce Clause, which states that "Congress shall regulate commerce . . . with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3, *cited in* COHEN, *supra* note 4, at 207.

7. *See* RENNARD STRICKLAND, FIRE AND THE SPIRITS 51-52 (1975); CLINTON ET AL., *supra* note 1, at 11-12.

8. STRICKLAND, *supra* note 7, at 63-68; CLINTON ET AL., *supra* note 1, at 12.

9. *Worcester*, 31 U.S. (6 Pet.) at 542. The case sets out the Georgia laws in their entirety. *Id.* at 521-28. Similar laws were passed by the states of Tennessee, Mississippi and New York. CLINTON, *supra* note 1, at 14.

10. *Worcester*, 31 U.S. (6 Pet.) at 562-63.

11. Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987); United States v. Mazurie, 419 U.S. 544, 557 (1975).

12. *See, e.g.*, Wacondo v. Concha, 873 P.2d 276 (N.M. Ct. App. 1994); Sanapaw v. Smith, 335 N.W.2d 425 (Wis. Ct. App. 1983); Paiz v. Hughes, 417 P.2d 51 (N.M. 1966).

State court acceptance of concurrent jurisdiction over reservation-based claims is not a direct attack on tribal sovereignty but is an expansion of the states' own judicial authority.[13] While not actively diminishing tribal court jurisdiction, concurrent state court jurisdiction brings about the same troubling side effects by questioning the validity of the tribal court system and undermining the effect of tribal laws.

Part II of this article begins with an examination of the jurisdictional divide in tribal-state relations, discussing first the instances where tribal and state court subject matter jurisdiction are independently exclusive.[14] It then looks to factors that courts have held as relevant when finding that concurrent tribal and state court jurisdiction exist, and reviews three state court decisions accepting concurrent jurisdiction over actions arising in Indian country.[15] Finally, this part scrutinizes the soundness of these and other state court decisions regarding their acceptance and exercise of concurrent jurisdiction over reservation-based claims.[16]

For purposes of analogy, part III explores the application of the Indian Abstention Doctrine in federal courts.[17] The Doctrine essentially asserts that, although federal and tribal court jurisdiction may be concurrent, where a cause of action arises in Indian country or involves a "reservation affair," the federal court should abstain from exercising its concurrent jurisdiction.[18] Cases arising on the reservation are necessarily reservation affairs. Thus, federal abstention is mandatory where a cause of action arises in Indian country. Mandatory abstention is justified in that federal courts are permitted a limited appellate review of tribal court decisions after exhaustion.[19]

With this premise in mind, part IV explores whether the Indian Abstention Doctrine should be applied at all in state courts, and, if so, to what extent.

States also accomplish their goal of regulating Indian country through legislative action aimed at taxing activities on the reservation. *See* Oklahoma Tax Comm'n v. Chickasaw Nation, 115 S. Ct. 2214, 2217 (1995) (holding that state could not apply motor fuels tax to fuels sold by tribe in Indian country, but state could tax income of member Indians working on the reservation but residing off-reservation); Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114, 128 (1993) (finding that state income or motor vehicle taxes imposed on tribal members living in Indian country are invalid); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 151, 161 (1980) (imposing nondiscriminatory state tax on nonmember smoke shop customers); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 165 (1973) (eliminating state's ability to tax tribe or tribal members living and working in Indian country).

13. By their very existence, Indian nations lessen state power by diminishing the states' land base and tax base. This is the primary reason that states desire to control Indian country.

14. *See infra* text accompanying notes 29-36.

15. *See infra* text accompanying notes 37-85.

16. *See infra* text accompanying notes 86-95.

17. This is commonly referred to as the "exhaustion of tribal court remedies," a concept first discussed in *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845 (1985).

18. *See infra* text accompanying notes 105-34.

19. *See infra* text accompanying notes 140-48.

This part looks to United States Supreme Court language in one of the seminal Indian Exhaustion decisions and recent federal court precedent that suggest that the principles of the Doctrine should apply to state courts.[20] Turning to the question of the extent to which the doctrine should apply, this part concludes that abstention is not mandatory in state court because state courts cannot serve as appellate reviewers of tribal courts: the justification for *mandatory* abstention is missing.[21] Part IV recommends a discretionary application of the Indian Abstention Doctrine by state courts over reservation-based claims.

Finally, part V suggests that this discretionary abstention should be based on the outcome of a state court's choice of law analysis. If tribal law is applicable, the state court should dismiss the action; however, if state law is applicable, the state court should provide a forum for the litigants.[22] This part also discusses the doctrine of *forum non conveniens* which provides an analogy for the reasoning that tribal laws cannot and should not be interpreted or applied in state court. The doctrine also provides additional factors which a state court should consider in its discretionary review.[23] Such discretionary dismissal in state court for reservation-based claims will serve the rationale set forth by the Supreme Court in *National Farmers* and *Iowa Mutual* while continuing to permit state courts to exercise concurrent jurisdiction over cases affecting strong state interests.

II. Jurisdictional Divide in Tribal-State Relations: Exclusive and Concurrent Civil Subject Matter Jurisdiction

Most tribal and state trial courts are courts of broad general jurisdiction limited only by the federal government.[24] Tribal court jurisdiction is limited

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20. *See infra* text accompanying notes 151-78.

21. *See infra* text accompanying notes 180-93.

22. *See infra* text accompanying notes 195-251. Dismissal rather than abstention is appropriate in state court, because, as will be explained below, state courts have no appellate review of tribal court decisions.

23. *See infra* text accompanying notes 252-63.

24. Melody L. McCoy, *When Cultures Clash: The Future of Tribal Courts*, HUM. RTS., Summer 1993, at 22, 22 (vol. 20, no. 3) ("[T]ribal courts are tribunals of general jurisdiction, meaning they can hear all types of claims and actions, even those that arise under federal or state law.") (published by the ABA Press for the Section of Individual Rights and Responsibilities); 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3522, at 60 (2d ed. 1984) (state district courts are courts of general jurisdiction); *see also* Moran v. Council of the Confederated Salish & Kootenai Tribes, 22 Indian L. Rep. (Am. Indian Law. Training Program) 6149, 6154-55 (C.S.& K.T. Ct. App. 1995) (finding the Salish & Kootenai Tribal Constitution vesting tribal trial court with jurisdiction to the "fullest extent possible" constituted "a generalized grant of subject matter jurisdiction over all civil cases and controversies"); Satiacum v. Sterud, 10 Indian L. Rep. (Am. Indian Law. Training Program) 6013, 6014 (Puyallup Tribal Ct. 1982) (declaring that the tribal court resembled an Article III constitutional court established by the legislative body, the tribal council).

through treaty provisions, federal statutes, and, in certain areas, as a result of the dependent status of Indian nations.[25] Tribal court subject matter jurisdiction is also limited to those areas that are necessary to the protection of tribal self-government and continued control over internal relations.[26] State court jurisdiction is limited where the exercise of state court jurisdiction would infringe upon tribal sovereignty[27] or where it is preempted by existing federal law.[28] These two barriers to state court jurisdiction are commonly referred to as the infringement and the preemption tests. Absent express limitation on either court system's jurisdiction, concurrent tribal and state court subject matter jurisdiction may exist.

This section will examine the extent of tribal and state court jurisdiction after applying the above stated limitations; first, detailing the situations where tribal and state court jurisdiction are independently exclusive. The discussion will then look to examples of concurrent tribal and state court jurisdiction, and examine three state court cases accepting concurrent jurisdiction where the action involved arose in Indian country.

A. Exclusive Jurisdiction

The term jurisdiction generally refers to the power or authority of a government to govern. The scope of jurisdiction is defined by the subject matter over which a government's courts have the authority to adjudicate. In tribal-state relations, exclusive jurisdiction refers to subject matter jurisdiction that one government enjoys to the exclusion of the other.

1. Exclusive Tribal Court Jurisdiction

As a general rule of federal Indian law,[29] where a case arises on the reservation and involves only Indians, tribal court jurisdiction will be exclusive.[30] The United States Supreme Court similarly held that tribal

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25. *See* Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987); National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 852 n.14 (1985) (citing United States v. Wheeler, 435 U.S. 313, 323 (1978) ("Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.")).

26. *See generally* Montana v. United States, 450 U.S. 544 (1981).

27. *See* Williams v. Lee, 358 U.S. 217, 220 (1959).

28. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983).

29. "Federal Indian law" encompasses the United States federal and state court jurisprudence *about* Indian nations and individuals, as opposed to tribal law which is defined here as the law *of* Indians. *See* ROBERT D. COOTER & WOLFGANG FIKENTSCHER, IS THERE INDIAN COMMON LAW? THE ROLE OF CUSTOM IN AMERICAN INDIAN TRIBAL COURTS 6 (Olin Working Paper Series 1992).

30. Bryan v. Itasca County, 426 U.S. 373, 376 n.2 (1976); Fisher v. District Court, 424 U.S. 382, 387-88 (1976) (pre-Indian Child Welfare Act case finding exclusive tribal jurisdiction over adoption proceeding involving only Indians); Whyte v. District Court, 346 P.2d 1012, 1015 (Colo.

court jurisdiction is exclusive of both state and federal courts where the defendant is an Indian and the cause of action arose on the reservation.[31] The rationale behind these two general rules is that it is an essential function of tribal sovereignty to regulate both the conduct of individual Indians and Indian country. Tribal governments maintain a significant interest in resolving disputes affecting either of these factors exclusive of state interference.[32]

Another major reason for excluding state court jurisdiction over actions arising in Indian country and involving individual Indians is based upon the federal government's exclusive relationship with Indian nations. Cohen stated: "[T]he Constitution delegated paramount authority over Indian affairs to the federal government."[33] The Supreme Court said in *Rice v. Olsen*, "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history."[34]

2. Exclusive State Court Jurisdiction

The Supreme Court recently recognized that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without congressional delegation."[35] Under this formula, state court jurisdiction exists exclusive of a tribal court's jurisdiction over actions occurring outside of reservation boundaries between non-Indians and over some off-reservation disputes involving Indians.[36]

While the courts have attempted to draw bright lines of jurisdiction in tribal-state relations, many areas of ambiguity exist. Most of these ambiguous areas involve complex fact patterns arising in Indian country. It is in these areas that state courts have attempted to take control by assuming concurrent jurisdiction.

1959) (recognizing exclusive tribal court jurisdiction over divorce between Indians living on the reservation), *cert. denied*, 363 U.S. 829 (1960); WILLIAM C. CANBY, AMERICAN INDIAN LAW 157-58 (2d ed. 1988); COHEN, *supra* note 4, at 342. *But see* Wacondo v. Concha, 873 P.2d 276, 279 (N.M. Ct. App. 1994) (holding that concurrent jurisdiction existed wherein Indian plaintiffs may pursue state remedies against a nonmember Indian in state court for reservation-based tort).

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

32. "Congress has . . . acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." *Id.*

33. COHEN, *supra* note 4, at 270.

34. Rice v. Olsen, 324 U.S. 786, 789 (1945).

35. *Montana v. United States*, 450 U.S. 544, 564 (1981).

36. *See* CANBY, *supra* note 30, at 161. However, "[o]utside Indian country tribal courts can have jurisdiction based on tribal membership, although in practice most tribes exercise such authority only over such matters as tribal membership, elections, referenda, property distribution, and other uniquely internal matters." COHEN, *supra* note 4, at 347-48. This jurisdiction will most likely be concurrent with the state.

B. Concurrent Tribal and State Court Jurisdiction

Concurrent jurisdiction recognizes the power to adjudicate a matter in more than one sovereign's justice system. Several courts may have concurrent jurisdiction over a single transitory or "moveable" cause of action. Thus, a plaintiff with a transitory cause of action will have a variety of courts from which to chose to file her lawsuit.[37] In federal Indian law, concurrent tribal and state court jurisdiction usually involves matters arising in Indian country. When a state court accepts concurrent jurisdiction over a reservation-based claim and applies its own laws to that controversy, it is unilaterally accepting the power to regulate Indian country, undermining the authority of tribal law and the tribal court system. Concurrent jurisdiction is especially troublesome where tribal and state laws, policies, and practices conflict with one another.

Two major factors govern jurisdictional conflicts in the area of tribal-state relations: (1) the status of the parties involved; and (2) the situs of the cause of action.[38] As stated above, tribal courts maintain exclusive jurisdiction over reservation-based claims involving only Indians.[39] Conversely, tribal courts are excluded from adjudicating actions occurring off the reservation involving only non-Indians.[40] The bright line of jurisdiction ends when non-Indians enter the reservation.

