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Exhaustion of Tribal Court Remedies: Rejecting Bright-Line Rules and Affirmative Action

Phillip Wm. Lear

Blake D. Miller

EXHAUSTION OF TRIBAL COURT REMEDIES: REJECTING BRIGHT-LINE RULES AND AFFIRMATIVE ACTION

PHILLIP WM. LEAR* AND BLAKE D. MILLER**

> [T]hat dramatically different facts . . . should produce different results is subject to the observation that it does not identify a bright-line rule. The primary responsibility for line-drawing, however, is vested in the legislature.
>
> Justice John P. Stevens***

I. INTRODUCTION

The doctrine of exhaustion of tribal court remedies is the latest example of the ongoing tension between tribal and federal courts. Pursuant to this doctrine, a federal court will not hear a matter arising on a reservation until the tribal court has determined the scope of its own jurisdiction and entered a final ruling.[1] The doctrine assumes that no federal statutes expressly direct exclusive federal jurisdiction,[2] or provide for state court jurisdiction.[3] The doctrine assumes concurrent jurisdic-

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* H.B.A. 1969, J.D. 1975, University of Utah. Mr. Lear is a partner in the Salt Lake City office of Snell & Wilmer. He practices natural resources law with an emphasis on mineral exploration and production activities and represents mineral developers on Indian country. He is admitted to practice in Utah, Colorado, and Wyoming and before the Ute Tribal Court of the Uintah and Ouray Reservation. His applications for admission are pending before the Navajo Nation and the State of Montana. Messrs. Lear and Miller represented Boyd & McWilliams Energy Group, Inc. in the federal district court and Navajo tribal court cases which provided the genesis for this article and symposium. *See infra* notes 110 & 123.

** B.A. 1980, Boise State University; J.D. 1983, University of Utah. Mr. Miller is a partner with the Salt Lake City firm of Suitter Axland & Hanson where he practices complex commercial litigation. He is admitted to practice in the State of Utah.

*** Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 447 (1989).

1. *See* Duncan Energy Co., Inc. v. Three Affiliated Tribes of the Fort Berthold Reservation, 27 F.3d 1249, 1300 (9th Cir. 1993), *cert. denied*, 115 S. Ct. 779 (1995) (relying on Crawford v. Genuine Parts Co., 947 F.2d 1405, 1407 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1174 (1992) for the proposition that exhaustion of tribal court remedies is mandatory).

2. *See, e.g.*, Major Crimes Act, 18 U.S.C. § 1153 (1988 & Supp. 1994).

3. *See, e.g.*, Pub. L. No. 280, 67 Stat. 588 (1953) (as amended and codified in 18 U.S.C. § 1162 (1988)) which authorized some states and directed others to assume civil and criminal jurisdiction over Indian country. *See generally* William V. Vetter, *The Four Decisions in Three Affiliated Tribes and*

tion of sovereigns. Concurrent jurisdiction is the natural product of unique overlapping of governmental authority that characterizes much of Indian law jurisprudence.[4]

Advocates for mandatory exhaustion extol the rule because of its simplicity, easy application, and judicial economy.[5] They argue that *National Farmers Union Insurance Companies v. Crow Indian Tribe*[6] and *Iowa Mutual Insurance Company v. LaPlante*,[7] the seminal cases announcing the exhaustion doctrine, created a bright-line test with no exceptions.[8] In their view, a case first must be addressed by tribal courts to serve the underlying federal Indian law polices of sovereignty and self-determination. Only in this manner, they argue, will tribal courts develop the experience necessary to bring true self-governance to Native American people.[9]

As worthy as sovereignty and self-determination policies may be, *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. In point of fact, the exhaustion doctrine being developed by the federal courts is protectionist. Ironically, protectionist attitudes favoring mandatory exhaustion of tribal court remedies diminish rather than enhance tribal court sovereignty and debase any notion of equal dignity of courts.

At issue is the clash of federal policies. On the one hand, the federal courts are obliged to take jurisdiction over cases raising federal questions.[10] On the other, federal Indian policy continues to embrace

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Pre-Emption by Policy, 23 LAND & WATER L. REV. 43 (1988); Robert Laurence, *Service of Process and Execution of Judgment on Indian Reservations*, 10 AM. INDIAN. L. REV. 257 (1982).

4. *See* Cotton Petroleum Co. v. New Mexico, 490 U.S. 163 (1989).

5. *See, e.g.*, Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C. L. REV. 1089 (1995) (applauding mandatory exhaustion involving challenges to tribal court jurisdiction, but rejecting the doctrine in cases challenging the tribes' administrative or legislative jurisdiction); Alex T. Skibine, *Deference Owed Tribal Courts' Jurisdictional Determinations: Towards Co-Existence, Understanding, and Respect Between Different Cultural and Judicial Norms*, 24 N.M. L. REV. 191 (1994); Timothy W. Joranko, *Exhaustion of Tribal Court Remedies in Lower Courts After National Farmers Union and Iowa Mutual: Toward a Consistent Treatment of Tribal Courts by the Federal Judicial System*, 78 MINN. L. REV. 259, 209, 293 (1993); Frank Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329 (1989); Frank Pommersheim, *Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisdiction*, 10 U. PUGET SOUND L. REV. 231 (1987).

6. 471 U.S. 845 (1985).

7. 480 U.S. 9 (1987).

8. *See, e.g.*, Joranko, *supra* note 5, 266, 290-91.

9. P.S. Deloria, opening comments introducing the litigation panel at this symposium. *See* 71 N.D. L. REV. 273 (1995) [hereinafter *Symposium*].

10. 28 U.S.C. § 1331 (Supp. 1993).

the laudable goals of tribal self-determination and sovereignty.[11] Requiring the federal judiciary to decline to exercise its jurisdiction in all cases when a tribal court has a colorable basis for jurisdiction is nothing less than affirmative action for tribal courts.

Authorities acknowledge the shifting winds of federal Indian policy. During the first hundred years, Congress "treated" with Indian tribes as sovereign nations.[12] Indeed, the Constitution rather clearly placed tribes outside the federal system.[13] During the second hundred years, Congress has regulated tribes through legislation, initially with design of assimilating individual Indians into mainstream American society and terminating tribal existence[14] and then reorganizing them into constitutional entities replete with western governmental institutions and notions of Anglo-American jurisprudence.[15] One might argue that with its legislation, Congress has effectively brought Indian tribes within the federal system.[16]

Despite changing policies regarding the relationship of Indian tribes to the federal government, the premise of separate sovereign nations has never been abandoned.[17] Tribes retain inherent powers and authorities derived from primeval sovereignty, not otherwise withdrawn by treaty or

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11. Contemporary policy is memorialized in the Congressional Statement of Findings to the Indian Self-Determination and Educational Assistance Act of 1975, as follows:

> Congress, after careful review of the Federal government's historical and special legal relationship with . . . American Indian people finds that:
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> (1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities . . . .

25 U.S.C. § 450(a)(1988).

12. The "treaty era" endured from 1789 to 1871. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 68-78 (1945). Congress "treated" with Indian tribes as sovereign nations pursuant to its treaty power. U.S. CONST. art. I, § 2, cl. 3. The Supreme Court characterized constitutional authority as one empowering Congress to make treaties with Indians as with foreign nations. *See* United States v. Forty-three Gallons of Whiskey, 93 U.S. 188, 197 (1876).

13. *See* Joranko, *supra* note 5, at 262.

14. *See Brendale*, 492 U.S. at 436 (citations omitted). *See generally,* COHEN, *supra* note 12, ch. 11, at 207-208 (chronicling the history of the "Allotment Era" and citing statutes, congressional records, and reports of the Commissioner of Indian Affairs). The Allotment Era ended with enactment of the Indian Reorganization Act of 1934, which expressly prohibited allotments. *See* 25 U.S.C. § 461 (1988).

15. *See generally,* COHEN, *supra* note 12, ch. 11 (chronicling the history of the "Allotment Era") & ch. 7 (discussing the Indian Reorganization Act of 1934, 48 Stat. 984).

16. *See* Joranko, *supra* note 5, at 262-63. *See also,* Frank B. Higgins, *International Law Considerations of the American Indian Nations by the United States,* 3 ARIZ. L. REV. 74, 84 (1961) (stating that the United States initially treated with Indian tribes as international sovereigns, but later amended the relationship to one of national sovereigns without the knowledge and consent of the Indian nations).

17. *See* William A. Vetter, *Of Tribal Courts and "Territories" Is Full Faith and Credit Required?*, 23 CAL. WEST. L. REV. 219, 220 (1987). *Cf.,* Higgins, *supra* note 16, at 84.

statutes.[18] They are not states, as they are not parties to the Constitution.[19] They are "higher" than states.[20] They occupy a unique position, perhaps more akin to nation states.[21] If nation states, then with respect to areas of sovereignty not limited or regulated by Congress, they are truly independent sovereigns. If they are independent sovereigns, they should be treated within the framework of international law.

Against the backdrop of historical antecedents, one can stage a broad, workable analysis that relieves tribal, state, and federal court tensions at least in the context of concurrent jurisdiction. If one is to view Indian tribes as dependent sovereigns within the federal system, technically they should be treated analogous to territories or possessions, subject to comity among states, full faith and credit, and abstention.[22] If we consider Indian tribes to be sovereign nations, international choice of law rules embodied in the judicial policy of comity should govern concurrent jurisdiction cases. Tribal and federal tensions thus could be eased within the international context of comity among foreign nations.

Indeed, commentators have argued that tribal courts might best be handled in the context of national comity, generally,[23] if not international law, specifically.[24] What is lacking in the legal literature is an exposition to assist litigants and courts in resolving the conundrum. Truly, if we desire to give full weight to self-determination, let us do so within the full spectrum of social, economic, and legal intercourse among sovereigns in a global society. Hence, this appeal to international law principles of comity and this article's decided counterpoint to bright-line rules and no-exception philosophies.

II. HISTORY OF THE EXHAUSTION DOCTRINE

The history of the relationship between the federal government and Indian tribes has been the subject of numerous scholarly works and will not be repeated here.[25] Suffice to say, that although Indian tribes are considered sovereign entities, they are subject to the plenary power of Congress. The sovereignty of Indian tribes, therefore, "exists only at the

18. Worcester v. Georgia, 6 U.S. (Pet.) 515, 559 (1832).

19. *See* United States v. Wheeler, 435 U.S. 313, 322 (1978).

20. *See* Native American Church v. Navajo Tribal Council, 272 F.2d 131, 134 (10th Cir. 1959).