The existence of a non-Indian in a dispute plays a significant role in a state court's decision to accept concurrent jurisdiction over a matter. Several state courts have recognized concurrent state and tribal court jurisdiction over actions where an Indian nation or an individual Indian sues a non-Indian in state court for a reservation-based claim.[41] Some state courts have found exclusive jurisdiction over reservation-based claims involving only non-Indians.[42] These courts view infringement as less evident because non-Indians play a less significant role in tribal sovereignty.[43]

Another significant source of concurrent state court jurisdiction over actions arising in Indian country is Public Law 280.[44] Enacted in 1953, the original version of Public Law 280 offered any state which was not expressly given jurisdiction, the option to unilaterally assume criminal and civil

37. *See* M.E. Occhialino, *Representing Mexican Clients in U.S. Courts in Claims of Liability in Industrial Accidents*, 4 U.S.-MEX. L.J. 147, 149-50 (1996).

38. *See* CANBY, *supra* note 30, at 97-98.

39. *See supra* note 30 and accompanying text.

40. *See supra* text accompanying note 36.

41. CANBY, *supra* note 30, at 148 & cases cited therein.

42. *Id.* at 161.

43. Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 467 U.S. 138, 148 (1984) (*Three Tribes I*); Paiz v. Hughes, 417 P.2d 51, 52 (N.M. 1966); CANBY, *supra* note 30, at 160-61; COHEN, *supra* note 4, at 352.

44. Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 (1994) (criminal) and 28 U.S.C. § 1360 (1994) (civil)).

jurisdiction over reservation-based claims between Indians.[45] In 1968, Congress required states wishing to assume jurisdiction under Public Law 280 to obtain consent of the Indian nation occupying the particular Indian country affected by the assumption of state jurisdiction before assuming such jurisdiction.[46]

Public Law 280 expressly permits states which have properly adopted the law to exercise jurisdiction over cases involving Indians acting in Indian country.[47] The statute does not preclude concurrent tribal court jurisdiction.[48] Therefore, concurrent tribal and state court jurisdiction exists over reservation-based claims between Indians in states which have properly adopted Public Law 280. Furthermore, the civil law provision of Public Law 280 expressly provides that state courts should use tribal law "if not inconsistent with any applicable civil law of the State."[49]

To summarize the jurisdictional divide in tribal-state relations: non-Public Law 280 states may have concurrent jurisdiction over reservation-based claims where the defendant is a non-Indian, and may have exclusive jurisdiction over reservation claims involving only non-Indians. States which have adopted Public Law 280 enjoy the same jurisdiction; however, added to their subject matter is jurisdiction over reservation-based claims involving Indians. These rules seems clear enough, but, as will be shown below, state courts push the limits of these factors in order to obtain concurrent jurisdiction over reservation-based claims. The following briefly reviews three state court cases accepting concurrent jurisdiction over claims arising within Indian country.

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45. 28 U.S.C § 1360(a) (1994) (requiring the states of Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin to assume civil and criminal jurisdiction over most Indian country located within each state). The Act added Alaska to the list of mandatory Public Law 280 states when it was adopted as a territory in 1958.

46. 25 U.S.C. § 1322 (1994). The new version also requires a state possessing an enabling Act to amend its constitution upon assuming jurisdiction under the statute. *Id.* § 1324.

47. *Id.* § 1360.

48. The courts have not tested this premise. The leading Indian law treatise, however, explains:

> The civil law provisions of Public Law 280 expressly preserve the legislative authority of tribes where not inconsistent with applicable state civil law. The wording of the section shows that its purpose is to require that such tribal law be recognized in state courts, but nothing in the wording of either the civil or criminal provisions of Public Law 280 or its legislative history precludes concurrent tribal court authority.

COHEN, *supra* note 4, at 344.

49. 28 U.S.C. § 1360(c) (1994). The statute effectively preserves the legislative authority of tribes. The statute provides that:

> Any tribal ordinance or custom . . . adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

Id.

1. Sanapaw v. Smith: Concurrent Jurisdiction Depends Upon Whether the Defendant is a Non-Indian for "Jurisdictional Purposes"

Sanapaw v. Smith[50] involved a reservation-based tort claim between two enrolled members of the Menominee Indian Tribe.[51] The plaintiff, Richard Sanapaw, filed an action in state court for damages resulting from injuries sustained from a battery committed by the defendant, Bernard Smith.[52] The defendant moved the court to dismiss the plaintiff's claim, asserting that the state court lacked subject matter jurisdiction over actions between Indians arising on the reservation.[53] The state trial court found that it had concurrent subject matter jurisdiction over the claim.[54] The trial court reasoned that the defendant, while an enrolled member, did not reside on the Menominee Indian Reservation, and thus, he was a non-Indian for purposes of jurisdiction.[55]

In *Sanapaw*, the Court of Appeals of Wisconsin recognized that "one who is recognized racially as an Indian may nevertheless be recognized as a non-Indian or 'emancipated' Indian for *jurisdictional purposes*."[56] The *Sanapaw* court then listed factors to consider when determining whether a person is an Indian for "jurisdictional purposes."[57] The court suggested that the trial court should consider blood quantum, racial status, membership, habits, and lifestyle, including place of residence.[58] In the end, the court reversed the trial court's ruling because the trial court based its decision solely on the defendant's place of residence.[59] Regardless, *Sanapaw* stands as dangerous precedent. Placing a jurisdictional determination solely on the finding of the race of the defendant completely ignores the tribe's sovereign authority over its territory.

2. Wacondo v. Concha: One Step Further; Concurrent Jurisdiction Over Reservation-Based Actions Involving Nonmember Indians

In *Wacondo v. Concha*,[60] a Jemez Indian woman and a Zia Indian woman brought suit in a New Mexico state court against a Taos Indian man for a tort arising on the Jemez Pueblo Indian Reservation.[61] The defendant, a member and resident of the Taos Pueblo Indian Reservation, moved to dismiss the

50. 335 N.W.2d 425 (Wis. Ct. App. 1983).
51. *Id.* at 426-27.
52. *Id.* at 426.
53. *Id.* at 427.
54. *Id.*
55. *Id.*
56. *Id.* at 429-30 (emphasis added).
57. *Id.* at 430.
58. *Id.*
59. *Id.* at 431.
60. 873 P.2d 276 (N.M. Ct. App. 1994).
61. *Id.* at 277. The Pueblos of Jemez, Zia, and Taos are all federally recognized Indian nations located within the exterior boundaries of the State of New Mexico.

complaint for lack of jurisdiction, claiming that the Jemez Tribal Court had exclusive jurisdiction over the matter.[62] The Court of Appeals of New Mexico rejected this contention and assumed concurrent jurisdiction over the case, finding that state court concurrent jurisdiction was not preempted by federal law and would not infringe upon the sovereignty of the Jemez Pueblo.[63]

In its jurisdictional analysis, the court admitted that all parties involved were Indians and that the cause of action arose in Indian country.[64] The *Wacondo* court nevertheless accepted concurrent jurisdiction over the case because "[t]he Defendant failed to show how recognizing concurrent jurisdiction in tribal and state courts would impinge upon tribal sovereignty in the present case."[65] The court reasoned that nonmember Indians were in fact non-Indians for jurisdictional purposes.[66] To justify this reasoning, the *Wacondo* court quoted the Supreme Court in *Duro v. Reina*[67] for the premise that "tribes are not merely fungible groups of homogenous persons among whom any Indian would feel at home. On the contrary, wide variations in customs, art, language, and physical characteristics separate the tribes, and their history has been marked by both intertribal alliances and animosities."[68]

Wacondo is an extreme example of the extent to which state court judges will go to assume control over Indian reservations. The court committed three major errors in devising its conclusion: first, it improperly classified nonmember Indians as non-Indians contrary to Congress' affirmation of retained tribal sovereignty over "all Indians;"[69] second, when denying that Public Law 280 preempted state court concurrent jurisdiction, it ignored the legislative purpose of Public Law 280 as well as the United States and the New Mexico Supreme Courts' interpretations of that law;[70] and finally, it erroneously imposed the burden of proving infringement of tribal sovereignty upon the defendant.[71]

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62. *Id.*

63. *Id.* at 280.

64. *Id.*

65. *Id.*

66. "Since Defendant is not a Jemez member, . . . the interests of the Jemez Pueblo would appear to favor providing a choice of courts to Plaintiff Wacondo, who is a Jemez member." *Id.* at 278-79.

67. 495 U.S. 676 (1990), *superseded by statute*, 25 U.S.C. § 1301(2) (1994).

68. *Wacondo*, 873 P.2d at 280 (quoting *Duro*, 495 U.S. at 695).

69. Indian Civil Rights Act, 25 U.S.C § 1301(2) (1994); COHEN, *supra* note 4, at 356-57 (stating that disputes arising in Indian country between member and nonmember Indians should preclude state court jurisdiction). Similarly, tribal codes have long equated nonmember Indians with members. *See* John J. Harte, Note, *New Mexico State Courts Have Concurrent Civil Jurisdiction Over Actions Brought by Nonmember Indians for Torts Committed on Reservations:* Wacondo v. Concha, 25 N.M. L. REV. 97, 101 n.38 (1995) and tribal codes cited therein.

70. *See* Harte, *supra* note 69, at 101-03.

71. *Id.* at 105 (citing *In re* Marriage of Wellman, 852 P.2d 559, 563 (Mont. 1993)).

3. McCrea v. Denison: Public Law 280 & Concurrent State Court Jurisdiction Over Reservation-Based Internal Disputes

In 1963, the Washington state legislature, acting pursuant to Public Law 280, enacted a statute which obligated the state to assume concurrent civil and criminal jurisdiction over certain designated areas of Indian country within state boundaries.[72] In *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*,[73] the Bands and Tribes of the Yakima Indian Nation contested the statutory and constitutional validity of this limited assumption of jurisdiction. The Tribes claimed that the State of Washington did not follow proper procedure under Public Law 280 when it assumed jurisdiction, and that the limited assumption of jurisdiction amounted to a "checkerboard" pattern of jurisdiction which violated the Equal Protection clause of the Constitution.[74] The Court found the Washington statute valid, rejecting all of the Tribes' points of appeal.[75]

One of the designated areas of Indian country over which the State of Washington assumed jurisdiction was the "[o]peration of motor vehicles upon the public streets, alleys, roads and high ways."[76] This provision of the statute was challenged in *McCrea v. Denison*. *Denison* involved a one-car accident on a highway running through the Spokane Indian Reservation.[77] Both the passenger and the driver were members and residents of the Reservation.[78] The plaintiff-passenger sued the driver in a Washington state court for damages caused by the driver's negligence.[79] At trial, the superior court granted the defendant-driver's motion to dismiss for lack of subject matter jurisdiction, reasoning that the alleged tort occurred in Indian country.[80]

On appeal, the *Denison* court reversed and remanded the case for trial, finding that the State of Washington properly assumed concurrent jurisdiction over civil actions involving Indians and occurring on reservation highways.[81] The defendant insisted that jurisdiction over this tort action should be extended to the tribal court under the principles of comity.[82] However, the *Denison* court refused, reasoning that the State of Washington "had a strong interest in assuring the full compensation of persons injured in automobile

72. WASH. REV. CODE § 37.12.010 (1991 & West Supp. 1997).
73. 439 U.S. 463 (1979).
74. *Id.* at 466-67.
75. *Id.* at 501-02.
76. McCrea v. Denison, 885 P.2d 856, 858 n.3 (Wash. Ct. App. 1994) (citing WASH. REV. CODE § 37.12.010(8)).
77. *Id.* at 857.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 859.
82. *Id.* at 859-60.

accidents."[83] The Court further reasoned that the purpose of assuming jurisdiction over Indian country pursuant to Public Law 280 was to provide individual Indians with a forum to settle their disputes.[84]

The *Denison* court's reasons for assuming concurrent jurisdiction may be considered an attenuated choice of law analysis. However, the court did not mention whether the Spokane Indian Tribe's laws were inconsistent with the laws of the state of Washington on this issue. If the tribal laws were not inconsistent, the court should have noted that tribal law should be used.[85]

C. The Reasoning Behind the Acceptance of State Court Jurisdiction Over Reservation-Based Claims is Misplaced

As evinced above, much of the jurisprudence dealing with tribal court jurisdiction depends upon the race of the parties involved and the situs of the cause of action. However, most state courts base their finding of concurrent state and tribal court jurisdiction on the single fact that non-Indians are involved in the dispute.[86] These state courts base their acceptance of concurrent jurisdiction on two factors: (1) that states have a significant interest in providing individual Indian people with a state forum; and (2) that tribal court jurisdiction over non-Indians is not "necessary to protect tribal self-government,"[87] and thus, state court adjudication of matters involving non-Indians' actions on the reservation does not infringe upon tribal sovereignty.