21. *See* Hubbard v. Chinle Sch. Dist. Nos. 4/5, 3 Nav. R. 167, 169 (1988).

22. *Symposium, supra* note 9, 71 N.D. L. REV. 365 (1995)(comments of Robert N. Clinton on trust panel).

23. *See, e.g.*, Vetter, *supra* note 17, at 269; Laurence, *supra* note 3, at 277.

24. *See* Robert N. Clinton, *Tribal Courts and the Federal Union*, 26, WILLAMETTE L. REV. 841, 904-08 (1990) (discussing federal, state, and tribal court decisions); Higgins, *supra* note 16.

25. *See id.*; Joranko, *supra* note 5; Clinton, *supra* note 24; Nell J. Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984).

sufferance of Congress,"[26] which has the power to modify or limit a tribes' authority. According to the United States Supreme Court, "all aspects of Indian sovereignty are subject to defeasance by Congress."[27] Although Congress has the power to limit the sovereign powers of an Indian tribe, however, Congress is not the source of tribal authority. As stated by Felix Cohen:

> Perhaps the most basic principle of all Indian law, . . . is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.* Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty.[28]

It follows that regardless of the characterization of Indian tribes vis-à-vis the federal government, whether as independent or dependent sovereigns, they have retained their right of self-rule.

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26. United States v. Wheeler, 435 U.S. 313, 323 (1977).

27. Escondido Mut. Water Co. v. La Jolla Bands of Mission Indians, 466 U.S. 765, 788 n.30 (1984).

28. COHEN, *supra* note 12, at 122. In Worcester v. Georgia, Chief Justice Marshall opined:

> [T]he settled doctrine of nations is, that a weaker power does not surrender its independence—its right to self-government—by associating with a stronger, and taking it under its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. "Tributary and feudatory states," say Vattel, "do not therby [sic] cease to be sovereign and independent states, so long as self-government, and sovereign and independent authority, are left in the administration of the state."

6 U.S. (Pet.) at 560.

A. DEVELOPMENT OF THE EXHAUSTION DOCTRINE: *NATIONAL FARMERS UNION*

In *National Farmers Union Insurance Companies v. Crow Tribe of Indians*,[29] the Supreme Court faced a challenge to the jurisdiction of a tribal court. Prior to the commencement of the federal action, a Crow Indian filed suit in tribal court against a school district for personal injuries arising from an accident at a school within the reservation, but on land owned by the state of Montana.[30] After the failure of the school district to respond, the plaintiff took a default judgment in the tribal court.[31] Thereafter, the school district and its insurer filed suit in federal court, challenging the jurisdiction of the tribal court and requesting an injunction against further proceedings in tribal court.[32] The school district and its insurer relied on 28 U.S.C. section 1331 for federal jurisdiction.[33]

The first issue addressed by the Supreme Court in *National Farmers* was whether the case presented a federal question within the meaning of section 1331.[34] The school district argued that, since federal law defines the limitations of a tribe's sovereignty, the jurisdiction of the tribal court was a matter of federal law.[35] Although recognizing that the scope of a tribal court's jurisdiction is based neither on a federal statute nor the Constitution, the Supreme Court agreed.[36] Thus, "[t]he question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under section 1331."[37]

After finding the existence of a federal question, the Court then addressed whether the school district was first required to exhaust its remedies in tribal court.[38] This issue depended, in part, on whether tribal

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29. 471 U.S. 845 (1985). Articles rejecting mandatory exhaustion of tribal court remedies include: Lynn H. Slade, *Dispute Resolution in Indian Country: Harmonizing* National Farmers Union, Iowa Mutual, *and the Abstention Doctrine in the Federal Courts*, 71 N.D. L. REV. 519 (1995); Joranko, *supra* note 5. G. Sonny Cave, *Litigation with Indians* in MINERAL DEVELOPMENT ON INDIAN LANDS 6-1 (1989).

30. National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985).

31. *Id.* at 847.

32. *Id.*

33. 28 U.S.C. § 1331 (1993) (providing that federal district courts "shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States").

34. 471 U.S. at 850.

35. *Id.* at 852.

36. *Id.* at 850.

37. *Id.* at 852.

38. Dissenting in part, yet concurring in the result, Justice Wright of the Ninth Circuit had stated that petitioners were required to exhaust their Tribal Court remedies prior to seeking relief from the

courts were precluded from exercising jurisdiction over non-Indians in civil matters. Six years earlier, in *Oliphant v. Suquamish Indian Tribe*,[39] the Supreme Court held that Indian tribes do not possess criminal jurisdiction over non-Indians, even as to offenses committed on the reservation.[40] This time, however, the Court rejected application of *Oliphant* in civil disputes. Instead,

> the existence and extent of a tribal court's [civil] jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.[41]

Further, the Supreme Court held that the analysis of the existence and extent of a tribal court's civil jurisdiction should be conducted first in tribal court.[42] The Court explained the underlying policy as follows:

> That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed. The risks of the kind of "procedural nightmare" that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made. Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for

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federal court. 736 F.2d 1320, 1326 (9th Cir. 1984).

39. 435 U.S. 191 (1978).

40. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978). In *Oliphant*, the Supreme Court stated that:

> By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress. This principal would have been obvious a century ago when most Indian tribes were characterized by a "want of fixed laws [and] of competent tribunals of justice."

Id.

41. *National Farmers*, 471 U.S. at 855-56.

42. *Id.* at 856. Exhaustion is not required, however, "where an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith,' or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *Id.* at 856 n.21.

> accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.[43]

The holding of *National Farmers*, therefore, is two-fold: (1) the issue of the scope of a tribal court's jurisdiction is a federal question; and (2) actions first brought in tribal court are not subject to jurisdictional challenges in federal court prior to exhaustion of tribal court remedies.

B. *IOWA MUTUAL*

Two years later, the Supreme Court considered a challenge to a tribal court's jurisdiction in federal court under the diversity statute. In *Iowa Mutual Insurance Company v. LaPlante*,[44] two Blackfeet Indians filed suit in tribal court for damages arising from an motor vehicle accident on the Blackfeet reservation.[45] The complaint sought not only damages for personal injuries, but damages against the insurance companies for bad faith refusal to settle.[46] The insurance companies filed a motion in tribal court to dismiss for lack of jurisdiction.[47] Finding it had subject matter jurisdiction, the tribal court denied the motion.[48]

Rather than proceeding further in tribal court, the insurers filed a federal court action seeking a declaratory judgment that they had no duty to defend or indemnify under the policy.[49] The district court dismissed the complaint for lack of subject matter jurisdiction.[50] The district court reasoned that federal courts, sitting in diversity, act merely as "adjuncts" to state courts.[51] Since, absent tribal consent, state courts do not have jurisdiction over reservation disputes,[52] federal courts also lack subject matter jurisdiction in diversity cases. The Ninth Circuit affirmed.

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43. *Id.* at 856-67 (footnotes omitted).
44. 480 U.S. 9 (1987).
45. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987).
46. *Id.*
47. *Id.*
48. *Id.* at 12. The tribal court also ruled that the plaintiffs failed to plead sufficient facts from which jurisdiction could be determined. *Id.* The Court dismissed the complaint, without prejudice, and allowed the plaintiffs leave to amend. *Id.*
49. *Id.* at 13. The insurers also filed a federal action seeking a declaratory judgment that the tribal court lacked jurisdiction over the plaintiff's bad faith claims. This action was dismissed, without prejudice, following the Supreme Court's decision in *National Farmers*.
50. *Iowa Mut.*, 480 U.S. at 13.
51. *Id.*
52. *See, e.g.*, Kennerly v. District Court, 400 U.S. 423 (1971).

The Supreme Court disagreed. The Court held that federal courts do have subject matter jurisdiction in diversity cases arising within the reservation. The Court held, however, that the exhaustion rule established in *National Farmers* applied equally to diversity cases. The issue of the scope of a tribal court's jurisdiction, therefore, must first be considered by the tribal court.[53]

In holding that the *National Farmers*' exhaustion rule applied equally to diversity cases, the Court cited the policy of encouraging tribal self-government:

> Regardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a "full opportunity to determine its own jurisdiction." In diversity cases, as well as federal-question cases, unconditional 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.[54]

In addition, only the tribal court's determination of its jurisdiction is subject to federal review. Unless tribal court jurisdiction is later determined to be improper, the merits of the case will not be reconsidered by a federal forum.[55]

Justice Stevens, in a separate opinion, agreed that federal courts have subject matter jurisdiction, but dissented from the application of the exhaustion rule.[56] Although agreeing that "only in the most extraordinary circumstances" should a federal court enjoin litigation pending in another tribunal,[57] Justice Stevens was concerned that federal courts not abdicate their responsibilities to decide the merits of controversy properly before it:

> For purposes of our decision, it is therefore appropriate to assume that the Tribal Court and the Federal District Court had concurrent jurisdiction over the dispute. The question presented is whether the Tribal Court's jurisdiction is a sufficient reason for requiring the federal court to decline to

53. *Iowa Mut.*, 480 U.S. at 11. The Court defined the issue before it as "whether a federal court may exercise diversity jurisdiction before the tribal court system has an opportunity to determine its own jurisdiction." *Id.*

54. *Id.* at 16 (citations omitted).

55. *Id.*

56. *Id.* at 20.

57. *Iowa Mut.*, 480 U.S. at 21.

> exercise its own jurisdiction until the Tribal Court has decided the case on the merits. In my opinion it is not.[58]

The factual underpinnings of *National Farmers* and *Iowa Mutual* are significant. Both federal actions were brought by non-Indians attempting to avoid pending tribal court proceedings. Neither action involved the interpretation or analysis of federal statutory or common law. In addition, neither decision involved the applicability of the exhaustion rule when resolution of the dispute requires a determination of federal law.

After *Iowa Mutual,* the Supreme Court decided *South Dakota v. Bourland*[59] and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation,*[60] both federal substantive law cases, and did not require exhaustion in either case. In light of *Bourland* and *Brendale*, the conclusion to be drawn is that *National Farmers* and *Iowa Mutual* stand for the narrow proposition that exhaustion in federal questions cases is mandatory if and when the only federal question is the scope of tribal court jurisdiction to hear the case.

C. POST-*IOWA* APPLICATION OF THE EXHAUSTION RULE BY LOWER COURTS

The application of the exhaustion rule by lower courts has been inconsistent at best. At one end of the spectrum are those cases which hold that exhaustion is a mandatory requirement, limited only by the three exceptions set forth in *National Farmers*. On the other end of the spectrum are those cases which limit exhaustion to jurisdictional issues involving cases arising on a reservation and/or involving tribal law. Such inconsistent approaches are best illustrated by the four circuits most often dealing with exhaustion cases—the Seventh, Eighth, Ninth, and Tenth Circuits.

1. *Seventh Circuit*

In *Altheimer & Gray v. Sioux Manufacturing Corp.*,[61] a medical supply fabricating company brought an action in Illinois state court against a tribal corporation for breach of contract for failing to establish a medical supply manufacturing operation on the Devil's Lake Sioux

58. *Id.* at 20.
59. 113 S. Ct. 2309 (1993).
60. 492 U.S. 408 (1989).
61. 983 F.2d 803 (7th Cir. 1993).

Reservation in Fort Totten, North Dakota.[62] The parties had entered into a letter of intent in which the tribal corporation waived its sovereign immunity and designated the law of Illinois as governing the contract.[63] Neither party obtained the consent of the Secretary of the Interior. When the deal failed to consummate, the medical supply company sued the tribal corporation in state court, and its law firm sued the tribal corporation in federal court to recover its fees for negotiating the agreement.[64] The tribal corporation removed the state action to federal court where the court consolidated the cases. The federal district court refused to require exhaustion of tribal remedies because the principal issue in the case involved a federal question, namely the nature of the Secretarial requirement to consent to all contracts, and because the court refused "to place before the tribal court a dispute that must be resolved by the laws of a distant jurisdiction."[65] The court refused to read *National Farmers* and *Iowa Mutual* to require exhaustion of tribal court remedies as a judicial condition precedent to federal courts taking cases arising on Indian reservations. Rather, it favored a broader reading requiring "an examination of the factual circumstances of each case."[66] The court distinguished *National Farmers* and *Iowa Mutual* because (1) there was no challenge to tribal court jurisdiction, (2) no pending case in tribal court, and (3) the dispute did touch or concern a tribal ordinance or law.[67]

2. *Eighth Circuit*

The positions taken by the Eighth Circuit are perhaps best illustrated by *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*[68] and *Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation*.[69] In *Northern States*, an electric utility operating a nuclear power plant brought a federal court action seeking a declaratory judgment that a tribal ordinance regarding the transportation of nuclear materials was preempted by the Hazardous

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62. Altheimer & Gray v. Sioux Mfg. Corp., 938 F.2d 803 (7th Cir. 1993).
63. *Id.* at 806.
64. *Id.*
65. *Id.* at 814.
66. *Id.* One commentator has christened the Seventh Circuit's fact-based approach to exhaustion as the "particularized inquiry" test. *See* Joranko, *supra* note 5, at 290.
67. *Altheimer*, 983 F.2d 803, 814.
68. 991 F.2d 458 (8th Cir. 1993).
69. 27 F.3d 1294 (1994), *cert. denied*, 130 L. Ed.2d 673 (1995). The authors represented the Rocky Mountain Oil & Gas Association as *amicus curiae* in support of Duncan Energy Company's petition for *certiorari*.

Materials Transportation Act (HMTA).[70] The tribal ordinance required that transporters of nuclear material obtain a separate tribal license for each shipment.[71] The ordinance also specified that each permit be filed 180 days in advance of each shipment and be accompanied by an application fee.[72] The HMTA provided that any state or tribal law is preempted if such law creates an obstacle to the accomplishment and execution of the HMTA.[73] The tribe argued that the plaintiff should have first exhausted tribal remedies.[74] The Eighth Circuit quickly disposed of that issue. According to the Eighth Circuit, the HMTA preempted the tribal ordinance, thereby leaving the plaintiff with nothing to exhaust.[75]

In *Duncan Energy*, however, the court required exhaustion.[76] Duncan Energy challenged the imposition of a tribal one-percent tax on all real and personal property within the reservation and certain employment requirements.[77] Duncan Energy operated numerous oil and gas leases from non-Indian landowners on lands arguably within the reservation.[78] It first argued that a certain Homestead Act diminished the reservation, taking the subject lands out of the jurisdiction of the tribe.[79] Second, Duncan Energy challenged the ability of the tribe to regulate the activities of non-tribal members on non-Indian fee lands.[80]

The circuit court required exhaustion.[81] According to the court, the tribal court must first determine if the subject tax and employment statutes comply with the requirements set forth by the United States Supreme Court in *Montana v. United States*,[82] In so holding, the court assumed that federal courts would have the ability to review the findings of the tribal court on these factual and legal issues: "[W]e note that the tribe may have a heavy burden justifying these tax and employment statutes under the Montana exceptions, but that caveat does not alter our

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70. Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community, 991 F.2d 458 (8th Cir. 1993).

71. *Id.* at 461.

72. *Id.*

73. *Id.* at 462.

74. *Id.*

75. *Northern States*, 991 F.2d at 462. The court failed to explain why the plaintiff should not be required to first address the preemption argument to the tribal court.

76. Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation, 27 F.3d 1294, 1299 (8th Cir. 1994), *cert. denied*, 130 L. Ed.2d 673 (1995).

77. *Id.* at 1296.

78. *Id.*

79. *Id.*

80. *Id.* at 1298.

81. *Duncan Energy*, 27 F.3d at 1299.

82. *Id.* at 27 F.3d at 1301 (citing Montana v. United States, 450 U.S. 544 (1981)). In *Montana*, the Supreme court set forth certain factors to determine if a tribe's attempts to regulate the activities of non-tribe members are a proper exercise of its sovereign powers.

conclusion that this issue is for the Tribal Court to determine in the first instance."[83] This conclusion is dubious in light of the Supreme Court's pronouncement in *Iowa Mutual* that federal courts will not rehear the merits of the action considered by the tribal court.

3. *Ninth Circuit*

In diversity cases, the Ninth Circuit looks to the action's nexus with the reservation. Its first post-*Iowa* exhaustion case, *Wellman v. Chevron U.S.A.*,[84] was a breach of contract case. The subject contract involved construction work to be performed on the reservation. The Ninth Circuit held that exhaustion was mandatory in all diversity actions arising from activities on the reservation: "If the dispute arises in Indian territory, [the parties] are limited to tribal court as the forum of first recourse. It is in non-Indian matters only that non-Indians can go to district court directly."[85]

In *Alaska v. Native Village of Venetie*,[86] however, the Ninth Circuit declined to require exhaustion.[87] There, an Indian village attempted to impose a tax against a state school district. Addressing the exhaustion issue as one of comity, the Ninth Circuit refused to require exhaustion until the sovereign status of the village was determined.[88]

In *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*,[89] the Ninth Circuit upheld an exhaustion ruling in a diversity case.[90] That case involved a breach of contract claim involving a sawmill located on the reservation. Subsequently, in *Stock West Corp. v. Taylor*,[91] however, the Ninth Circuit originally refused to require exhaustion in a legal malpractice action involving the very same sawmill.[92] In that case, the court considered it important that the subject legal opinion, drafted by a non-Indian on the reservation, was delivered to a non-Indian off the reservation. Finding that the case presented a non-reservation matter, the court held that "in non-Indian matters, 'non-Indians can go to district court directly.'"[93] On rehearing, however, the decision was reversed.[94]

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83. *Id.*
84. 815 F.2d 577 (9th Cir. 1987).
85. *Id.* at 578.
86. 856 F.2d 1384 (9th Cir. 1988).
87. Alaska v. Native Village of Venetie, 856 F.2d 1384 (9th Cir. 1988).
88. *Id.* at 1388.
89. 873 F.2d 1221 (9th Cir. 1989).
90. Stock West, Inc. v Confederated Tribes of the Colville Reservation, 873 F.2d 1221 (9th Cir. 1989).
91. 942 F.2d 655 (9th Cir. 1991), *rev'd*, 964 F.2d 912 (1992).
92. Stock West Corp. v. Taylor, 942 F.2d 655 (9th Cir. 1991), *rev'd*, 964 F.2d 912 (1992).
93. *Id.* at 663 (quoting *Wellman*, 815 F.2d at 579).
94. 964 F.2d 912 (9th Cir. 1992).

There, the *en banc* decision reconsidered the issue of whether the matter involved a reservation affair and held that the malpractice may have occurred on the reservation. The court thus required exhaustion.[95]

In federal question cases in the Ninth Circuit, exhaustion is less clear. In *Burlington Northern Railroad v. Blackfeet Tribe*,[96] the Circuit entertained a challenge to a tribe's attempted taxation of a railroad right of way through the reservation. The court rejected the tribe's assertion that exhaustion was required:

> Burlington Northern's failure to exhaust is not a bar to jurisdiction, and the district court did not abuse it discretion by reaching the merits. The complaint presents issues of federal, not tribal law; no proceeding is pending in any tribal court; the tribal court possesses no special expertise; and exhaustion would not have assisted the district court in deciding federal law issues.[97]

A scant four months later, however, the Ninth Circuit required abstention in a challenge to a tribal ordinance regulating railroads crossing the reservation. In *Burlington Northern Railroad Company*,[98] the Ninth Circuit stated that exhaustion is a mandatory prerequisite to a federal court's exercise of its concurrent jurisdiction.[99]

4. *Tenth Circuit*

Of all of the circuits, the Tenth Circuit most readily embraces a mandatory exhaustion requirement. In *Smith v. Moffett*,[100] an Indian commenced a civil rights action in the United States District Court against federal officials, tribal officials, and private individuals.[101] The district court granted the defendants' motion to dismiss.[102] The Tenth Circuit remanded the case to the district court for a determination of whether the plaintiff's claims "arose on the reservation and whether they

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95. *Id.* at 920.
96. 924 F. 2d 899 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 3013 (1992).
97. *Id.* at 901 n.2 (citations omitted).
98. 940 F.2d 1239 (9th Cir. 1991).
99. Burlington N. R.R. Co. v. Crow Tribal Council, 940 F.2d 1239, 1245 (9th Cir. 1991).
100. 947 F.2d 442 (10th Cir. 1991).
101. Jurisdiction was based on 28 U.S.C. § 1343(a)(3) (1993):

> [T]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

The opinion is silent as to why this provision was applicable to actions by the tribe or tribal officials, acting under color of tribal law.
102. *Smith*, 947 F.2d at 443.

have been presented to the appropriate tribal court."[103] In so holding, the court posited that *National Farmers* and *Iowa Mutual* established an "inflexible bar" to a federal court considering a case prior to exhaustion of tribal remedies.[104] This holding was based on the doubtful conclusion that the Supreme Court did not find a congressional "intent [to limit tribal court jurisdiction] in the federal question statute at issue in *National Farmers Union*."[105] *National Farmers* did not involve a federal statute. Rather, the only federal question in *National Farmers* was the scope of the tribal court's jurisdiction.