Both of these reasons fail to justify concurrent state court jurisdiction over reservation-based claims. First, the premise of providing a state court forum for individual Indians completely contradicts the United States Supreme Court's language in *Fisher v. District Court.*[88] The *Fisher* Court held that the Northern Cheyenne Tribal Court had exclusive jurisdiction over an adoption proceeding, "[s]ince the adoption proceeding is appropriately characterized as litigation arising on the Indian reservation."[89] The Indian-plaintiffs claimed that denying them access to the state court system would comprise impermissible racial discrimination.[90] The Court rejected this claim, stating:

> The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law. Moreover, even if a jurisdictional holding occasionally results in

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83. *Id.* at 860.

84. *Id.*

85. *See* 28 U.S.C. § 1360(c) (1994).

86. *See* Wacondo v. Concha, 873 P.2d 276 (N.M. Ct. App. 1994); Sanapaw v. Smith, 335 N.W.2d 425 (Wis. Ct. App. 1983).

87. This is required by *Montana v. United States*, 450 U.S. 544, 564 (1981).

88. 424 U.S. 382 (1976).

89. *Id.* at 389.

90. *Id.* at 390.

> denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government.[91]

The state courts' second contention that jurisdiction over non-Indians is not important to tribal sovereignty directly conflicts with the Supreme Court's express recognition that "[t]ribal authority over the activities of non-Indians on reservation is an important part of tribal sovereignty."[92] Tribal sovereignty today is highly dependent upon many economic factors which a tribe must control through its own justice system.[93] With the passage of the Indian Gaming Rights Act (IGRA)[94] and the expansion of tribal economic activity,[95] the presence of non-Indians on reservations has dramatically increased over the past ten years. Non-Indians regularly do business on the reservation, gamble in tribally owned casinos, purchase Indian-made art, view Indian cultural and religious activities, and simply pass through the reservation on a daily basis. A state court's regulation of this conduct presents a great threat to tribal sovereignty.

Emphasis on the race of the parties involved is misplaced when determining the jurisdictional divide in tribal-state relations. The situs of the cause of action should play the major role in a court's decision regarding jurisdiction. This factor holds with it many implications such as determining *in personam* jurisdiction, choice of substantive law, and convenient forum considerations. Furthermore, as this article suggests, the Indian Abstention Doctrine permits tribal courts to exercise initially exclusive jurisdiction over actions arising on the reservation and involving non-Indian defendants.[96] While originally applied in federal courts, this Doctrine should apply in state courts as well.[97] As will be shown below, the Doctrine does not divest the court of its subject matter jurisdiction, but it limits the court's *exercise* of

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91. *Id.* at 390-91 (citing Morton v. Mancari, 417 U.S. 535, 551-55 (1974)).

92. Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987).

93. *See* Ray Halbritter & Steven Paul McSloy, *Empowerment or Dependence? The Practical Value and Meaning of Native American Sovereignty*, 26 N.Y.U. J. INT'L L. & POL. 531, 560-64 (1994); Russel Lawrence Barsh, *The Challenge of Indigenous Self-Determination*, 26 U. MICH. J. LAW REFORM 277, 284 (1993).

94. 25 U.S.C. §§ 2701-2719 (1994).

95. Congress has strongly promoted the development of tribal economic activity through such acts as the Indian Employment, Training and Related Services Act, 25 U.S.C. §§ 3401-3417 (1994 & Supp. I 1995) (enacted to reduce joblessness on Indian reservations and to improve existing businesses in Indian country); the Indian Self-Determination and Educational Assistance Act of 1975, 25 U.S.C. §§ 450-458hh (1994 & Supp. I 1995); and the Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1544 (1994).

96. *See infra* note 106.

97. *See infra* text accompanying notes 151-78.

concurrent jurisdiction over reservation-based claims. For purposes of analogy, this article now examines what a federal court is required to do when a claim arises on the reservation and its jurisdiction is concurrent with a tribal court's.

III. Exhaustion of Tribal Remedies in Federal Courts

The Indian Abstention Doctrine recognizes that, although federal and tribal court jurisdiction may be concurrent, a federal court must abstain from accepting jurisdiction over suits arising on the reservation or involving "reservation affairs"[98] until parties expend all available tribal court remedies.[99] This doctrine is analogous to the various concepts of abstention where federal and state courts have concurrent jurisdiction. Occasionally, when federal and state court jurisdiction are concurrent, certain circumstances require that the federal court abstain from exercising its jurisdiction and defer to the state court proceedings.[100] Federal abstention involving state proceedings is the exception and not the rule.[101] However, as explained below, the deference a federal court owes a tribal court is somewhat greater.[102]

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98. The circuits are split on the type of inquiry that a federal court should conduct before requiring exhaustion. The Seventh Circuit requires exhaustion only after the federal court conducts a "particularized inquiry," which requires the federal court to first determine whether the case arose on the reservation or involved a "reservation affair." *See* Timothy W. Joranko, *Exhaustion of Tribal Remedies in the Lower Court After National Farmers Union and Iowa Mutual: Toward a Consistent Treatment of Tribal Courts by the Federal Judicial System*, 78 MINN. L. REV. 259, 284-85, 290-92 & cases cited therein (1993). The Ninth and Tenth Circuits follow a "bright-line rule," which requires exhaustion in "virtually every case that does not fall plainly within one of the three exceptions set forth in *National Farmers Union*." *Id.* at 271, 290-92 & cases cited therein.

99. National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 856 (1985). The line of Indian Abstention cases do not base the requirement of exhaustion upon the race of either party. *See, e.g.*, Stock West Corp. v. Taylor, 964 F.2d 912, 920 (9th Cir. 1992) (requiring exhaustion where both parties to suit were non-Indians).

100. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 820 (1976) (finding U.S. District Court decision to dismiss justified because of policy underlying federal statute); Younger v. Harris, 401 U.S. 37, 41 (1971) (finding federal court abstention appropriate in criminal cases where prosecution is pending in state court); Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 501 (1941) (abstaining from deciding constitutional adjudication where methods available to obtain definitive ruling on issue of state law in state court).

Professors Skibine and Clinton, at a conference held by the *North Dakota Law Review*, caution direct analogy of the Indian Abstention Doctrine to the federal/state abstention doctrines. *See* Patti Alleva et al., *Dispute Resolution in Indian Country: Does Abstention Make the Heart Grow Fonder*, 71 N.D. L. REV. 541, 547-49, 556-59 (1995).

101. *Colorado River*, 424 U.S. at 813 (citing County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89 (1959) ("'The doctrine of abstention . . . is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.'").

102. Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 22 (1987) (Stevens, J., dissenting in part) ("Until today, we have never suggested that an Indian tribe's judicial system is entitled to a greater degree of deference than the judicial system of a sovereign state.").

The United States Supreme Court first discussed the Indian Abstention Doctrine in *National Farmers Union Ins. Co. v. Crow Tribe of Indians*.[103] In *National Farmers Union* the Court listed three reasons for the exhaustion of tribal court remedies. The Court recognized that exhaustion will: (1) promote the congressional policy of strengthening tribal self-governance; (2) serve the orderly administration of justice; and (3) provide the parties and the federal court involved with the benefit of the tribal court's expertise.[104] All three of these purposes for exhaustion are aimed towards strengthening and validating the tribal court system, a goal which the federal government has consistently encouraged.

The following discussion examines each of the three reasons for exhaustion, and briefly discusses the role of the federal court system in reviewing a tribal court's decision after exhaustion.

A. Exhaustion of Tribal Remedies Promotes the Federal Policy of Encouraging Tribal Self-Governance

The first basis for the exhaustion of tribal court remedies, the policy encouraging tribal self-government, recognizes that "Indian tribes retain 'attributes of sovereignty over both their members and their territory.'"[105] In addition, the *Iowa Mutual* Court recognized that tribal civil jurisdiction over the actions of non-Indians on reservation lands is also an important part of tribal sovereignty.[106] These statements recognize the importance of the role that the tribal court system plays in tribal self-governance.[107] Thus, contrary to the congressional policy of Indian self-determination, unconditional access to the federal courts by either Indians or non-Indians would impair the validity of the tribal court system.[108]

The modern tribal court system is a relatively new approach to justice for many tribal governments. In the 1800s a few tribes adopted Anglo-American justice systems.[109] Most tribes instead chose to maintain their traditional legal systems, which consisted of informal unwritten laws guided by behavioral norms which emerged as tribal custom.[110] During the policy of Assimilation (1871-

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103. 471 U.S. 845 (1985).

104. *Id.* at 856-57.

105. *Iowa Mutual*, 480 U.S. at 14 (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975)).

106. *Id.* at 18.

107. *Id.* at 14.

108. *Id.* at 16.

109. COHEN, *supra* note 4, at 333.

110. *Id.* at 230. Many Pueblos of the Southwest continue to utilize their traditional justice systems or "Governor's Courts" — in which the traditional language is spoken. This system is used exclusively for disputes between members or involving members and members of other Pueblos speaking the same dialect. Most Pueblos also maintain a modern tribal court for disputes involving those who cannot participate in the traditional court. In most instances, the modern pueblo court system is equipped with a law-trained judge (knowledgeable in the ways of the

1934), the federal government imposed Anglo-American court systems (commonly referred to as CIO or CFR Courts) upon many tribal governments having traditional justice systems.[111] The Indian Reorganization Act of 1934[112] and a revised Code of Indian Tribal Offenses for CFR Courts[113] restored a large amount of authority over tribal justice to the tribal governments.[114] Today tribal courts provide one of the primary forms of validation of tribal governmental authority.[115] Tribal courts formally recognize tribal customary law and serve to strengthen tribal governments by exercising jurisdiction to the fullest extent.[116]

B. Exhaustion of Tribal Remedies Serves the Orderly Administration of Justice

The second purpose of exhaustion, the orderly administration of justice, recognizes that exhaustion serves as a prophylactic measure against "procedural nightmares."[117] Litigation may be pending in a federal and a tribal court, wasting the time and money of both governments. Thus, by mandating that parties first exhaust all available tribal remedies where a case arises on the reservation or involves a reservation affair, the Supreme Court assured the prevention of conflicting adjudications and wasted judicial resources. In order to assure the orderly administration of justice, the *Iowa Mutual* Court recognized that exhaustion is not complete until the tribal appellate court is permitted an opportunity to rectify any errors the lower tribal court may have made.[118]

Hepler v. Perkins[119] provides a perfect example of the procedural nightmares that can result when parties fail to exhaust tribal remedies. *Hepler* involved a custody dispute between an Indian mother and her in-laws, the non-

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Pueblo) as well as a tribal court clerk and court administrator. Interview with Santiago Trancosa, San Felipe Tribal Court Probation Officer (Nov. 1995); *see also* Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126, 129-31 (Nov.-Dec. 1995). *See generally* Ada Pecos Mellon, Traditional and Contemporary Justice in Pueblo Communities (1993) (on file with author) (paper prepared for conference hosted by the Pueblo of Santa Clara and sponsored by the Southwest Intertribal Court of Appeals and Office of Indian Affairs).

111. In 1883, the Bureau of Indian Affairs created the Courts of Indian Offenses. *Id.* at 333 (noting that the purpose of the courts was to create a center of authority organized and operated by non-Indians to compete with the traditional tribal justice system).

112. 25 U.S.C. §§ 461-479 (1994).

113. The Code was published in 1935 by Commissioner John Collier. 3 Fed. Reg. 952 (1938) (codified as amended at 25 C.F.R. pt. 11 (1979)), *cited in* COHEN, *supra* note 4, at 333.

114. COHEN, *supra* note 4, at 333.

115. Valencia-Weber, *supra* note 5, at 232 (quoting Frank Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay*, 18 N.M. L. REV. 49, 71 (1988)).

116. *Id.* at 245-46.

117. National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 856-57 (1985).

118. Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 17 (1987).

119. 13 Indian L. Rep. (Am. Indian Law. Training Program) 6011 (Sitka Community Ass'n Tribal Ct. 1986).