In *Bank of Oklahoma v. Muscogee (Creek) Nation*,[106] the Tenth Circuit required exhaustion even in cases arguably arising off the reservation.[107] There, a bank filed an interpleader action in federal court involving a tribe's bank account used in connection with the tribe's bingo hall. In opposing exhaustion, the bank argued that the banking activity took place off the reservation. The Tenth Circuit made short shrift of this argument. According to the court, "this jurisdiction argument should first be heard in tribal court."[108]

In *Texaco, Inc. v. Zah*,[109] the court again required exhaustion.[110] There, Texaco challenged the Navajo Nation's imposition of a tax on production and pipeline activities occurring outside the reservation but within Navajo Indian Country. As opposed to *Bank of Oklahoma*, however, the Tenth Circuit ruled that whether the issue arises on or off the reservation is important in determining whether exhaustion should apply:

> 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. Thus, we have characterized the tribal exhaustion rule as "an inflexible bar to consideration of the merits of the petition by the federal court." When the dispute involves non-Indian activities 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

103. *Id.* at 445.
104. *Id.*
105. *Id.*
106. 972 F.2d 1166 (10th Cir. 1992).
107. Bank of Oklahoma v. Muscogee (Creek) Nation, 972 F.2d 1166 (10th Cir. 1992).
108. *Id.* at 1170.
109. 5 F.3d 1374 (10th Cir. 1993).
110. Texaco, Inc. v. Zah, 5 F.3d 1374 (10th Cir. 1993).

remedies before presenting their dispute to the federal courts.[111]

III. JUXTAPOSITION OF THE MANDATORY EXHAUSTION RULE WITH INTERNATIONAL LAW

The mandatory exhaustion rule is inconsistent with well recognized international legal principles of concurrent jurisdiction. Such international legal principles provide the necessary guidance when courts of two sovereigns have concurrent jurisdiction over a particular matter. As opposed to mandatory exhaustion, these international legal principles provide a better approach to resolving concurrent jurisdictional issues between federal and tribal courts.

A substantial body of law has developed regarding the priority principle of concurrent jurisdiction. According to this principle, the court of concurrent jurisdiction that first exercises its jurisdiction should be allowed to finalize the case.[112] Comity has often been given as the justification for the priority principle.[113] Similarly, courts employing the mandatory exhaustion rule have justified their decisions, in part, on the doctrine of comity.

Comity is a frequently used term in international relations. Unfortunately, comity is also a broadly-used term, often encompassing concepts such as courtesy, reciprocity, morality, and utility.[114] According to the *Restatement of Foreign Relations Law of the United States*,[115] comity is:

> neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the

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111. *Id.* at 1378 (citation omitted).

112. *See, e.g.*, Scott v. Industrial Accident Comm'n, 293 P.2d 18 (1956). As between federal and state courts, however, this principle is sometimes not applied to actions in personam. Donovan v. Dallas, 375 U.S. 878 (1963).

113. E.H. Schopler, *Annotation, Stay of Civil Proceedings Pending Determination of Action in Federal Court in Same State*, 56 A.L.R. 2d 325, 341 (1957).

114. The Constitution directs each state to give "full faith and credit" to public acts, records, and judicial proceedings of other states. U.S CONST. art. IV, § 1. Congress extended the obligation and entitlement to territories and possessions of the United States. *See* 28 U.S.C. § 1738 (1984). Congress has not extended the concept to federal courts. Despite the able arguments of some commentators advancing the notion that tribal courts should by virtue of their dependent sovereign status be brought under the panoply of section 1738, most state courts have rejected the application of full faith and credit to Indian tribes, while others states embraced the result of giving full faith and credit either expressly or impliedly under principles of comity. *Id.* At least one tribal court has rejected the application of full faith and credit of state courts decisions to tribal courts for the traditional reason of the clause's applicability solely to states of the union. *See* Anderson Petroleum Serv., Inc. v. Chuska Energy & Petroleum Co., 4 Nav. R. 187 (1983); Hubbard v. Chinle Sch. Dist., 3 Nav. R. 167 (1982) (urging application of international law principles to the independent sovereign Navajo Nation).

115. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1986).

> recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws.[116]

Rather than focus on comity, however, the Restatement uses the principal of "reasonableness" as the appropriate limitation on concurrent jurisdiction.[117] The Restatement lists the following factors to consider whether the exercise of concurrent jurisdiction is reasonable:

> (a) the link of the activity to the state;
> (b) the link between the parties and the state;
> (c) the importance of the regulation to the state;
> (d) the justified expectations of the parties;
> (e) the extent to which regulation is consistent with the traditions of the international system;
> (f) the extent to which another state has an interest in regulating the activity; and
> (g) the likelihood of conflict with regulation by another state.[118]

If, after applying the foregoing factors, it is not unreasonable for more than one state to exercise jurisdiction over a person or activity and the laws of the two states differ: "[E]ach state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors . . . . [A] state should defer to the other state if that state's interest is clearly greater."[119]

Although typically applied to cases of concurrent jurisdiction in international law, the foregoing factors are not dissimilar to those used in resolving concurrent jurisdictional issues. For example, it is well-recognized that federal courts may enjoin a party from commencing or continuing a suit in another forum.[120] In so doing, courts often look to whether the other proceeding was commenced prior to or subsequent to the federal action,[121] the motives of the parties in commencing the other

116. *Id.* § 101 (citing Hilton v. Guyot, 159 U.S. 113, 163-64 (1895)).
117. *Id.* at part IV, Introductory Note.
118. *Id.* § 403(2).
119. *Id.* § 403(3).
120. This was what each of the plaintiffs sought in *National Farmers* and *Iowa Mutual*.
121. *See, e.g.*, In re Salvore, 36 F.2d 712 (2d Cir. 1929). In Laker Airways, Ltd. v. Savena, Belgian World Airlines, 731 F.2d 909 (D.C. 1984), the court refused to enjoin subsequent actions in foreign countries.

action,[122] and whether an injunction is necessary to protect the interests of the federal forum.[123]

The foregoing factors are also in accord with the well-established principle of federal law that federal courts have an obligation to resolve all matters properly brought before them. In *Colorado River Water Conservation District v. United States*,[124] the Supreme Court discussed the strict limitations of the abstention doctrine:

> Abstention from the exercise of federal jurisdiction is the exception, not the rule. "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. . . ."[125]

Requiring mandatory abstention[126] whenever a tribal court has concurrent jurisdiction runs counter to the "unflagging obligation of the federal courts to exercise the jurisdiction given them."[127]

The United States Supreme Court has not required mandatory exhaustion in any decision addressing the authority of a tribe to regulate the activities of non-tribal members. In *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*,[128] the issue was the authority of a tribe to impose a zoning ordinance over fee lands owned by non-Indians, but located within reservation boundaries. Similarly, in *South Dakota v. Bourland*,[129] the Court faced the issue of whether a tribe could prohibit hunting by non-Indians on non-trust land located within the reservation. Resolution of the merits in both *Brendale* and *Bourland* involved interpretation of federal law. Moreover, the Court decided both *Brendale* and *Bourland* long after *Iowa Mutual*. Yet the Supreme Court did not require abstention in either case.

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122. Chase Manhattan Bank, N.A. v. State of Iran, 484 F. Supp. 832 (S.D.N.Y. 1980).

123. *See, e.g.*, Garpeg, Ltd. v. United States, 583 F. Supp. 789 (S.D.N.Y. 1984).

124. 424 U.S. 800 (1976).

125. *Id.* at 813. *See also*, New Orleans Public Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 368 (1989) ("Only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States.").

126. "Exhaustion" and "abstention" are used interchangeably by courts, although they are distinguishable. "Exhaustion" is a procedural rule requiring litigants to "exhaust" administrative or state remedies before seeking redress in federal courts. The purpose is to avoid premature interruption of the administrative process. *See* McKart v. United States, 395 U.S. 185 (1969). "Abstention" is a procedural rule permitting federal courts to exercise discretion and relinquish jurisdiction to avoid needless conflicts with the administration of state court affairs. *See* Railroad Comm'n of Texas v. Pullman, 312 U.S. 496 (1941).

127. *Colorado River*, 424 U.S. at 817.

128. 492 U.S. 408 (1989).

129. 113 S. Ct. 2309 (1993).

Questions of concurrent jurisdiction between federal and tribal courts should be resolved by reference to the Restatement factors. Such factors give credence to the federal policy of encouraging tribal self-government. They are less deprecating than the mandatory exhaustion rule. That rule assumes that tribal courts are somehow inferior or weaker and require greater protection.[130] The Restatement factors give proper respect to tribal courts as independent sovereign courts.

The Restatement factors also properly take into consideration those cases in which resolution of the dispute principally involves a federal question. Mandatory abstention in cases involving the interpretation of federal law going to the merits of a controversy is not appropriate in light of the Supreme Court's statement in *Iowa Mutual* that, after abstention in favor of a tribal court, federal courts may not reconsider the merits. This, in effect, makes tribal courts the final arbiter of federal law in every case having an Indian reservation nexus.[131] This result would run counter to the pronouncement in *FMC v. Shoshone-Bannock Tribes*,[132] that federal courts are not bound by legal conclusions of tribal court and federal courts are the proper forums for resolving federal law.[133]

IV. APPLICATION OF THE EXHAUSTION RULE TO NATURAL RESOURCES DEVELOPMENT: A CASE FOR THE RESTATEMENT RULES

Natural resources development within Indian country,[134] particularly mineral extraction operations, provides a unique and reasonably

130. The mandatory exhaustion rule can be roughly analogized to affirmative action for tribal courts.

131. Similarly, federal courts should not be the final arbiter of tribal laws.

132. 905 F.2d 1311 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991).

133. FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1313-14 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991).

134. "Indian Country" is defined in 18 U.S.C. § 1151 (1983), as:

> (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 title to which have not been extinguished, including rights-of-way running through the same.

Id.

"Indian country" applies equally to criminal and civil jurisdiction. *See, e.g.* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 n.7 (1987); DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975).

controlled legal environment in which to test the incongruity of a mandatory application of *National Farmers* and the appropriateness of the Restatement hypotheses advanced in Part III.