Indian grandparents.[120] Actions relating to the dispute were pending in four different jurisdictions: the Sitka Community Association Tribal Court, the United States Court of Appeals for the Ninth Circuit, an Alaskan state court, and a Washington state court.[121] These four separate suits created the significant possibility of conflicting adjudications which would clearly defeat the important goal of finality in custody cases.[122] Furthermore, the case involved complex legal issues the answers to which were dependent upon the application of written and customary tribal law, federal law, and the laws of both the states of Alaska and Washington.[123]

The tribal court in *Hepler*, recognizing federal statutes, state common law, and tribal customary law, found that it had subject matter jurisdiction over the case.[124] The *Hepler* court employed a device of the Sitka jurisdictional code which vested the tribal court with the discretion to certify questions of tribal custom to the Sitka Court of Elders.[125] If tribal remedies had been exhausted in the first instance, the time and economic resources of the other three court systems involved in this dispute would not have been wasted, a result the Supreme Court sought to avoid in creating the Indian Abstention Doctrine.

C. Exhaustion of Tribal Remedies Provides Tribal Court's Expertise in the Application of Tribal Law

The third reason for the exhaustion of tribal court remedies is that it will provide the parties and other courts with the expertise of the "tribal courts [which] are best qualified to interpret and apply tribal law."[126] Tribal laws are made up of tribal customs, written codes and ordinances, and of tribal common law provided by opinions of the tribal court.[127]

At least one commentator has argued that tribal laws or codes are nothing more than a simulation of state and federal statutes, and thus, tribal courts do not deserve the deference provided by the Indian Abstention Doctrine.[128] What

120. *Id.* at 6011.

121. *Id.*

122. *Id.* at 6011 n.2.

123. *Id.* at 6011.

124. *Id.* at 6013-19.

125. *Id.* at 6013. The mother in *Hepler* had moved off of the reservation when she had relations with the father of her child. *Id.* at 6011. Thus, the tribal court certified to the Court of Elders the question of the extent of tribal and clan jurisdiction over custody disputes involving children born to female members who move away from the reservation. The Court of Elders found that the tribal court did have jurisdiction reasoning that "[c]lan membership does not wash off, nor can such membership be removed by any force, or any distance, over time. Even in death clan membership continues, and in re-birth it is renewed." *Id.* at 6016.

126. Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1985).

127. *See* Valencia-Weber, *supra* note 5, at 244-56.

128. "In both conception and operation, the tribal courts are little more than pale copies of the white system." SAMUEL J. BRAKEL, AMERICAN INDIAN TRIBAL COURTS: THE COSTS OF SEPARATE JUSTICE 100 (1978).

this commentator fails to realize is that the *application* of the written codes and the many other tribal laws that are not written, require the knowledge of tribal custom and tradition that can only be properly applied in a tribal courtroom.[129] The application of tribal law is not conducive to the adjudicatory system practiced in state and federal courts. The American legal system is an adversarial system that offers only a "win-lose solution."[130] Conversely, "[t]raditional tribal justice tends to be informal and consensual rather than adjudicative, and often emphasizes restitution rather than punishment."[131]

"The legal principles derived from American Indian custom distinguish the tribal nations' judicial systems from non-Indian American jurisprudence."[132] Tribal law in many cases is not written and is thus the product of fundamental traditions and customs and usages.[133] Tribal courts enforce these customs by filling the gaps in the written law through the recognition of customs.[134] Thus,

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129. "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 tribes fully extirpated." Frank Pommersheim, *Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411, 420-21. To the contrary, "[t]he law produced in tribal codes and courts does not necessarily retain the discrete elements from Anglo-American legal culture with the same meaning and value as in the contributor culture or jurisprudence." Valencia-Weber, *supra* note 5, at 256.

130. Robert Yazzie, *"Life Comes From It": Navajo Justice Concepts*, 24 N.M. L. REV. 175, 177-78 (1994).

131. Robert D. Garrett, *Mediation in Native America*, 49 DISP. RESOL. J. 38, 39 (1994) (quoting an unpublished lecture given by Rennard Strickland); *see also* Yazzie, *supra* note 130, at 180 (describing the objective of tribal law as a circle "because it is perfect, unbroken, and a simile of unity and oneness"); Philmer Bluehouse & James W. Zion, *Hozhooji Naat'aanii: The Navajo Justice and Harmony Ceremony*, 10 MEDIATION Q. 327 (Summer 1993); Chief Justice Tom Tso, *Moral Principles, Traditions and Fairness in the Navajo Nation: Code of Judicial Conduct*, 76 JUDICATURE 15, 16 (1992) ("Traditional Navajo common law fostered a system of justice based on clan relations, equality, freedom with responsibility, harmony, mediation, leadership by reputation and respect, and a focus on making victims whole."); STRICKLAND, *supra* note 7, at 11 ("Public consensus and harmony rather than confrontation and dispute, as essential elements of the Cherokee world view, were reflected in the ancient concepts of law.").

132. Valencia-Weber, *supra* note 5, at 244.

133. United States *ex rel.* Mariano v. Tsosie, 849 F. Supp. 768, 774 (D.N.M. 1994) (also reported at 21 Indian L. Rep. (Am. Indian Law. Training Program) 3120, 3124 (D.N.M. 1994)) (quoting Navajo Nation Supreme Court Justice Tso's affidavit) ("The Navajo culture historically did not employ writings to codify the rules which governed Navajo society. However, many of the cultural traditions and values are . . . equivalent to a statute or constitutional provision in the United States laws."); *see also* Valencia-Weber, *supra* note 5, at 245-49 (noting the differences between tradition, and custom and usage, and recognizing that "tribal litigators and judges must decide when custom and usage should be determinative in decisions").

134. Chief Justice Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225, 230 (1989). For an example of this gap-filling, see Descheenie v. Mariano, 15 Indian L. Rep. (Am. Indian Law. Training Program) 6039, 6039 (Navajo Sup. Ct. 1988) (recognizing lack of legislation regarding paternity actions or how to determine child support amounts, the Navajo Supreme Court developed a formula integrating Navajo culture and modern family law principles to determine such amounts).

as promoted through mandatory exhaustion of tribal court remedies, the application of tribal law is best served in the tribal court system.

With few exceptions,[135] the exhaustion of tribal court remedies is mandatory where a case arises on the reservation.[136] Further, exhaustion is required regardless of whether action is pending in tribal court,[137] regardless of whether

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135. The Supreme Court recognizes three exceptions to tribal court exhaustion: (1) where tribal court jurisdiction is asserted with a desire to harass or is conducted in bad faith; (2) where jurisdiction is patently violative of express tribal court jurisdictional prohibitions; and (3) where exhaustion of tribal court jurisdiction would prove futile. National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 856 n.21 (1985).

136. Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294, 1300 (8th Cir. 1994) (requiring exhaustion over action involving non-Indian oil companies' challenges to tribal taxation), *cert denied*, 115 S. Ct. 779 (1995); Texaco, Inc. v. Zah, 5 F.3d 1374, 1378 (10th Cir. 1993) ("When the activity at issue arises on the reservation, these policies almost always dictate that the parties exhaust their tribal remedies before resorting to the federal forum."); Crawford v. Genuine Parts, Inc., 947 F.2d 1405, 1407 (9th Cir. 1991), *cert denied*, 502 U.S. 1096 (1992); Burlington N. R.R. Co. v. Crow Tribal Council, 940 F.2d 1239, 1245 (9th Cir. 1991); Kerr-McGee Corp. v. Farley, 915 F. Supp. 273, 280 (D.N.M. 1995) (requiring exhaustion over claim by Navajo member plaintiffs against non-Indian corporation for wrongful death caused by improper uranium processing in light of an apparent jurisdictional prohibition in the Price-Anderson Act, 42 U.S.C. §§ 2011-2023); Prescott v. Little Six, Inc., 897 F. Supp. 1217, 1221 (D. Minn. 1995) (finding that tribal courts have concurrent jurisdiction with federal courts to determine whether ERISA plans, thus, exhaustion of tribal remedies is required). *But see* Altheimer & Gray v. Sioux Manufacturing Corp., 983 F.2d 803, 815 (7th Cir. 1993) (exhaustion not required where choice of law provision in contract stipulated to use of state law), *cert. denied*, 510 U.S. 1019 (1993); Alaska v. Native Village of Venetie, 856 F.2d 1384, 1388 (9th Cir. 1988) (rejecting exhaustion contention where tribal status was in question); Phillip Lear & Blake Miller, *Exhaustion of Tribal Court Remedies: Rejecting Bright-Line Rules and Affirmative Action*, 71 N.D. L. REV. 277, 277 (1995) ("*National Farmers* and *Iowa Mutual* do not mandate exhaustion of tribal court remedies. Bright-line tests result from tortured reading of the seminal cases by federal district and appellate courts.")

Several cases have suggested that exhaustion may be required even where the activity at issue arises outside of Indian country.

> When the dispute involves non-Indian activity occurring outside the reservation, however, the policies behind the tribal exhaustion rule are not so obviously served. Under these circumstances, we must depend upon the district courts to examine assiduously the *National Farmers* factors in determining whether comity requires the parties to exhaust their tribal remedies before presenting their dispute to the federal courts.

Zah, 5 F.3d at 1378; Barker v. Menominee Nation Casino, 897 F. Supp. 389, 396 n.6 (E.D. Wis. 1995) (quoting *Zah*); Kerr-McGee Corp. v. Farley, 915 F. Supp. 273, 279 (D.N.M. 1995) (quoting *Zah*).

137. United States *ex rel.* Kishell v. Turtle Mountain Housing Auth., 816 F.2d 1273, 1276 (8th Cir. 1987) (requiring exhaustion although no action brought before the tribal court); Wellman v. Chevron Corp., U.S.A., 815 F.2d 577, 578 (9th Cir. 1987) (requiring exhaustion where Indian contractor brought an action in federal court against non-Indian corporation); Kaul v. Wahquahboshkuk, 838 F. Supp. 515, 518 (D.Kan. 1993) (requiring exhaustion where non-Indian owner of store on reservation sued tribal council); Middlemist v. Secretary of U.S. Dep't of Interior, 824 F. Supp. 940, 944 (D. Mont. 1993) (lacking ongoing proceeding in tribal forum did not negate exhaustion requirement), *aff'd*, Middlemist v. Babbit, 19 F.3d 1318 (9th Cir.),

the issue is raised by either party,[138] and in some cases, regardless of whether the tribal court is fully operational at the time the action was commenced.[139] If exhaustion were not mandatory the principles set forth in *National Farmers* and *Iowa Mutual* would have no force.

D. Federal Court Review of Tribal Court Jurisdictional Findings: The Justification for Mandatory Exhaustion

Federal court review of a tribal court's jurisdictional finding provides the justification for *mandatory* exhaustion of tribal court remedies.[140] The primary basis for federal court review is that tribal court subject matter jurisdiction is a question that must be answered by reference to federal common law, a federal question.[141] Thus, a federal district court may review a tribal court's jurisdictional finding by exercising its federal question jurisdiction.[142]

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cert.denied, 115 S. Ct. 420 (1994); Tom's Amusement Co., Inc. v. Cuthbertson, 816 F. Supp. 403, 407 (W.D.N.C. 1993) (abstaining from exercising jurisdiction pending exhaustion of tribal court remedies); *see also* Brown v. Washoe Housing Authority, 835 F.2d 1327, 1328 (10th Cir. 1988) (exhausting tribal remedies required before federal court will hear case); Weeks Construction, Inc. v. Oglala Sioux Housing Authority, 797 F.2d 668, 672 n.3 (8th Cir. 1986) (referring the case for initial determination by the tribal court). *But see Altheimer & Gray*, 983 F.2d at 814 (concluding exhaustion not required where no action pending in tribal court); Burlington N. R.R. Co. v. Blackfeet Tribe, 924 F.2d 899, 901 n.2 (9th Cir. 1991) (declaring exhaustion not applicable where "no proceeding is pending in any tribal court"), *cert denied*, 505 U.S. 1212 (1992); Vance v. Boyd Mississippi, Inc., 923 F. Supp. 905, 911 (S.D. Miss. 1996) (exhausting tribal remedies not required as no pending proceeding in tribal forum and issues presented were purely questions of federal law).

138. Smith v. Moffett, 947 F.2d 442, 444-45 (10th Cir. 1991) (*sua sponte* exhaustion within the discretion of the court); United States *ex rel.* Mariano v. Tsosie, 849 F. Supp. 768, 775, 21 Indian L. Rep. (Am. Indian Law. Training Program) 3120, 3124 (D.N.M. 1994) (finding exhaustion required even where all parties oppose abstention).

139. Basil Cook Enterprises, Inc. v. St. Regis Mohawk Tribe, 914 F. Supp. 839, 841-42 (N.D.N.Y. 1996) (requiring exhaustion where the "tribal court was established before the action precipitating the dispute, although shortly before," and where "the court, as yet, is not functioning in the exact form set forth in the [tribal] constitution."); Krempel v. Prarie Island Indian Community, 888 F. Supp. 106, 109 (D.Minn. 1995) (finding fact that tribal court was fully operational at time of trial sufficient to require exhaustion of remedies in newly formed tribal court). *But see* Nenana Fuel Co., Inc. v. Native Village of Venetie, 834 P.2d 1229, 1233-34 (Alaska 1992) (finding exhaustion of tribal remedies not required where tribal court not functioning).

140. Professor Robert Williams has voiced strong opinion against the federal court review of tribal court decisions, stating that such review reveals the "legacy of European colonialism and racism." Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 276 (1989).

141. *See* National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 852 (1985). Exhaustion is required as a matter of comity, it does not divest federal courts of subject matter jurisdiction. Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 16 n.8 (1987).

142. *See National Farmers*, 471 U.S. at 850 & n.6 (citing Illinois v. City of Milwaukee, 406 U.S. 91, 99-100 (1972)).

However, where a tribal court's finding of subject matter jurisdiction also depends upon the facts of the case, the federal court may be required to review the decision under a different standard.[143]

While a federal district court may review certain tribal court findings of subject matter jurisdiction *de novo*,[144] it must review the tribal court's fact finding under a deferential, clearly erroneous standard.[145] This view coincides with the second reason for exhaustion, the orderly administration of justice. By deferring to a tribal court's fact finding, federal courts will greatly conserve judicial resources in keeping with the "orderly administration of justice" reasoning of *National Farmers* and *Iowa Mutual.*

Additionally, the federal courts must defer to a tribal court's interpretations of tribal law. In *Hinshaw v. Mahler*,[146] the Ninth Circuit Court of Appeals, reviewing the Confederated Salish and Kootenai Tribal Court's exercise of jurisdiction over a tort involving only nonmembers, expressly stated that "the Tribal Court's interpretation of tribal law is binding on this court."[147] Thus, unless the tribal court's jurisdictional determination is overruled, the federal district court must defer to the tribal court judgment.[148]

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143. A "[t]ribal court's jurisdictional determinations that are based on what is vital to tribal self-government . . . involve the application of law to facts, or 'mixed' questions of law and fact. Therefore, these determinations should not be reviewed *de novo* but should be upheld if reasonable or rational." 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, 219 (1994).

144. Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation, 27 F.3d 1294, 1300 (8th Cir. 1994) (examining tribal court's determination is a question of federal law that must be reviewed de novo), *cert. denied*, 115 S. Ct. 779 (1995); *see also* FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1313 (9th Cir. 1990) (demonstrating that federal courts must show some deference to a tribal court's determination, therefore clearly erroneous applies to factual questions and de novo on federal legal questions), *cert. denied*, 499 U.S. 943 (1991).

145. "[I]n making its analysis, the district court should review the Tribal Court's findings of fact under a deferential, clearly erroneous standard." *Duncan Energy*, 27 F.3d at 1300 (citing FMC v. Shoshone-Bannock Tribes., 905 F.2d 1311, 1313 (9th Cir. 1990)). Furthermore, a tribal court's determination of personal jurisdiction is not reviewable in that it involves application of the Indian Civil Rights Act, 25 U.S.C. § 1302, which federal courts may only review for habeas corpus relief. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).

146. 42 F.3d 1178, 1180 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 485 (1994). *Hinshaw* was on appeal from a decision of the Confederated Salish and Kootenai Court of Appeals in Mahler v. Hinshaw, 17 Indian L. Rep. (Am. Indian Law. Training Program) 6044 (C.S. & K. Ct. App. 1990).

147. *Hinshaw*, 42 F.3d at 1180 (citing Sanders v. Robinson, 864 F.2d 630, 633 (9th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989)).

148. *Duncan Energy*, 27 F.3d at 1300 (citing Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987); Tamiami Partners Ltd. v. Miccosukee Tribe of Indians, 999 F.2d 503, 508 n.12 (11th Cir. 1993) (citing *Iowa Mutual*, 480 U.S. at 19).

Deference to tribal court decisions dictates that "[t]ribal courts must have a chance to develop their own jurisprudence concerning what self-determination means to them and define their own vision of tribal self-government." Skibine, *supra* note 143, at 210.

In conclusion, where a cause of action arises on the reservation and tribal and federal court jurisdiction are concurrent, a federal court *must* abstain to permit the tribal court, an expert in tribal law, to determine the extent of its own jurisdiction. Mandatory exhaustion is justified in that a federal court has the power to review the tribal court's acceptance of subject matter jurisdiction. Now that we understand the basis for mandatory federal court abstention, this article will now examine the application of the Indian Abstention Doctrine in state courts for reservation-based claims.

IV. The Indian Abstention Doctrine Applied in the State Courts

When a state court faces a reservation-based claim or a claim involving a "reservation affair," it is not clear whether the Indian Abstention Doctrine should apply. Some state courts have applied the Doctrine,[149] while many others have refused to apply it or have simply ignored it.[150]

A. Support for Application of the Indian Abstention Doctrine in State Courts

Support for application of the Doctrine in state courts is found in both the Supreme Court's language in *Iowa Mutual Insurance Co. v. LaPlante* and in recent federal court case law.[151]

1. Supreme Court Support for State Abstention

The *Iowa Mutual* Court indicated that exhaustion applies to state as well as federal courts when it used the phrase "any nontribal court."[152] The Court did not define the term "nontribal court," but the plain meaning of the term must encompass all courts that are not employed in the justice systems of the various Indian nations. However, to gain a better understanding of what the Court actually meant when it used the phrase "nontribal court," this term must be placed in the proper context.

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149. Klammer v. Lower Sioux Convenience Store, 535 N.W.2d 379, 384 (Minn. Ct. App. 1995) (reversing state district court's denial of tribal business' motion to dismiss non-Indian plaintiff's suit "and refer[ring] him to tribal court to first exhaust his remedies there."); *In re* Marriage of Limpy, 636 P.2d 266, 269 (Mont. 1981) (recognizing, prior to the *National Farmers* case, that tribal courts "should interpret Tribal law as a matter of policy and that State courts should abstain from interpreting Tribal law to the contrary in cases where the Tribal Court has spoken on the subject").

150. *See e.g.*, Wacondo v. Concha, 873 P.2d 276, 280 (N.M. Ct. App. 1994) (accepting concurrent jurisdiction over a reservation tort where all parties involved were Indians; completely ignoring *amici*'s argument that state court should abstain until tribal remedies were exhausted); Larrivee v. Morigeau, 602 P.2d 563, 571 (Mont. 1979) (holding that district court had subject matter jurisdiction because tribal ordinance granted state concurrent civil jurisdiction).

151. Judge Canby, in his Indian law treatise, also recognizes that the Doctrine should apply to state courts: "If the federal courts must defer to tribal courts to avoid undue interference with tribal adjudication of claims against non-Indians, it is difficult to see why state courts should not be required to do the same." CANBY, *supra* note 30, at 160.

152. *Iowa Mutual*, 480 U.S. at 16.

Iowa Mutual involved the issue of whether a federal court should abstain from exercising its diversity jurisdiction over a reservation-based claim between a member Indian and a non-Indian insurance company.[153] The Supreme Court in *Iowa Mutual* began by examining the infringement test set forth in *Williams v. Lee*.[154] The Court recognized that *state courts* are generally divested of jurisdiction over "activities on Indian lands" where it would interfere with tribal sovereignty.[155] The Court then acknowledged that *federal court* jurisdiction over "matters relating to reservation affairs" also impairs tribal sovereignty.[156] Referring to both state and federal courts in its infringement analysis, the Court recognized two scenarios where tribal sovereignty will be implicated: (1) when an activity occurs on the reservation; and (2) where the activity involves a reservation affair.

Holding that exhaustion applies to diversity cases as well as federal question cases, the Court continued by reasoning that:

> [U]nconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs. Adjudication of such matters by any *nontribal court* also infringes upon tribal lawmaking authority, because tribal courts are best qualified to interpret and apply tribal law.[157]

This paragraph is very important. The Court is setting forth its primary reason for requiring exhaustion: the promotion of tribal self-government. In this paragraph, the Court continues to focus on the infringement test, and continues to refer to both state and federal courts by citing two very different cases for authority supporting abstention: *Santa Clara Pueblo v. Martinez* and *Fisher v. District Court. Martinez* involved a reservation-based claim brought in federal court,[158] while the plaintiff in *Fisher* sought relief in state court for her reservation-based claim.[159] In the very next sentence the Court uses the term "nontribal court" as opposed to strictly "federal court."[160] This language was used apparently to include state courts within the scope of application of the Doctrine.[161] Since the *Iowa Mutual* decision in 1987, the Supreme Court has

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153. *Id.* at 11-13.

154. 358 U.S. 217, 219 (1959) (declaring that "the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them")

155. *Iowa Mutual*, 480 U.S. at 15.

156. *Id.*

157. *Id.* at 16 (emphasis added) (citations omitted).

158. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 51 (1978).

159. Fisher v. District Court, 424 U.S. 382, 383 (1976).

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

161. "*LaPlante* suggests that a state court would similarly have to defer a case brought by an Indian against a non-Indian if parallel proceedings were under way in a tribal court." CANBY,

not spoken directly of the Indian Abstention Doctrine. Other federal courts addressing the issue of whether abstention applies in state court have answered in the affirmative.

2. Other Federal Court Support of State Abstention

Only two federal courts have addressed whether the application of the Indian Abstention Doctrine should be applied to state courts. Both courts have adopted the view that the Doctrine should be applied in state courts where the cause of action occurred in Indian country.

Bowen v. Doyle[162] involved an action brought by Dennis Bowen, the President of the Seneca Nation of Indians,[163] against two New York State Supreme Court judges seeking to enjoin the state judges from exercising jurisdiction over a state court proceeding involving President Bowen.[164] In the state court action, several present and former officials of the Seneca Nation sought an injunction against Bowen, claiming that he acted in violation of the Seneca Nation Constitution.[165] The state court suit was initiated after the Seneca Peacemakers Court denied the Seneca officials' motion to vacate its order enjoining one official from acting or sitting as a Council member.[166]

Finding that the exhaustion rule should have equal application to state courts as well as federal courts, the *Bowen* court stated that "[a]lthough *LaPlante* and *National Farmers Union* apply th[e] exhaustion rule to actions in federal court, those decisions . . . compel application of the exhaustion rule to the controversy at issue here . . . ."[167] The court further reasoned that litigation of reservation disputes "in a forum other than the tribe's simply 'cannot help but unsettle a tribal government's ability to maintain authority.' . . . The same disruption occurs whether it is a federal or a state court that asserts jurisdiction over a civil dispute that is otherwise within the tribal court's authority."[168]

Tohono O'odham Nation v. Schwartz[169] similarly involved a request of a federal court to enjoin state court proceedings. A non-Indian contractor (Canyon) brought an action in an Arizona State Superior Court against the Tohono O'odham Housing Authority (TOHA) for damages arising from breach of contract.[170] The Tohono O'odham Nation and TOHA obtained a temporary restraining order from the United States District Court for the District of

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supra note 30, at 149.

162. 830 F. Supp. 99 (W.D.N.Y. 1995).

163. In both his individual capacity and on behalf of the Seneca Nation. *Id.* at 105.

164. *Id.*

165. *Id.* The state court claims were based solely on Seneca tribal law. *Id.* at 105 n.1.

166. *Id.* at 106-07.

167. *Id.* at 123.

168. *Id.* at 124 (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978)).

169. 837 F. Supp. 1024 (D. Ariz. 1993).

170. *Id.* at 1026.

Arizona halting further proceedings in state court.[171] TOHA and the Tohono O'odham Nation then sought a permanent injunction from this same court.