The Rocky Mountain and Mid-Continent regions[135] contain the most geographically expansive Indian reservations in the United States,[136] as well as the majority of reservations of energy resource tribes.[137] Typically, the exhaustion doctrine is addressed in one of three contexts. First, mineral extraction may occur on reservation lands which are subject to split-estate ownership.[138] Second, mineral extraction may

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135. The states most likely to be affected by the clash of jurisdictions are the public land states of Arizona, Colorado, Idaho, Kansas, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming. Reservations within Oregon and Washington are not affected by mineral extraction operations. Reservations in Michigan and Wisconsin have not been surveyed.

136. Acreage embraced within the exterior boundaries of reservations within the 13 Rocky Mountain and Mid-Continent states surveyed equals 49,572,374 acres. *See* MAXFIELD ET AL., NATURAL RESOURCES LAW ON AMERICAN INDIAN LANDS App. C, at 321-35 (1977). Recent decisions of the federal judiciary have expanded the acreage total to exceed 52,000,000 acres. *See, e.g.*, Ute Indian Tribe v. Utah, 521 F. Supp. 1072 (D. Utah 1981), *aff'd*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 478 U.S. 1002 (1986) (expanding the Uintah and Ouray Reservation by 3,000,000 acres); Hagen v. Utah, 114 S. Ct. 958 (1994), *reh'g denied*, 114 S. Ct. 1580 (1994) (diminishing the expanded Uintah and Ouray Reservation by approximately 1,000,000 acres).

137. There are currently 57 tribes registered as members of the Council of Energy Resource Tribes.

Reservations within the Rocky Mountain and Mid-Continent regions (and tribes if different from reservation names) include the following: ARIZONA—Big Sandy, Camp Verde, Cocopha, Colorado River, Havasupai, Hualapai, Yavapai, Hopi, Navajo, Pagago, Fort McDowell (Pima), Gila River (Pima), Maricopa [Ak Chin] (Pima), Salt River (Pima), San Carlos (Apache), and Kaibab; COLORADO—Southern Ute, Ute Mountain Ute; IDAHO—Fort Hall (Shoshone—Bannock), Coeur D'Alene (Coeur d'Alene, Kootenai, Pend d'Oreille, and Spokane), Kalispel, Kootenai, and Lapwai (Nez Perce); KANSAS—Iowa, Kickapoo, Potawatomi, and Sac and Fox; MINNESOTA—Chippewa (Fund du Lac, Grand Portage, Leech Lake, Mille Lac, Nett Lake, and White Earth), Granite Falls (Upper Sioux), Morton (Lower Sioux), Prairie Island, Prior Lake, and Red Lake; MONTANA—Blackfeet (Blackfeet, Blood, and Piegan), Crow, Flathead (Flathead, Kootenai, Kalispel, Pend d'Oreille, Bitter Root, and Carlos Band), Fort Belknap (Assiniboine and Gros Ventre), Rocky Boy's (Chippewa Cree), Fort Peck (Assiniboine—Sioux), Tongue River (Northern Cheyenne); NEBRASKA—Omaha, Ponca, Sundae-Sioux, Winnebago; NEW MEXICO—Jicarilla (Apache), Mescalero (Apache), United Pueblo Agency (Acoma, Cochiti, Isleta, Jemez, Laguna, Nambe, Picunis, Pojoaque, Ramah, Sandia, San Felipe, San Ildefonso, San Juan, Santa Ana, Santa Clara, Santa Domingo, Taos, Teseque, Zia, Zuni, Alamo [Navajo], Canoncito [Navajo], and Ramah [Navajo]; NORTH DAKOTA—Fort Berthold (Arikara, Hidatsa, and Mandan—The Three Affiliated Tribes), Fort Totten (Sioux), Standing Rock (Sioux), Turtle Mountain (Chippewa); OKLAHOMA—Cherokee, Chickasaw, Choctaw, Creek, Seminole, Quapaw, Shawnee, Miami, Ottawa, Peoria, Quapaw, Seneca-Cayuga, Wyandotte, United Keetoowah Band Cherokees, Alabama Quassarte (Creek), Kialegee (Creek), Kialegee (Creek), Thlopthlocco (Creek), Osage, Fort Sill Apache, Caddo, Cheyenne, Arapaho, Iowa, Kaw, Kickapoo, Kiowa-Comanche, Otoe and Missouri, Pawnee, Ponca, Sac and Fox, Shawnee (Absentee), Tonkawa, and Wichita Affiliated Band; SOUTH DAKOTA—Cheyenne River (Sioux), Crow Creek (Sioux), Flandreau-Sundae Sioux, Lower Brule Sioux, Pine Ridge (Ogalala Sioux), Rosebud (Sioux), Yankton (Sioux), Sisseton-Wahpeton (Sioux), Standing Rock (Sioux); UTAH—Navajo, Uintah and Ouray (Northern Ute); and WYOMING—Wind River (Shoshone—Arapaho). *See* MAXFIELD ET AL., *supra* note 136, Apps. B & D at 306-20, 337-59.

138. In the typical split-estate, the dominant mineral estate is owned by the United States, and the subservient surface estate is owned by the tribe. On some reservations, such as the Navajo and the Uintah and Ouray in Utah, federal, Indian, and state agencies assert operational jurisdiction over oil and gas exploration, development, and production. *See, e.g.*, Pub. L. No. 85-868, 72 Stat. 1686 (1958) & Pub. Land Order 3397, 29 Fed. Reg. 6685-86 (1964) (creating the 51,606.78-acre McCracken Mesa

be conducted wholly on reservation lands, but under the auspices of federal Indian mineral extractions statutes.[139] Third, mineral extraction may be prosecuted on enclaves of federal, state, or private oil, gas, uranium, and coal lands owned by non-Indians, but located within the exterior boundaries of reservations. Operations on split-estate lands and those conducted under the various Indian mineral leasing acts raise federal questions distinct from the relatively narrow federal question addressed in *National Farmers* regarding the scope of the tribe's jurisdiction that should, if one is to be theoretically consistent, take cases out of the exhaustion doctrine. Operations on federal, state, and private inholdings within the exterior boundaries of reservations posit the perfect application of the Restatement factors.

A. SPLIT-ESTATES: TRIBAL SURFACE—FEDERAL OR STATE MINERALS

Boyd & McWilliams Energy Group, Inc. v. Tso[140] typifies the split-estate scenario. The case arose on the McCracken Mesa area of the Navajo Indian Reservation in southeastern Utah. Boyd & McWilliams obtained a permit from the United States Department of the Interior, Bureau of Land Management (BLM),[141] to drill an oil and gas well on a federal public domain lease.[142] The lands covered by the lease, indeed

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enclave of federal (public domain) mineral estate underlying tribal surface estate within the expanded Navajo Nation, which federal mineral estate is administered by the Bureau of Land Management under the Mineral Leasing Act of 1920, and which tribal surface estate is administered by the Bureau of Indian Affairs and the Navajo Nation); The Act of March 11, 1848, Pub. L. No. 80-440, 62 Stat. 72, 77-78 (1948) (creating the Hill Creek Extension of the Uintah & Ouray Reservation, establishing a 726,000-acre enclave of federal (public domain) mineral estate overlain by tribal surface estate). *See also* FRED A. CONETAH, A HISTORY OF THE NORTHERN UTE PEOPLE 140-142 (Kathryn L. MacKay & Floyd A. O'Neil eds., 1982); Ute Indian Tribe v. State of Utah, 521 F. Supp. 1072 (D. Utah 1981), *aff'd*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 478 U.S. 1002 (1986) (restoring the original boundaries of the Uintah Valley and Uncompahgre Reservations (now the Uintah and Ouray Reservation) containing numerous inholdings of private, state, and federal lands, particularly within the Uncompahgre portion of the reservation not affected by Hagen v. Utah, 114 S. Ct. 958, *reh'g denied*, 114 S. Ct. 1580 (1994).

139. *See supra* text accompanying notes 114-25.

140. No. 93-C-1083A (D. Utah, filed Dec. 17, 1993).

141. Bureau of Land Management, U.S. Dept. of Interior, Application for Permit to Drill or Deepen, Form 3160-December 1990, dated July 20, 1993, approved Sept. 15, 1993. The permit authorized the drilling of the Turquoise Horse #1 Well in the NE quarter of Section 8, Township 39 South, Range 24 East, S.L.M., in San Juan County, Utah.

142. The mineral estate was covered by United States Oil and Gas Lease UTU-65994. *See* Bureau of Land Management, U.S. Dept. of Interior, Offer to Lease and Lease for Oil and Gas, UTU-65994, Form 3120, dated effective Oct. 1, 1989. The BLM issued the lease pursuant to the Mineral Leasing Act of 1920 for a primary term of five years. *See* 30 U.S.C. §§ 181-287 (1986 & Supp. 1994).

the entire surrounding area, involved split-estate ownership.[143] The United States owned the dominant mineral estate as part of the public domain. The United States held title to the subservient surface estate in trust for the Navajo Nation. The Bureau of Indian Affairs (BIA) supervised the surface estate for the trustee, acting through its Shiprock Agency. The BLM managed the mineral estate on behalf of the United States. The lands covered by the lease and several adjoining leases had been combined to form a federal oil and gas exploration unit.[144]

The statute authorizing the exchange of Navajo Nation lands taken for the Glen Canyon Dam project with the McCracken Mesa area expressly directed the Secretary to reserve the minerals and to authorize mineral activities on the reserved mineral estate subject to such regulations as the Secretary might prescribe, including rules to protect the tribal surface estate.[145] The Mineral Leasing Act of 1920 empowers the Secretary to promulgate regulations for the development of the mineral estate in public domain lands.[146] The rules governing use of split-estate lands involving Indian and private surface estates and federal minerals are contained in federal Onshore Oil and Gas Order No. 1.[147] Also, pursuant to federal regulations, the BLM had operational jurisdiction over all oil and gas wells drilled on public domain and Indian tribal and allotted lands.[148]

The BLM approved the permit to drill only after it had obtained concurrence of the BIA. As part of the surface approval process, Boyd & McWilliams had been required to obtain permission of the local Aneth Chapter of the Navajo Nation, conduct the required archeological and other surface inspections and inventories to the satisfaction of the Shiprock Agency, and pay the requested surface damage cash bond to

143. The split estate nature of the ownership of the lands derived from the Act of September 2, 1958, Pub. L. No. 85-868, 72 Stat. 1686 (1958) and Public Land Order No. 3397 (May 18, 1964), under which the United States exchanged lands along the Colorado River then part of the Navajo Indian Reservation for lands in the McCracken Mesa area of southeastern Utah. The exchange was part of the Glen Canyon unit of the Colorado River storage project (Exchange Act). *See* Fed. Reg. 6685 (May 22, 1964). The PLO expressly excepted the mineral estate in the McCracken Mesa Area as part of the land exchange. *See id.* at 6685. Lands within the McCracken Mesa exchange totalled approximately 51,606.78 acres. *See id.* at 6686.