Canyon moved the court to dismiss for lack of jurisdiction. The court denied Canyon's motion, stating that "federal courts do have jurisdiction and authority to enjoin state court proceedings when it is necessary to preserve the integrity of Indian sovereignty."[172] Canyon next contended that the Anti-Injunction Act[173] precluded the federal court from exercising its jurisdiction. The court rejected this contention, reasoning that interpretation of Indian law was a matter of federal law, and thus, fell within the second exception of the Anti-Injunction Act.[174]

In determining where the cause of action occurred, the *Schwartz* court found that while the contract was negotiated and executed off of the reservation, its performance occurred exclusively within reservation boundaries.[175] Thus, the court considered the *locus* of the matter to have occurred on the reservation.[176] Relying on the reasoning that "[t]he question of tribal court jurisdiction should be determined, in the first instance, by the tribal court[,]"[177] the *Schwartz* court stated that "Canyon improperly brought this action in state court prior to exhaustion of the issues in tribal court."[178]

These cases suggest that the Indian Abstention Doctrine should apply to state courts where the claim arises on the reservation or involves a "reservation affair." As noted above, the exhaustion rule does not divest the nontribal court of subject matter jurisdiction.[179] The Doctrine, however, does limit the *exercise* of the nontribal court's concurrent jurisdiction. Exhaustion prevents litigants from racing to the state court room to avoid tribal court remedies. But to what extent should the Doctrine apply? In federal court, abstention is mandatory where the action arises on the reservation. Should abstention similarly apply in state court? I answer no. *Mandatory* abstention in state courts for reservation-based claims is not justified because state courts cannot review tribal court

171. *Id.* The named defendants were the Honorable Jonathan H. Schwartz, Maricopa County Superior Court, Division 61, and the Canyon Contracting Co.

172. *Id.* at 1027-28 (citing White Mountain Apache v. Smith Plumbing Co., 856 F.2d 1301, 1304-06 (9th Cir. 1988)). The court noted, however, that if the Tohono O'odham Nation did not file as co-plaintiff, jurisdiction may have been precluded. *Id.* at 1028.

173. 28 U.S.C. § 2283 (1994). The statute "provides that 'federal courts may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.'" *Id.*

174. *Schwartz*, 837 F. Supp. at 1028. The court also rejected Canyon's contention that principles of the *Younger* Abstention Doctrine require the federal court to abstain from exercising its jurisdiction and to permit the state court action to proceed. *Id.* at 1028-29.

175. *Id.* at 1032.

176. *Id.*

177. *Id.* at 1033.

178. *Id.* at 1030.

179. *See supra* note 141 and accompanying text.

decisions as can federal courts. State courts simply are not authorized to act as appellate courts for disputed tribal court decisions.

B. Validity of State Court Review of Tribal Court Decisions

The state courts which recognize the Indian Abstention Doctrine do not discuss whether a state court may review a tribal court's decision after exhaustion, but the implication of such a practice is abhorrent.[180] State court appellate review of a tribal court decision expressly suggests that a state court is superior to a tribal court. Such a contention can only come from the afterbirth of the ethnocentric policies of the federal government which have long been abolished.[181] State courts lack the power to review tribal court judgments for two important reasons: (1) state court appellate review of tribal court decisions would infringe upon tribal sovereignty, and (2) state appellate review is preempted by existing federal law.

1. State Court Review Would Infringe on Tribal Sovereignty

"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history."[182] Only "where essential tribal relations were not involved and where the rights of Indians would not be jeopardized" can a state assert jurisdiction.[183] Thus, the Supreme Court invalidates state action when it infringes upon tribal self-government.[184]

The importance of the tribal court system to tribal sovereignty is well recognized by both the United States Supreme Court and the Congress.[185]

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180. However, when it comes to enforcing a tribal court judgment in state court, the state court may conduct a jurisdictional review when conducting its full faith and credit or comity analysis. *See generally* Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLIAMETTE L. REV. 841 (1990); Robert Laurence, *The Enforcement of Judgments Across Indian Reservation Boundaries: Full Faith and Credit, Comity and the Indian Civil Rights Act*, 69 OR. L. REV. 589 (1990).

181. The congressional policy of Assimilation ended with enactment of the Indian Reorganization Act, 25 U.S.C. §§ 461-479 (1994). However, some remnants of Assimilation continue to exist, *see* Major Crimes Act, 18 U.S.C. § 1153 (1994) (enacted in 1883 because of the perceived inadequacies of tribal justice systems), and ethnocentric thought has not entirely vanished even from the highest court of this nation. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211 (1978) (holding that tribal courts have been divested of jurisdiction over reservation crimes committed by non-Indians).

182. Rice v. Olsen, 324 U.S. 786, 789 (1945) (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)); *see also* Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114, 123 (1993) (holding that State of Oklahoma could not impose income or motor vehicle taxes on tribal members residing within Indian country); Bryan v. Itasca County, 426 U.S. 373, 376 n.2 (1976) (rejecting contention that Public Law 280 granted states power to levy personal property tax on mobile home owned by Indian and located within Indian country).

183. Williams v. Lee, 358 U.S. 217, 219 (1959).

184. *Id.*

185. *See* Indian Tribal Justice Support Act, 25 U.S.C. §§ 3601-3613 (1994) (recognizing that "tribal justice systems are an essential part of tribal governments and serve as important forums

"Tribally operated courts are 'the primary tribal institutions charged with carrying the flame of sovereignty and self-government.'"[186] State appellate review "calling into question the validity or propriety of an act fairly attributable to the tribe as a governmental body" would inherently infringe on this sovereignty.[187] Thus, the federal policies of excluding states from tribal matters and the protection and promotion of tribal self-government prevent a state court from acting as appellate reviewer of tribal court decisions.

2. State Court Review of a Tribal Court Decision is Preempted by Federal Law

"[Q]uestions of pre-emption in [Indian law] are not resolved by reference to standards of pre-emption that have developed in other areas of the law . . . ."[188] The preemption test, in the federal Indian law context, precludes state action not only by explicit congressional statement — the traditional preemption standard — but also if the balance of the federal, tribal and state interests at stake favors preemption.[189] "State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority."[190]

The federal and tribal interests involved in validating the tribal court system are great. Tribal courts and tribal laws are regulated by a number of federal statutes. In 1934, Congress enacted the Indian Reorganization Act (IRA)[191] which returned the power over tribal justice systems to the tribal governments. Recent statutes, such as the Indian Tribal Justice Act[192] and the Indian Law Enforcement Reform Act,[193] provide further evidence of the pervasive federal regulatory scheme over tribal justice systems. State governments had no part in the making of tribal law or treaties and thus can have no part in regulating them. These statutes, viewed together with the federal government's interest in encouraging tribal self-government and the tribal interest in exercising its

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for ensuring public health and safety and the political integrity of tribal governments[,] . . . the adjudication of disputes affecting personal and property rights[,] . . . [and] are essential to the maintenance of the culture and identity of Indian tribes"); Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987).

186. *See supra* note 115.

187. R.J. Williams Co. v. Fort Belknap Housing Auth., 719 F.2d 979, 983 (9th Cir. 1983), *cert. denied*, 472 U.S. 1016 (1985), *quoted in* Byzewski v. Byzewski, 429 N.W.2d 394, 397 (N.D. 1988).

188. Blue Lake Forest Prods., Inc. v. Hongkong & Shanghai Banking Corp., Ltd., 30 F.3d 1138, 1141 (9th Cir. 1994) (quoting Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 176 (1989)).

189. *Id.*

190. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983).

191. 25 U.S.C. §§ 461-479 (1994).

192. 25 U.S.C. §§ 3601-3613 (1994 & Supp. I 1995).

193. 25 U.S.C. §§ 2801-2809 (1994).

sovereign authority over actions occurring within Indian country, clearly outweigh any possible state interest in reviewing tribal court decisions, and thus such action is preempted.

We have now answered two major questions concerning the application of the Indian Abstention Doctrine in the state court system. The Doctrine should apply in state courts where a suit's cause of action arises on the reservation or involves a "reservation affair," but, because state courts cannot review tribal court decisions, abstention is not mandatory in state courts. The final question we must answer is, "To what extent does the Doctrine apply?" I recommend that a state court should be required to apply a form of discretionary review when deciding whether to dismiss the case.[194] Part V suggests that conflicts of law concepts, concepts usually ignored in a state court's jurisdictional analysis involving Indian nations, should guide a state court in its discretionary application of the Indian Abstention Doctrine.

V. Conflicts of Law Concepts Provide the Basis for the Discretionary Review of Abstention in State Court

"Conflicts of law occur when foreign elements appear in a lawsuit. Nonresident litigants, incidents in sister states or foreign countries, and lawsuits from other jurisdictions are all foreign elements that may create problems in . . . choice of law."[195] When a court faces a case involving multi-jurisdictional interests on which the laws of the two jurisdictions conflict, a choice of laws must be made.[196] Observing choice of law principles, state courts regularly apply the laws of their sister states. Because of sufficient similarities between state laws and their court systems, application of another state's law poses no substantial problem for state courts. Similarly, federal courts apply state law with relative ease.[197] However, when a federal or state court is called upon to apply the laws of an Indian nation, the problem becomes complex.

I recommend that a state court's discretionary review pursuant to the Indian Abstention Doctrine consist of a choice of laws analysis to determine which set of substantive laws,[198] the state's or the tribe's, govern the case. The state court

194. Abstention by definition permits the deferring court to later review the case. As shown above, state courts cannot review tribal court actions. Thus, dismissal, rather than abstention, is the appropriate term.

195. James P. George & Fred C. Pedersen, *Conflict of Law*, 41 SW. L.J. 383, 383 (1987).

196. Perry Dane, *Vested Rights, 'Vestedness,' and Choice of Law*, 96 YALE L. J. 1191, 1194 (1987).

197. *See* Erie Railroad Co. v. Tompkins, 304 U.S. 64, 79 (1938) (holding that federal courts must apply state statutory and common law in diversity actions). .

198. Under the traditional approach to choice of laws, the forum court applies its own procedural laws. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 585 (1934).

should also look to certain factors employed by the common law doctrine of *forum non conveniens* to strengthen its decision.

The leading treatise on federal Indian law recognizes that choice of law concepts apply to jurisdictional determinations involving Indian nations:

> Both reason and authority support the application of . . . [choice of law concepts] to conflicts of laws arising between Indian tribes and other jurisdictions. Choice of law rules based on the comity principle are a flexible doctrine the reasons for which often apply to tribal jurisdictions as well as others, and courts have generally recognized tribal law in appropriate cases.[199]

State courts, nevertheless, frequently overlook choice of law considerations when important tribal interests are at stake. Using a choice of laws analysis in a state court's discretionary review will put a stop to such oversights and will strengthen the tribal court system.

The following discussion first considers the feasibility of the application of "tribal law" in a state courtroom. This consideration is necessary, as it provides the foundation for using a choice of law analysis in a state court's discretionary review. The discussion then briefly examines the two primary schools of thought in choice of law and suggests exactly how a state court's choice of law analysis should be applied to the theory of discretionary review pursuant to the Indian Abstention Doctrine.

A. The Application of Tribal Law in State Court

Tribal courts, and tribal courts alone, should interpret tribal law,[200] and a state court should enter a judgment of dismissal where a case involves the interpretation of tribal law.[201] This premise provides the key to using a choice of law analysis in a state's discretionary review. Tribal laws are based on ingrained customs, traditions, and tribal common law derived from the decisions of the tribal courts.[202] In many cases, tribal law is not written, leaving the federal or state court with no chance of proper application. Further, it is essential that tribal courts make determinations concerning the extent of "what is necessary to protect tribal self-government" under the *Montana* test, because it is the judicial body in the best position to make such a determination.[203]

Most tribal law is not conducive to state court application for both practical and conceptual reasons. Practically, proof of tribal law in a state court is at best

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199. COHEN, *supra* note 4, at 385.

200. As noted above, the term "tribal law" is defined as the laws *of* the various Native American tribes, as opposed to federal Indian law which represents state and federal court laws and decisions *about* tribes. *See* COOTER & FIKENTSCHER, *supra* note 29, at 6.

201. *In re* Marriage of Limpy, 636 P.2d 266, 269 (Mont. 1981).

202. *See supra* note 129 and accompanying text.

203. *See* Skibine, *supra* note 143, at 210.

difficult, and in some cases impossible. To gain insight to unknown foreign laws, such as unwritten tribal laws, state courts may attempt to employ proof of foreign law statutes.[204] However, proving the existence of foreign laws can be time consuming, expensive, and, where unwritten tribal laws are involved, sometimes impossible. "Proof of foreign laws remains notoriously difficult, particularly when the nation involved has not significantly attracted the attention of English-speaking scholars."[205] Additionally, for purposes of our analysis regarding the Indian Abstention Doctrine, the state court must contend with the fact that many tribal elders, who hold the key to tribal customs, may not speak English or may not be permitted to divulge important tribal ideals in an open and alien state courtroom.