144. The BLM approved the commitment of the lease and adjoining leases to the Turquoise Horse Unit effective Nov. 22, 1993. Boyd & McWilliams was both the operator of the well and the unit. *See* Transcript at 54-55 (tribal court case) (testimony of Harold J. McWilliams in hearing on motion for preliminary injunction).

145. 72 Stat. 1686 § 1 (1958). Congress acknowledged that the McCracken Mesa are was known for its oil and gas potential. *See* H.R. Rep. No. 2457, 85th Cong., 2d Sess. (1958), *reprinted in* 1958 U.S.C.C.A.N. 5085, 5088-89.

146. 30 U.S.C. § 189 (1986).

147. *See infra* text accompanying notes 168, 178.

148. 43 C.F.R. §§ 3160.0-1, 3161.1 (1994).

the Aneth Chapter.[149] Concurrently, Boyd & McWilliams applied to the Resources Committee of the Navajo Nation for a right-of-way for surface access and use.[150]

When Boyd & McWilliams commenced site preparation for the drilling rig, members of the Aneth Chapter ordered Boyd & McWilliams' drill-site construction personnel off the land. Tribal members formed a human chain to prevent the contractors from working, and erected a barbed-wire fence across the access road to prevent them from removing their heavy equipment. Under its agreements with the lessees, Boyd & McWilliams was obligated to commence actual drilling operations within a very short specified period or lose its right to drill the well, its rights to drill additional wells on the lease, its investment in obtaining permits, the availability of the drilling rig, and its investors in the drilling program to be conducted on the lease.[151]

Boyd & McWilliams sued for injunctive relief in the United States District Court for the District of Utah. The court issued its order enjoining individual members of the tribe and the Aneth Chapter from interfering with drilling operations.[152] The federal court rejected the mandatory application of the exhaustion doctrine on grounds that a federal court need not abstain when the case raised a federal question or when the matter was not pending in tribal court.[153]

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149. *See* Bureau of Indian Affairs, U.S. Dept. of Interior, Transmittal of Application for Permit to Drill/Sundry Notice, dated Aug. 6, 1993, approved by the Shiprock Agency Aug. 11, 1993 (authorizing the drilling of the Turquoise Horse #1 Well). In fact, the BLM did not issue the permit until it had received approval from the Shiprock Agency Realty Office of the BIA. The BIA approved the permit on August 11, 1993, following the requisite on-sight inspections and environmental and archeological reviews and subject to inclusion of required BIA surface stipulations which the BLM attached to the permit.

150. Transcript at 54-55 (tribal court case) (testimony of Harold J. McWilliams in hearing on motion for preliminary injunction).

151. Boyd & McWilliams' interest stems from farmout agreements with the lessees. *See* Plaintiff's Ex. 1, in Boyd & McWilliams Energy, Inc. v. Tso, No. 93-C-1083A (D. Utah, Dec. 15, 1993).

152. Order Granting Plaintiff's Motion for a Preliminary Injunction in Boyd & McWilliams Energy, Inc. v. Tso, No. 93-C-1083A (Dec. 17, 1993). The authors represented Boyd & McWilliams in the United States District Court for the District of Utah.

153. When the federal marshall could not find the named parties and the tribal police refused to serve the order, Boyd & McWilliams sought relief in Navajo Tribal Court in Shiprock, New Mexico, praying for domestication of the federal injunction, or, in the alternative, a separate injunction from the tribal court. *See* Boyd & McWilliams Energy, Inc. v. Tso, No. SR-CV-121-93 (Navajo D. Ct., Dec. 17, 1993).

1. *Analysis of Federal Questions Raised in* Boyd & McWilliams *for Split-Estate Lands*

Actions by mineral lessees to enjoin surface owners from interfering with surface use state a cause of action under 28 U.S.C. section 1331.[154] When federal questions arise beyond the limited exception of determination of the scope of tribal authority to hear cases, federal courts need not automatically abstain from jurisdiction or require exhaustion of tribal court remedies.[155]

Boyd & McWilliams raised several federal questions. First, did the reservation of mineral rights under the Exchange Act creating the McCracken Mesa area carry with it the right to use the surface estate to develop the minerals? Second, assuming that the reservation of the mineral estate carried with it the right to use the surface, what was the nature and scope of that right? Third, since the permit was issued pursuant to the federal Mineral Leasing Act of 1920,[156] what rights to surface use did Boyd & McWilliams have by virtue of the lease? Fourth, did the federal government recognize the general common law of the dominance of the mineral estate in split-estate situations, implying a right-of-way or way-of-necessity over and through the surface estate to the subterranean minerals deposits? Fifth, did the federal government's policy of self-determination for Indian tribes supersede and abrogate rights under federal law to use so much of the surface estate as reasonably necessary to enjoy the mineral estate? Stated another way, in a split-estate situation, was Boyd & McWilliams subject to the jurisdiction of the Navajo Nation Resource Committee's approval of a right-of-way under the federal Indian Right-of-Way Act which requires consent of the Indian tribe?

"Split-estate" lands are defined by the Solicitor of the Department of the Interior as "those [lands] where the surface estate is owned by one entity and the mineral estate is owned by another."[157] In that memorandum the Solicitor addressed the rights of the operator under a mineral lease from the United States to use the surface estates patented to private parties under the Stockraising Homestead Act of 1914 (SRHA), and other acts. The Solicitor concluded that the operator has a right to use

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154. Mountain Fuel Supply Co. v. Smith, 471 F.2d 594, 596 (10th Cir. 1973).

155. *See* Colorado River Water Conservation Dist., 424 U.S. at 813. *See also* South Dakota v. Bourland, 113 S. Ct. 2309 (1993); Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989).

156. 30 U.S.C. §§ 181-287 (1986 & Supp. 1994).

157. *See* Memorandum of the Solicitor, United States Dep't. of Interior, to the Director, Bureau of Land Management dated April 1, 1988, n.1, at 1.

the surface estate inherent in the mineral reservations, subject only to the BLM ensuring that the National Environmental Policy Act, the Endangered Species Act, the National Historic Preservation Act, and related archeological preservation act requirements are met.[158]

The Solicitor's Memorandum restated the law laid down by the United States Supreme Court in the leading case on this subject. In *Kinney-Coastal Oil Co. v. Kieffer*,[159] the lessee under an oil and gas lease from the United States sought to enforce its rights of surface access inherent in its lease of the mineral estate. The United States owned the mineral estate as part of the public domain. The surface had been patented to private persons pursuant to the terms of the SRHA. The Court ruled that when the surface and mineral estates are severed, a servitude is laid upon the surface estate for the benefit of the mineral owner.[160] It defined that servitude as a right appurtenant to the primary right of exploring for and extracting the oil and gas. The appurtenant right in the surface estate is to use the surface so far as may be necessary to extract the oil and gas.[161] The Court also held that the surface owners were not entitled to compensation for the reasonable surface use.

Modern courts have embraced the rule announced in *Kinney* as the doctrine of accommodation. The doctrine holds that the owner of the dominant mineral estate may use so much of the surface estate as reasonably necessary to explore for and extract the minerals.[162] The right of the mineral owner to use the surface historically has been referred to as an incidental estate in land and as profit à prendre, easement, servitude, license, or right of re-entry. In the context of federally reserved minerals, the rule has been succinctly reemphasized in *Barrett S. Duff*,[163] wherein the patented surface was held to be subservient to the dominant reserved federal mineral estate and the right of its lessee to prospect for and remove the minerals.[164]

One might attempt to distinguish *Kinney* from *Boyd & McWilliams* by stating that the SRHA and the patents issued thereunder contained express reservations of the mineral estates and rights of ingress and egress, whereas in *Boyd & McWilliams* the Secretary of the Interior (Secretary) appears to have made no such provision for ingress and egress when he exchanged the Glen Canyon Dam properties for the

158. *Id.* at 8.
159. 277 U.S. 488 (1928).
160. *Id.* at 504.
161. *Id.*
162. *See* Slaatan v. Cliff's Drilling Co., 748 F.2d 1275 (8th Cir. 1984); Flying Diamond Corp. v. Rust, 551 P.2d 509 (Utah 1976); Getty Oil Co. v. Jones, 470 S.W.2d 618 (Tex. 1971).
163. Barret S. Duff, 122 IBLA 244 (1992).
164. *Id.* at 249.

McCracken Mesa. That argument should fail under well established principles of law that the mineral estate is the dominant estate in split-estate situations even in the absence of express reservations, and a servitude is laid upon the surface estate by severance of the two estates.[165] Indeed, the argument made in *Kinney* was that by expressly providing for the reservation and surface access in the SRHA and in the patents issued under that act, Congress merely restated the law.

As a matter of current congressional policy, the BLM's organic act[166] expressly directs the Secretary to reserve the mineral estates in conveyances of public domain lands, together with the right to "prospect for, mine, and remove the minerals."[167] In other words, Congress has now succinctly made statutory what for years has been the accepted federal common law, the law applicable to the land exchange affecting the McCracken Mesa area.

Although there are no judicial decisions directly on point in the context of Indian surface and BLM minerals, the SRHA cases are instructive, if not authoritative. In fact, the Secretary has determined that the procedures for preserving the surface estates in SRHA surface and BLM minerals situations apply equally to Indian surface and BLM minerals.[168] Inasmuch as the Secretary considers procedures for Indian surface estates to be identical to those for SRHA patents, it follows that the judicial decisions construing rights of access to the surface estate to be authority for disputes involving rights of access to Indian surface. In summary, consent of the Indian tribe is not required in split-estate situations, assuming that the BLM has complied with environmental, cultural, and historic preservation acts.

Indian tribes frequently cite the Indian Right-of-Way Act of 1948 as authority for the proposition that certain tribes must consent to the Secretary granting surface access to Indian lands. The Act requires the Secretary to obtain tribal consent as an apparent condition precedent to approving the right-of-way.[169] Since the Navajo Nation is one of the tribes from whom consent must be obtained,[170] it follows, the Navajo Nation would argue, that the Secretary may not authorize surface access without tribal consent.

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165. *See* Chartiers Block Coal Co. v. Mellon, 25 A. 597, 598-99 (1893); Lovelace v. Southwestern Petroleum Co., 267 F. 513, 517-19 (6th Cir. 1920).

166. Federal Land Policy and Management Act, Pub. L. No. 94-579, 90 Stat. 2757 (1976) (codified at 30 U.S.C. §§ 1701-1784 (1983 & Supp. 1994)).

167. 43 U.S.C. § 1719 (1983 & Supp. 1994).

168. *See* Bureau of Land Management, U.S. Dept. of Interior, Onshore Oil and Gas Order No. 1, 48 Fed. Reg. 48,915, 48,927, § VII.A (1983).

169. *See* 25 U.S.C. § 324 (1988).

170. *See id.*

Reliance on the Indian Right-of-Way Act of 1948 is misplaced in split-estate situations involving tribal surface and BLM minerals. The Right-of-Way Act contemplates that the party seeking access has no inherent right to use the surface. It should be noted that the Right-of-Way Act provides expressly for right-of-way for railroads, highways and other public roads, and pipelines. The general provisions upon which most tribes rely do not specify a type of use, but appear to serve as general catch-alls for rights-of-way not previously identified. In these situations, a right-of-way or license is required to empower the operator to use the surface estate. It was never intended to supplant or even to augment the inherent right of a mineral owner or his lessee to use the surface by virtue of the severance of the surface and mineral estates. Indeed, it has been suggested that the catch-all provision of section 324 was intended by Congress to apply to irrigation systems.[171]

Onshore Oil and Gas Order No. 1 (Onshore Order)[172] constitutes the federal rulemaking governing split-estate situations involving Indian surface and federal minerals. The Onshore Order implements the operational directives of the Secretary.[173] According to the Onshore Order, the operator is required to reach an agreement *with the BIA* regarding protection of surface resources and reclamation. In the absence of consent (of the BIA, not the tribe), the Secretary may approve a permit to drill if the operator has complied with the regulations contained in 43 C.F.R. subpart 3814 pertaining to the SRHA.[174] The regulations prohibit the operator from injuring, damaging, or destroying permanent improvements of the surface owner.[175] Further, they require the operator to either (1) obtain an agreement for surface use from the surface owner and (2) pay damages to crops or other tangible improvements *or* (3) in lieu of a consent or paying for (actual) damages, post a bond or undertaking to the United States for the use and benefit of the

171. *See* cross-references and annotations following 25 U.S.C.A. § 324 (West 1983).

172. *See* 48 Fed. Reg. 48,916, 49,927, § VII.A (1983).

173. 43 C.F.R. Subpart 3164 (1994).

174. 43 C.F.R. § 3814 (1994) addresses actions required by an operator under a mineral lease when the surface has been patented to private owners under the Stockraising Homestead Acts. In this instance, the Order requires operators to adhere to the same procedures for obtaining a permit on Stockraising Homestead lands in the absence of consent when seeking access to or over surface estates owned by individual Indians or Indian tribes.

In *Boyd & McWilliams* the operator reached an agreement with the BIA. Even if Boyd & McWilliams would have been construed not to have reached an agreement with the BIA, it complied with the procedures for obtaining a permit set forth in 43 C.F.R. Subpart 3814, as it has both posted a drilling bond with the BLM and paid a damage deposit to the Aneth Chapter. The payment of the surface damage deposit was intended as an accommodation to prevent the very problem that arose.

175. 43 C.F.R. § 3814.1 (c) (1994).

surface owner.[176] The Secretary has expressly stated that the drilling bond alone suffices as surety.[177]

Noteworthy is the fact that the Onshore Order and the SRHA regulations speak in terms of the lessee's right to "re-enter" the surface estate. Also noteworthy is the absence from the Onshore Order of any requirement that independent rights of surface access must be negotiated and compensated. It follows that damages are to be paid only when there is actual injury, damage, or destruction to crops and permanent improvements.[178] Thus, if there is no damage or destruction, the damage deposit made to the BIA should be refunded.

How is the Onshore Order to be reconciled with the requirement of the Indian Right-of-Way Act of 1948, if, indeed, reconciliation is necessary? The Right-of-Way Act is intended to apply to those situations when the operator has no right of access under a lease by virtue of mineral reservations in a patent or other implied easements or ways of necessity. In other words, the Act applies exclusively to those situations when the operator must cross other Indian lands to gain access to the leasehold lands. The Onshore Order, on the other hand, applies to surface access on the leasehold lands themselves, when the surface is owned by a party other than the United States. This construction is the only logical way to harmonize the Act, the Onshore Order, judicial decisions, and the actions of the BLM and BIA.

2. *Application of the Restatement Factors is Appropriate in a* Boyd & McWilliams *Split-Estate Context*

The Restatement factors[179] compel rejection of the mandatory exhaustion doctrine in split-estate cases. The Secretary reserved the mineral estate as part of the public domain in contemplation of exploitation of the constituent minerals. There would be no other reason for reserving minerals in public domain lands. Mineral extraction on public domain lands are controlled by the federal Mineral Leasing Act of 1920. Federal lessees are directly linked to the United States (public domain), as they are operating on federal public domain lands. The

176. *Id.* § 3814.1(d).

177. *See* BLM MANUAL H-3104-1-Bonds, Section XVII.A (Rel. 3-129).

178. *See* Kinney-Coastal Oil, Inc. v. Kieffer, 277 U.S. at 507. It is important to note that the compensation specified in the Onshore Order is not for the right to use the surface. Rather, it is for damages to "crops and other tangible improvements" and is payable only if such damages occur. This is consistent with the ruling in *Kinney* that compensation is due, again, not for surface access, but exclusively for damages to crops and improvements. *Id.* Technically speaking, there should be no payments if there is no injury to crops and tangible improvements.

179. *See supra* text accompanying note 89.

United States has a direct interest in regulating the extraction of minerals from public lands and the flow of royalties into the federal treasury. The public has a justifiable expectation of enjoying royalties from production of public domain minerals. The Indian tribe has no interest in the mineral estate and, therefore, has no right to regulate the activity. Provision exists in federal law and regulations for mitigating possible conflicts occasioned by the clash of mineral rights of the United States and surface rights of the Indian tribe. Application of federal law provides for the weighing of the rights of both the surface and mineral owner, while the application of tribal law may not. The court best positioned to address the laws and consider the rights of the parties is the federal court which (1) has a direct interest in the orderly development of federal law and (2) is accustomed to applying the concepts of Anglo-American jurisprudence embodied in the applicable statutes.[180]

B. FEDERAL INDIAN MINERAL DEVELOPMENT STATUTES

The second scenario arises when both surface and mineral estates are owned by Indian tribes or allottees under the trust relationship with the United States. Mineral extraction operations are conducted under one of three Indian mineral acts.

The Indian Mineral Leasing Act of 1938[181] comprises, with limited exceptions not relevant here, the comprehensive authority governing the leasing of minerals on tribal lands. The Act states the duration of the leases, requires consent of the tribal council or authorized spokesman, prescribes the public auction nature of awarding leases, and establishes bonding requirements. One of the primary purposes of the Act was to repeal the piece-meal, often inconsistent leasing acts affecting various Indian tribes in favor of a more universal and consistent administration of tribal lands leasing.

The Allotted Lands Leasing Act of 1909[182] provides general authorization for leasing lands allotted in severalty to enrolled tribal members under the various Indian allotment acts. The Secretary is authorized to lease the lands of the allottees or their heirs at public

180. Both the exhaustion and the Restatement analyses apply equally to split-estates involving tribal or allotted surface and state-owned minerals. Such a circumstance is exemplified by the Hill Creek Extension to the Uintah and Ouray Reservation in eastern Utah. The United States holds title to the surface estate for Ute Indian Tribe or its allottees and the state of Utah owns the mineral estate in school sections 2, 16, 32, and 36 or in lands granted in lieu of the school sections. *See* 62 Stat. 72. *See also,* Bureau of Land Management, U.S. Dept. of Interior, *Areas of Responsibility and Land Status Map for the State of Utah* (ed. 1977). *See generally* Ute Indian Tribe v. Utah, 521 F. Supp. 1072 (D. Utah 1981) (discussing state of Utah mineral inholdings underlying the Hill Creek Extension).

181. 25 U.S.C. §§ 396a-396g (1983).

182. *Id.* § 396.

auction.[183] Consent of the tribal council or of its authorized spokesman is not required.

The Indian Mineral Development Act of 1982[184] provides for alternative mineral extraction arrangements (other than leasing) between the extraction industries and Indian tribes. Prior to 1982, any attempts to develop Indian minerals other than through leasing were questionable, if not void.[185] The Act empowers Indian tribes to enter into agreements with mineral exploration companies. Acknowledged contractual arrangements include joint ventures between the tribe and the operators, operating agreements, production sharing, service sharing, leasing, and other agreements for the exploration, extraction, gathering, and processing of mineral.[186] Allotted lands may be made part of a mineral development agreement if tribal lands are the primary subject of the agreement.[187] All mineral development agreements must be approved by the Secretary.[188]

The operational phases of mineral development on Indian lands are governed by federal regulations. The BLM has overall authority and jurisdiction of operations on Indian lands.[189] Moreover, the Minerals Management Service has collection and accounting jurisdiction over the payment of royalties from Indian leases and agreements.[190]

Under the authority of the Tenth Circuit decisions, the controlling factor in application of the exhaustion doctrine is whether the activity giving rise to the controversy arose on Indian reservations.[191] But is that approach reasonable when operations are controlled by federal statutes? As long as reservations are subject to the trust relationship, who has more direct interest in ensuring the orderly development of federal Indian law than the federal courts? Who is the best able to construe federal law? Again, the Restatement factors,[192] for the reasons stated above, lead to the conclusion that federal district courts should take jurisdiction, particularly in light of the *Iowa Mutual* dictum that federal courts will not rehear substantive law decided by tribal courts.[193]

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183. 25 C.F.R. § 212.4(a) (1994).

184. 25 U.S.C. §§ 2101-08 (1988).

185. LOUIS R. MOORE & MICHAEL E. WEBSTER, 2 LAW OF FEDERAL OIL & GAS LEASES ch. XXVI, § 26.14 (1992).

186. *Id.* § 26.14, at 26-58.

187. 25 U.S.C. § 2102(b) (1988).