Conceptually, the use of most tribal law in a state adversarial system of justice will defeat the purpose behind the tribal law.[206] Failing to abstain from applying tribal laws will undermine the purpose of such laws, and, in turn, the authority of the tribal court system, which will lead to a corresponding decline in tribal culture.[207] Simply put, the fundamental value differences between tribal and state justice systems are dramatically different. The very nature of tribal law mandates that only the tribal court, whose law is at issue, be authorized to apply it.[208] Because of these problems, state courts should dismiss a suit where the application of tribal law presents itself. The reasoning set forth in *National Farmers,* recognizing that tribal courts are experts in the field of tribal law, should be similarly recognized in the state courts.[209]

With this foundation laid, we may now explore how the conflicts of laws concepts of choice of laws and the doctrine of *forum non conveniens* affect a state court's discretionary abstention review.

B. Choice of Laws Analysis: A Bright-Line Approach to a State Court's Discretionary Abstention Review

The respect of a government's laws goes hand in hand with the exercise of its sovereignty. Civil actions arising on the reservation necessarily involve important tribal interests, and it is critical to the Indian Nations involved in such

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204. *See, e.g.*, N.M. R. Civ. P. 1-044 (found in vol. J-1 of the 1978 New Mexico Statutes Annotated).

205. *In re* Estate of Chichernea, 424 P.2d 687, 689 (Calif. 1967) (recognizing the expense and difficulty of proving Rumanian inheritance laws); *see also* Walton v. Arabian American Oil Co., 233 F.2d 541, 545 (2d Cir. 1956) (dismissing plaintiff's personal injury claim arising in Saudi Arabia, because plaintiff failed to properly plead and prove that law), *cert. denied*, 352 U.S. 872 (1956).

206. *See supra* text accompanying notes 129-31.

207. *Cf.* Fisher v. District Court of Sixteenth Judicial Dist., 424 U.S. 382, 387-88 (1976) (recognizing that state court jurisdiction would plainly interfere with tribal self-government exercised through the tribal courts).

208. *Cf.* Tso, *supra* note 134, at 233.

209. National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 856 (1985).

actions that their laws be recognized. A choice of laws analysis, conducted in a state court contemplating jurisdiction over an action arising on the reservation, is the judicial device which can supply this much needed recognition. When an action is brought in a state court for a cause that arose in another jurisdiction, the state court will conduct a choice of law analysis to determine whether to apply its forum law or to apply the law of the foreign jurisdiction. Most states follow one of the two major choice of law systems: (1) the *Restatement First*, known as the traditional choice of law theory; or (2) the *Restatement Second*, known as the modern choice of law theory.

1. Traditional Choice of Law: the Restatement First

United States traditional or common law regarding choice of laws is incorporated in the *Restatement (First) of Conflict of Laws*.[210] The *Restatement First* is essentially a territorial system based on the vested rights theory.[211] It is a system consisting of broad but rigid rules. The vested rights theory holds that foreign law can never operate outside of the territory of the foreign sovereign.[212] This system is based on the premise that when an event occurs in a foreign territory, the foreign territory's law governing that occurrence vests a right in the forum court where the action is being litigated.[213]

The *Restatement First's* rules each govern a major area of law that identifies one particular contact.[214] For example: questions in tort are governed by the place of the injury (*lex loci delicti*);[215] questions in contract are governed by the place of the making of the contract (*lex loci contractus*);[216] and questions in property are governed by the situs of the land.[217] In effect, the traditional approach holds that "the law governing a given legal interaction [is] almost always the law of the place in which certain discrete, specified events in that interaction took place."[218]

The traditional approach to choice of laws is rigid and does not consider fairness or common sense in choosing the substantive law to apply to a particular case. In light of this problem, many state courts developed escape devices — "highly conceptual maneuvers which permitted them to avoid an undesirable outcome without breaking faith with the traditional system."[219]

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210. *See generally* JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935); Dane, *supra* note 196, at 1194-95.

211. Dane, *supra* note 196, at 1195.

212. *Id.* at 1198-99.

213. RESTATEMENT FIRST OF CONFLICT OF LAWS § 1 (1934).

214. Harold L. Korn, *The Choice of Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 778-79 (1983).

215. RESTATEMENT FIRST OF CONFLICT OF LAWS § 378 (1934).

216. *Id.* § 332.

217. *Id.* § 208.

218. Dane, *supra* note 196, at 1195.

219. WILLIAM RICHMAN & WILLIAM REYNOLDS, UNDERSTANDING CONFLICT OF LAWS §

Such maneuvers include recharacterization of a law from substantive to procedural or from a tort issue to a property issue, employment of the judicial device of *renvoi*, or simply choosing to ignore the foreign law for public policy reasons.[220]

2. Modern Choice of Laws: the Restatement Second

Some states found the hard-and-fast rules of the *Restatement First* were not properly tailored to serve the goals of their system. The traditional system does not inquire into the purposes behind the application of the other jurisdiction's laws. These states have chosen to adopt the *Restatement Second* or modern choice of law theory.[221] The modern approach shuns the territorial approach of the *Restatement First* in favor of the general principle that the forum's law will apply "unless, with respect to the particular issue, some other state has a more significant relationship to the parties and the occurrence, in which event the law of the other state will be applied."[222] The *Restatement Second* blossomed through a series of cases beginning with *Auten v. Auten*,[223] in which the State of New York's high court recognized a "center of gravity" or "grouping of contacts" test in determining choice of law. These theories look beyond the territorial approach of the *Restatement First* and further into the place with "the most significant contacts with the matter in dispute."[224]

The *Restatement Second* provides that "[a] court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law."[225] When a state has no such directive, the *Restatement Second* provides a list of factors relevant in guiding a court to the proper choice of law. These factors include:

> (a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (d) the protection of

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63, at 171 (2d ed. 1993).

220. *Id.*

221. There are a number of modern choice of law theories, however, this article will only discuss the *Restatement's* version. For insight into the various other theories, see generally Korn, *supra* note 214.

222. Willis L.M. Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 324 (1972) (citing the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 189 (1971)).

223. 124 N.E.2d 99 (N.Y. 1954).

224. *Id.* at 101-02. The New York Court of Appeals formally rejected the *Restatement First* in *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963). *Babcock* is considered by most conflict of law scholars as "almost certainly the most significant contribution to choice of law that has been made in this century." Willis L.M. Reese, *Chief Judge Fuld and Choice of Law*, 71 COLUM. L. REV. 548, 552 (1971).

225. RESTATEMENT SECOND OF CONFLICT OF LAWS § 6(1) (1971).

> justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability and uniformity of result; and (g) ease in the determination and application of the law to be applied.[226]

These factors are listed in no particular order, however, the comments to section 6 organize these factors into three basic topics: governmental interests, party interests, and interests involving the administration of justice.[227] The *Restatement Second* took almost twenty years to compile,[228] and "has in fact been the authority most commonly relied upon by the courts now working with the modern approaches."[229]

Not unlike the *Restatement First*, states following the *Restatement Second* also employ escape devices albeit to a lesser extent given the inherent flexibility of the modern theory. The main survivor of the traditional theory's escape devices is the public policy exception which is expressly included section 6(b) of the *Restatement Second.*

3. Application of Choice of Laws Analysis in a State Court for Purposes of a Discretionary Abstention Analysis

How should state courts apply the discretionary abstention review pursuant to the Indian Abstention Doctrine? As discussed above, state courts cannot and should not attempt to apply or interpret tribal law.[230] I thus recommend a bright-line rule for state courts when applying this analysis to determine whether to dismiss a reservation-based claim pursuant to the Indian Abstention Doctrine: if, after conducting its choice of law analysis, the state's choice of law system points to the substantive law of the tribe, then the court should dismiss the action and permit the tribal court to decide the matter;[231] if however, the state's choice of laws system points to the use of the forum state's law, the state court should accept jurisdiction.[232]

The application of discretionary abstention using a state's choice of law analysis is obviously not flawless, and the author cannot discuss in this article every possible pitfall. However, two probable stumbling blocks may exist: (1) the absence of tribal law on a particular subject, and (2) the lack of constitutional constraints on state court's choice of law.

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226. *Id.* § 6(2).

227. *Id.*

228. Korn, *supra* note 214, at 816.

229. *Id.* at 819.

230. *See supra* notes 200-09 and accompanying text.

231. Pending further consideration based on certain factors provided by an analogy to the doctrine of *forum non conveniens. See infra* notes 252-63 and accompanying text.

232. The state court should not conduct a "false conflicts" analysis to determine whether the laws of the two jurisdictions actually conflict. It does not matter that the written tribal law appears similar to the state law, because *application* of the tribal law will require the consideration of tribal norms and customs that a state law will not consider.

a) Setbacks: Where No Tribal Law Exists

Some state courts have decided that if there is no written tribal law addressing the issue in a particular case, then the tribal court is not exercising its sovereignty. Thus, even though the action may have occurred on the reservation, the exercise of state court jurisdiction will not infringe on tribal self-government.[233] For example, in *Little Horn State Bank v. Stops*,[234] the Montana Supreme Court held that enforcing a state court judgment, applying Montana garnishment law against the Crow Indian defendants, did not infringe upon the Crow Tribe's self-government because the Crow Tribal Code did not have a garnishment provision.[235] Similarly, in *State ex rel. R.G. v. W.M.B*,[236] the Court of Appeals of Wisconsin, finding no Menominee tribal codes on paternity and child support, applied Wisconsin statutes and common law.[237] These state courts fail to realize that the absence of legislation is itself a statement of policy of that jurisdiction's legislature. This is the case for some Indian nations; however, many others simply have not written or codified their laws. In either case, a state court should not be permitted to look beyond its choice of law analysis into the existence or substance of a tribe's laws for purposes of its abstention analysis. This practice is recognized in the doctrine of *forum non conveniens*.[238] Following this rule will assure that a state court recognizes a tribe's sovereign authority to recognize certain laws and fail to recognize others, depending upon whether the law is compatible with tribal norms.

In *Chino v. Chino*[239] the Supreme Court of New Mexico followed this rule. *Chino* involved a suit brought in state court for forcible entry and

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233. *See* John Arai Mitchell, *A World Without Tribes? Tribal Rights of Self-Government and the Enforcement of State Court Orders in Indian Country*, 61 U. CHI. L. REV. 707, 717 (1994).

234. 555 P.2d 211 (Mont. 1976), *cert. denied*, 431 U.S. 924 (1977).

235. *Id.* at 214, *discussed in* Mitchell, *supra* note 233, at 717-18. In *Little Horn* the defendant-Indian's garnished wages were earned entirely on the reservation. The court however found subject matter jurisdiction within the state court's control, because the defendant entered into the loan transaction outside of Indian country. *Little Horn*, 555 P.2d at 211-14. This decision lies in direct contrast with Joe v. Marcum, 621 F.2d 358 (10th Cir. 1980), which held that state courts have no jurisdiction to enforce a writ of garnishment against a non-Indian corporation garnishee for a member Indian's wages earned entirely on the reservation. *Id.* at 361-63. The Tenth Circuit reasoned that "[g]arnishment is a statutory remedy, which does not exist at common law. . . . Some states . . . permit garnishment of wages. Others do not. Similarly, a sovereign entity such as the Navajo Tribe need not provide garnishment, if it so chooses." *Id.* at 361. Primary to the court's reasoning was the fact that "[t]he garnishment *res* . . . [was] located *on the reservation*." *Id.* at 363 (emphasis added).

236. 465 N.W.2d 221 (Wis. Ct. App. 1990).

237. *Id.* at 224; *see also* Jacobs v. Jacobs, 405 N.W.2d 668, 671 (Wis. Ct. App. 1987) (applying state domestic law because no tribal legislation on the issue); County of Vilas v. Chapman, 361 N.W.2d 699, 702 (Wis. 1985) (finding no motor vehicle provisions in tribal code).

238. *See infra* note 261 and accompanying text.