188. *Id.* § 2103.

189. 43 C.F.R. § 3161.1 (1994).

190. 30 C.F.R. pt. 202 (1994).

191. *See, e.g.*, Texaco, Inc. v. Zah, 5 F.3d 1374, 1378 (10th Cir. 1993) (remanding the case for a determination if the case arose off-reservation).

192. *See supra* text accompanying note 89.

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

Similarly, the Restatement analysis suggests that federal courts should take jurisdiction in Indian mineral development cases. The Secretary is charged by Congress to ensure that the trust is adequately protected and properly managed. Mineral extraction operations on tribal and allotted lands are controlled by the federal Indian mineral development statutes. Federal Indian lessees are directly linked to the United States trust relationship, as they are operating on lands subject to the trust. As trustee, the United States has a direct interest in regulating the extraction of minerals and flow of royalties through the federal treasury to and for the benefit of Indian tribes and allottees. No provision exists in tribal law and regulations for the leasing of minerals and collection of royalties. Application of federal law provides for the weighing of the rights of both the tribe and allottees and the lessees approved by the BIA. Again, the court best positioned to address the laws and consider the rights of the parties is the federal court which (1) has a direct interest in the orderly development of federal law and (2) is accustomed to applying the concepts of Anglo-American jurisprudence embodied in the applicable statutes.

C. FEDERAL, STATE, AND PRIVATE ENCLAVES

A more difficult question involves the application of the mandatory exhaustion doctrine to enclaves of non-Indian lands within the exterior boundaries of Indian reservations. To the extent that the lands are federal or state enclaves, both the possibility of a federal question arising and the limitations to the *National Farmers/Iowa Mutual* rule are greater. However, what happens when the lands are private enclaves and the only federal question is the scope of tribal court authority under the treaties or congressional legislation establishing the reservation? The Restatement factors[194] provide a more reasoned approach to the problem.

The extraction operations themselves are the major link of the activity to the state. The state oil and gas conservation commissions or equivalent mining authorities are charged with regulating operations on private and state lands.[195] The state is obligated pursuant to federal

194. *See supra* text accompanying note 89.

195. *See, e.g.*, UTAH CODE ANN. §§ 40-6-1 to 40-6-18 (1993 & Supp. 1994). Section 40-6-1 provides:

> It is declared to be in the public interest to foster, encourage, and promote the development, production, and utilization of natural resources of oil and gas in the state of Utah in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be obtained and that the correlative rights of all owners may be fully protected; to provide exclusive state authority over oil and gas exploration and development as regulated under the provisions of this chapter; to

environmental protection and other acts to ensure proper environmental oversight.[196] The state levies, assesses, and collects mineral production taxes.[197] Industry representatives conducting the operations are licensed by the state to conduct business generally and are obligated to pay income, franchise, and other taxes.[198] Since most mineral extraction companies are non-Indian owned or controlled, they have an interest in seeking resolution of their rights under a legal system that is inclined to weigh traditional Anglo-American property ownership principles-principles under which the companies acquired their mineral extraction rights in the first instance. Private mineral lessees are directly linked to the state police powers.

On the other hand, the tribe does not own the mineral estate. The tribe derives no economic benefit from development of the minerals, other than possible surface access fees when lessees are required to cross adjacent Indian lands to gain access to the inholdings. Arguably, the tribe may not levy taxes or otherwise regulate the activities. The only real interest the tribe has is to ensure that the political integrity, economic security, health, or welfare of the tribe will not be affected adversely.[199] The court best positioned to address the laws and consider the rights of the parties is either the federal court in diversity cases or the state courts in all other cases—courts which are accustomed to applying the concepts of Anglo-American jurisprudence embodied in the applicable statutes, regulations, and contracts.

V. CONCLUSION

International law provides a workable framework for concurrent jurisdiction cases, but is not a panacea. It has limitations. The Restatement factors do not work when extra-territorial enforcement of judgments is needed. Extra-territorial enforcement between sovereigns is the subject matter for treaties. Congress no longer executes treaties with Indian tribes, it regulates them. Consequently, extra-territorial enforcement cases should be controlled by statutes or by the comity tenants of full faith and credit. Finally, the Restatement factors do not

> encourage, authorize, and provide for voluntary agreements for cycling, recycling, pressure maintenance, and secondary recovery operations in order that the greatest possible economic recovery of oil and gas may be obtained within the state to the end that the land owners, the royalty owners, the producers, and the general public may realize and enjoy the greatest possible good from these vital natural resources.

Id. § 40-6-1.

196. *See, e.g.*, Utah Environmental Code, UTAH CODE ANN. tit. 19 (1991 & Cum. Supp. 1994).

197. *See., e.g., id.* §§ 59-5-102 (oil & gas), -5-202 (metals), -6-101 to -6-104 (mineral production withholding tax) (1993 & Supp. 1994).

198. *See, e.g., id.* § 59-7-102 (1993 & Supp. 1994) (corporate franchise tax).

199. *See* Montana v. United States, 450 U.S. 544, 566 (1981).

direct their own application when a case has been filed in the concurrent forum and relief is sought in the other. Under the law of *Colorado River Water Conservation District v. United States*, abstention should be used sparingly.[200]

Moreover, application of international law is purely discretionary. While courts are obliged to give full faith and credit to public acts, records, and judicial proceedings of foreign states within the federal system, the application of the Restatement factors requires a case-by-case evaluation. Discretionary application of any procedural rule suffers all the disadvantages raised by proponents of mandatory application.[201] It is subject to uncertainty because it requires a case-by-case determination. It has the potential of additional expense to litigants to try the system. It consumes the energies of federal courts to hear motions for abstention and exhaustion. Yet, justice, not ease of application, is the goal.

The mineral extraction industries have a substantial interest in a fair resolution of the exhaustion conundrum. The industries have become increasingly subject to attempts by Indian tribes to regulate mineral extraction operations on private and public lands within reservation boundaries. In view of these continuing attempts, access to federal court for injunctive and declaratory relief is imperative. The holdings in the seminal cases prohibit consideration by a federal court of the appropriateness of tribal regulation and governance under certain circumstances until the tribal court has ruled on the scope of tribal jurisdiction. The Eighth, Ninth, and Tenth Circuits' holdings make the exhaustion doctrine absolute, regardless of whether a federal question is involved or the lands regulated are tribal, public, or private. In effect, it establishes a double standard for access. It forecloses federal court relief in the first instance to non-Indians, but leaves unfettered the right of Indian tribes to choose between the federal and tribal forums.[202] This is not a proper result between sovereigns.

Application of a mandatory exhaustion doctrine will have a chilling effect[203] on the development and production of natural resources vital to the economy and national defense of the United States. The rising costs of oil and gas exploration, development, and production simply will not sustain the added expense of multi-jurisdictional regulation of the same oil and gas operations and lands.[204] It is one thing for tribal govern-

200. 424 U.S. at 813.

201. *See* Joranko, *supra* note 5.

202. *Iowa Mutual*, 480 U.S. at 22 (Stevens, J., dissenting).

203. *See* Altheimer v. Sioux Mfg. Corp., 983 F.2d 803, 815 (7th Cir. 1993); Alaska v. Native Village of Venetie, 856 F.2d 1384, 1389 (9th Cir. 1988).

204. *See, e.g.*, UTAH CODE ANN. § 40-6-18 (1993) (asserting oil, gas, and mining operational jurisdiction over private, federal, and tribal lands within the state of Utah).

ments to choose as a matter of principle, philosophy, or agenda to temporarily or permanently forego energy development of their own lands and to postpone the enhancement of tribal treasuries by the attendant revenue stream comprising mineral royalty and tribal severance, use, and business activities tax dollars. However, it is quite another to interfere by way of regulation and asserted jurisdiction with private and public rights to explore for and produce oil and gas from federal, state, and fee enclaves locked within those reservations or to risk impairment of the nation's economy and security which surely will result from loss of production from those enclaves. Adding layers of governmental regulation and requiring submission to multiple sovereign courts increases costs. At some point, companies will find the costs of operating on or within the boundaries of Indian reservations prohibitive.

Finally, mineral extraction companies are concerned that they, in an effort to protect their property rights on federal, state, and private enclaves within Indian reservations, will find themselves subject to tribal jurisprudence whose statutory and common law underpinnings, particularly of property ownership, vary widely from the Anglo-American jurisprudence under which the companies acquired and hold their property rights. The problem is not one of moral or ethical superiority of one body of laws over the other. Rather, it is the incongruous result of rights acquired under one concept of law, with its attendant expectations of use and enjoyment, being rendered subject to a wholly different body of law and ownership philosophy in practical enjoyment and exercise of those rights. Moreover, several commentators note at least the perception, if not the fact, that some tribal courts suffer qualitative and procedural deficiencies.[205] Again, the suggestion is not one of intellectual capacity, but rather of training, experience, and exposure. Many tribal judges are not formally trained in the law, while others may have substantial experience in applying tribal common law (oral traditions) to localized problems, but have little, if no, experience applying more esoteric principles.[206] Federal courts, on the other hand, have no experience applying tribal law. Although the relative competency of courts appears to have been dismissed by *Iowa Mutual*,[207] it does not follow that the relative incompetency of a federal court to decide a

205. *See, e.g.*, Note, *Recognition of Tribal Court Decisions in State Courts*, 37 STAN. L. REV. 1397 (1985); Richard B. Collins et al., *American Indian Courts and Tribal Self-Government*, 63 A.B.A. J. 808 (1977); Samuel J. Brakel, *American Indian Tribal Court: Separate? "Yes," Equal? "Probably Not,"* 62 A.B.A. J. 1002 (1976).

206. The authors note that some of the most competent trial jurists before whom they have appeared in their 34 years of combined experience have been law-trained, Native American tribal judges.

207. 480 U.S. at 18-19 (citations omitted).

point of tribal law or a tribal court's relative incompetency to decide a point of federal law should not be taken into consideration as one of the factors in the Restatement balancing test.

A bright-line rule of mandatory exhaustion is neither necessary nor advisable. The Restatement factors properly take into consideration the applicable jurisdictional interests of federal and tribal courts. A mandatory exhaustion rule is demeaning to tribal courts, suggesting that tribal courts require jurisdictional protection from the federal government. Tribal self-government is encouraged by treating tribal courts more like independent sovereign courts. The Restatement factors are used to resolve jurisdictional disputes between federal and independent sovereign courts. These factors provide the most appropriate resolution of issues involving jurisdictional disputes between federal and tribal courts.