239. 561 P.2d 476 (N.M. 1977).

wrongful detainer by a nonmember Indian against her member Indian son.[240] The son, Mark Chino, moved into his mother's home located on the Mescalero Apache Indian Reservation without her consent.[241] The court acknowledged the fact that Mescalero Apache tribal law did not provide for actions in forcible entry and wrongful detainer. The State of New Mexico did recognize such actions. The *Chino* court nevertheless refused to accept jurisdiction over the matter, reasoning that:

> Even though the Mescalero tribal law makes no provision for a wrongful entry and detainer action, the state may not assume jurisdiction without congressional or tribal authorization. Indian customs and traditions may dictate different approaches than that which the state may use. For a state to move into areas where Indian law and procedure have not achieved the degree of certainty of state law and procedure would deny Indians the opportunity of developing their own system.[242]

It is an exercise of sovereign authority not to recognize a certain cause of action, remedy or procedure. "For centuries Indians have resolved internal disputes through unwritten customs and traditions . . . . Considering written tribal codes to be the sole source of tribal law is unrealistic because tribal custom may trump written tribal law as well as state law."[243]

Decisions such as *Little Horn State Bank* and *W.M.B.* undermine the tribal court system and the tribal legislatures. To avoid such consequences, a state court's discretionary abstention analysis must adhere strictly to the choice of law analysis. If tribal law is applicable, the state court must dismiss the action. The state court should not be permitted to question the existence or substance of tribal laws. When the state courts apply the Indian Abstention Doctrine in this manner, it will ensure that tribal laws and law making authority are recognized. This will in turn further validate the tribal court system, the primary basis of the Indian Abstention Doctrine, and the goal that Congress has consistently encouraged.[244]

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240. *Id.* at 477.

241. *Id.*

242. *Id.* at 479.

243. Mitchell, *supra* note 233, at 727-28, 732 n.121 (citing *In re* Marriage of Napyer, 19 Indian L. Rep. (Am. Indian Law. Training Program) 6078 (Yakima Tribal Ct. 1992)); *see also* Descheenie v. Mariano, 15 Indian L. Rep. (Am. Indian Law. Training Program) 6039, 6039 (Navajo Aug. 4, 1988) (devising the court's own formula for determining child support amounts in the absence of a paternity or child support provision in the Navajo Tribal Code);

244. *See generally* Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987).

b) Setbacks: Lack of Constitutional Constraints on State Courts' Choice of Law Systems

Another related, but possibly larger, problem with discretionary abstention based on a choice of law analysis is the avoidance of tribal law through the use of escape devices. State courts are permitted broadly unrestricted use of escape devices, because the Constitution does not play a major role in limiting a state court's decision regarding which law to apply to a particular case.

As discussed above, escape devices are judicially created mechanisms which permit state courts to avoid the use of undesirable laws while at the same time continuing to abide by the *Restatement's* rules.[245] State courts' use the devices of recharacterization, *renvoi*, and public policy to escape the use of unfavorable laws of other states. Thus, it is likely that state courts will employ similar devices when faced with the possibility of using tribal law. The most foreboding of the escape devices, for purposes of the proposed state court discretionary abstention review, is the avoidance of tribal law via the public policy escape.

The public policy escape was originally intended as a narrow exception to the application of foreign laws. Courts were obligated to recognize and apply foreign laws "unless the judicial enforcement . . . would be the approval of a transaction which is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense of a sister state."[246] While this intended use is usually adhered to, some state courts have adopted a more liberal use of this escape.[247] In most of these cases, the Federal Constitution provides nothing to bar such slights of foreign law and subsequent choices of forum law.

The Due Process Clause and the Full Faith and Credit Clauses are the only enduring constitutional provisions which limit a state court's choice of law. The Supreme Court has articulated the limitations that these provisions place on a state's choice of law analysis as follows: "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[248] In

245. *See supra* Parts V.A(1)-(2); *see also* RICHMAN & REYNOLDS, *supra* note 219, at 170-91.

246. Intercontinental Hotels Corp. v. Golden, 203 N.E.2d 210, 212 (N.Y. 1964). Justice Cardozo stated that a foreign law should only be refused recognition if it "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." Loucks v. Standard Oil Co. of New York, 120 N.E. 198, 202 (N.Y. 1918).

247. *See* Kilberg v. Northeast Airlines, Inc., 172 N.E.2d 526, 527 (N.Y. 1961) (refusing to apply the Massachusetts damage recovery limitation for wrongful death actions, because "New York's public policy prohibiting the imposition of limits on such damages is strong, clear and old").

248. Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981). Justice Stevens, concurring, would apply separate constitutional standards for the Due Process and the Full Faith and Credit Clauses. *Id.* at 320-22 (Stevens, J., concurring). The *Restatement Second* employs a similar provision limiting the law which a state may choose: "A court may not apply the local law of

practice, this statement amounts to the imposition of minimal constitutional scrutiny on a state court's choice of law decision.[249] As long as a state court can describe something more than a single nominal, insignificant, or post-occurrence contact with the forum, it is permitted virtually unrestricted use of the public policy and other escape devices to avoid foreign law to achieve application of forum law.[250]

The absence of constitutional limitations on a state court's choice of law may pose significant problems for the proposed state court discretionary abstention review. For example, anytime a non-Indian state resident is involved in a cause of action arising in Indian country, the state court may simply claim that a certain tribal law, being conceptually different from its own, would violate state public policy. The state court would then claim that it must apply forum law, and thus, dismissal pursuant to the Indian Abstention Doctrine is not required under our proposed discretionary review.[251] To avoid such results, we must either rely on the good faith application of the theory of discretionary abstention by state court judges, or in the absence of such application, rely on the Supreme Court or Congress to create a method to enforce the principles set forth in the Indian Abstention Doctrine.

C. The Common Law Doctrine of Forum Non Conveniens

The common law doctrine of *forum non conveniens* (FNC) provides a direct analogy to the above stated reasons that tribal law cannot and should not be applied in a state court. As originally developed, FNC provides a forum court with the power to dismiss a suit where another more convenient forum has concurrent jurisdiction over the suit.[252] FNC asserts that "a court may decline to exercise its jurisdiction if the court finds that it is a 'seriously inconvenient' forum and that the interests of the parties and of the public will be best served by remitting the plaintiff to another more convenient forum that is available to him."[253] The doctrine of *forum non conveniens* "is designed in part to help

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its own state to determine a particular issue unless such application of this law would be reasonable in light of the relationship of the state and of other states to the person, thing or occurrence involved." RESTATEMENT SECOND OF CONFLICT OF LAWS § 9 (1971).

249. RUSSEL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 525 (3d ed. 1986).

250. *Hague*, 449 U.S. at 311 (citing Home Ins. Co. v. Dick, 281 U.S. 397 (1930); John Hancock Mutual Life Ins. Co. v. Yates, 299 U.S. 178 (1936)).

251. A fact pattern similar to that in Wacondo v. Concha, 873 P.2d 276 (N.M. Ct. App. 1994), *see supra* notes 60-71 and accompanying text, would mandate that the New Mexico court dismiss pursuant to the suggested discretionary review. To find that state law should apply in that situation would clearly violate the constitutional limitations on choice of law. (All parties involved were either member or non-member Indians and the cause of action occurred in Indian country).

252. 1A JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.204, at 2163 (2d ed. 1996).

253. RESTATEMENT SECOND OF CONFLICT OF LAWS § 84 (1971), *cited in* WEINTRAUB, *supra* note 249, at 213.

courts avoid conducting complex exercises in comparative law."[254] The need to apply foreign law "has frequently been deemed an important factor favoring dismissal of the suit" pursuant to FNC.[255] *Forum non conveniens* clearly supports the view that tribal law, like the laws of a foreign country, is difficult to find, prove, and apply in a state or federal courtroom.[256]

FNC concepts also provide additional factors which a state court should consider when conducting its discretionary abstention analysis. The United States Supreme Court, in *Piper Aircraft Co. v. Reyno*, stated that:

> [W]hen an alternative forum has jurisdiction to hear the case, and when trial in the chosen forum would 'establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience,' or when the 'chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems,' the court may, in the exercise of its sound discretion, dismiss the case.[257]

When using this discretion the court should consider both private interest factors affecting the convenience of the litigants and public interest factors affecting the convenience of the forum.[258] Relevant private interest factors include: relative ease of access to sources of proof; availability and cost of obtaining the attendance of witnesses; view of the premises if appropriate; "and all other practical problems that make trial of a case easy, expeditious and inexpensive."[259] Public factors a court should consider are: administrative difficulties flowing from the court; "[the] local interest in having localized controversies decided at home"; a home forum where that law must govern the case; the avoidance of conflict of law problems, or the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.[260]

Forum non conveniens does not permit the reviewing court to look into whether "the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum."[261] However, the

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254. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 263 (1981).

255. Jones v. Searle Laboratories, 444 N.E.2d 157, 161 (Ill. 1982); *see also* Mercier v. Sheraton Int'l, Inc., 981 F.2d 1345, 1357 (1st Cir. 1992) (granting FNC dismissal because of difficulty in application of Turkish law and other factors made Turkey more appropriate forum), *cert. denied*, 508 U.S. 912 (1993); Syndicate 420 at Lloyd's London v. Early American Ins. Co., 796 F.2d 821, 832 (5th Cir. 1986) (affirming dismissal pursuant to FNC, based on necessity of applying British law).

256. *See supra* notes 200-09 and accompanying text.

257. *Reyno*, 454 U.S. at 241.

258. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947).

259. *Id.* at 508.

260. *Id.* at 509.

261. *Reyno*, 454 U.S. at 247.

court conducting a FNC review must assure the parties involved that an alternative forum is available[262] and may condition the dismissal pursuant to FNC upon the defendant's submission to jurisdiction in the alternative forum.[263]

The concepts and factors employed in the doctrine of *forum non conveniens* should be used to strengthen a state court's discretionary abstention review. If a state court finds that a tribal court is not operating or is not accessible to all parties, then the state court need not dismiss the matter. However, private and public interest factors — such as the difficulty in obtaining witnesses and evidence, viewing premises where the cause arose, lack of state interests, and the unfairness of burdening state citizens acting as jurors to an unrelated cause of action — support state dismissal of claims arising in Indian country.

To conclude briefly, a state court's discretionary abstention analysis should maintain that: if tribal law is found applicable through a state court's choice of law analysis, the state court should refrain from exercising its concurrent jurisdiction and dismiss the action pursuant to the principles set forth by the Supreme Court in the Indian Abstention Doctrine; however, if state law is to be applied, then the state need not dismiss. This discretionary analysis ensures that state courts respect tribal sovereignty by recognizing tribal law.

> The United States has often made claims about the richness of its pluralistic society — made claims that the loss . . . of tribal identity would not only be a loss to . . . tribes, but would also harm all citizens because of the benefit of living in a country in which not all are required to follow the same norms.[264]

In order to maintain the diversity which makes American society enviously rare, the laws of America's Indian nations must be preserved by mandating their recognition in the state court system through the application of a discretionary abstention analysis.[265]

VI. Conclusion

Under the Indian Abstention Doctrine, where federal and tribal court jurisdiction are concurrent and the cause of action arises on the reservation, the federal court must abstain from accepting jurisdiction over the case until all available tribal remedies have been exhausted, even absent pending action in tribal court or mention of exhaustion by either party. This mandatory application

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262. *Id.* at 254 b,22 (citing *Gilbert*, 330 U.S. at 506-07).

263. MOORE ET AL., *supra* note 252, ¶ 0.204, at 2169.

264. Judith Resnick, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 751 (1989).

265. *Cf.* Chapoose v. Clark, 607 F. Supp. 1027, 1036 (D. Utah 1985) ("Indians have little political power to protect their rights . . . . Even though Indian rights can be easily overlooked and carelessly taken away, preservation of these rights is important to Indian and non-Indian alike.").

is justified in that federal courts are permitted later appellate review of a tribal court's jurisdictional determination. Conversely, where tribal and state court jurisdiction are concurrent, a state court has no similar obligation to abstain from exercising its jurisdiction, because tribal court decisions are not subject to appellate review in state court. Thus, application of the Indian Abstention Doctrine is not mandatory in state court. However, Supreme Court language in *Iowa Mutual* and other recent federal case law suggest that the Doctrine does apply to state courts. These authorities however do not discuss the extent to which the Doctrine should apply. This article suggests a discretionary form of abstention in state courts over reservation-based claims.

A state court's discretionary abstention analysis should require the state court to apply its choice of law system to the matter before it. When a state's choice of law system points to the application of tribal law, a state court should dismiss the action, because state courts are not properly equipped to apply tribal law. Application of discretionary abstention in the state courts will relieve the flooded state courtrooms of cases where state governmental interests are minimal, prevent the misapplication of tribal law, and more importantly, preserve the integrity of both tribal courts and legislatures.