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Deference Owed Tribal Courts' Jurisdictional Determinations: Towards Co-Existence, Understanding, and Respect between Different Cultural and Judicial Norms

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DEFERENCE OWED TRIBAL COURTS' JURISDICTIONAL DETERMINATIONS: TOWARDS CO-EXISTENCE, UNDERSTANDING, AND RESPECT BETWEEN DIFFERENT CULTURAL AND JUDICIAL NORMS

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I. INTRODUCTION

About fifteen years ago, I gave a lecture on "Indian Sovereignty" in Bellingham, Washington, in front of many tribal officials and representatives. The speaker following me was the then Attorney General for the State of Washington. Having heard my concluding comments, he started his speech by stating something to the effect that the states and the tribes had to work together on jurisdictional issues. While he was willing to talk to tribes about Indian jurisdiction, he would not talk to tribes about Indian sovereignty because as he put it: "Indian jurisdiction exists while Indian sovereignty does not."[1]

In response to his speech, I remarked to some tribal officials that, in my mind, one could not talk about Indian jurisdiction without first talking about Indian sovereignty because without Indian sovereignty, there could not be any Indian jurisdiction. Jurisdiction is nothing more than the exercise of inherent sovereign powers.[2]

In the last fifteen years, however, the Supreme Court has reshaped the landscape of Federal Indian law in answering questions concerning the existence of tribal jurisdiction. The Court has refocused the inquiry by moving away from a discussion of the existence of tribal jurisdiction based on Indian sovereignty and has instead answered jurisdictional questions by asking itself whether the exercise of tribal jurisdiction is necessary to tribal self-government or vital to the tribes' right to self-determination.[3] At first, it seems that this change is not important, because "Indian sovereignty" can be defined as the exercise of the powers of self-government. But the manner in which the Court has phrased the issue does make a difference. If the Court asks whether Indian tribes have sovereign

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1. The Attorney General was Slade Gordon. A year later he argued the state's position in the landmark decision of Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978). *See* discussion *infra* notes 95-98. He is currently serving as the United States Senator for the State of Washington.

2. "Sovereignty" is "[t]he supreme, absolute, and uncontrollable power by which any independent state is governed . . . the self-sufficient source of political power, from which all specific powers are derived." BLACK'S LAW DICTIONARY 1396 (6th ed. 1990).

3. *See* discussion *infra* note 108-109 and accompanying text.

rights because these rights, which have always existed, have never been relinquished in a treaty or taken away by an act of Congress, the Court is asking a legal question, the answer to which depends on statutory construction and historical interpretation. If, however, the Court asks whether a tribe's sovereign rights still exist because they are vital to tribal self-government, it is asking a question of a more political and subjective nature. In effect, the answer to this second question will largely depend on who decides the issue.[4]

In the same decade in which it was redefining its test to determine the existence of tribal jurisdiction, the Court held in *National Farmers Union v. Crow Tribe*[5] that the question of tribal court jurisdiction is a question of federal law. This ruling gave federal courts jurisdiction over cases involving issues of tribal jurisdiction.[6] Two years later, in *Iowa Mutual v. LaPlante*,[7] the Court extended its holding to cases which met the diversity requirement of federal law.[8] In both cases, however, the Court mandated litigants to "exhaust" the available tribal court remedies before filing in federal courts. The main reason for such an "exhaustion" requirement was anchored in the congressional policy of protecting tribal self-government and encouraging Indian self-determination.

This article analyzes what impact the Court's journey from tribal sovereignty to tribal self-government should have on the deference owed to decisions of tribal courts when the courts make jurisdictional determinations pursuant to the mandate given in *National Farmers Union*, when these decisions are reviewed by the federal courts.[9] Should the tribal

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4. In determining the sovereign rights of Indian tribes by relating it to what is vital to tribal self-government, the Court seems to have moved closer to adopting a position similar to the position adopted under international law when it comes to recognizing the rights of Indigenous People. The problem here is that the Court still recognizes doctrines of domestic law which are contrary to international norms such as the so-called plenary power doctrine under which Congress is recognized as having virtually unlimited power to curtail the sovereignty of Indian nations. For articles comparing the rights of Indians under domestic and international law as well as exploring some of the problems with the right of self-government as currently recognized under international law, see S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 ARIZ. J. INT'L & COMP. L. No. 2, at 1 (1991); Curtis Berkey, *International Law and Domestic Courts: Enhancing Self-Determination for Indigenous People*, 5 HARV. HUM. RTS. J. 65 (1992); and Robert A. Williams Jr., *Encounters on the Frontiers of International Human Rights: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660.

5. 471 U.S. 845 (1985).

6. The U.S. Judicial Code provides that "[t]he District Courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C.A. § 1331 (West Supp. 1993).

7. 480 U.S. 9 (1986).

8. The U.S. Judicial Code provides in part that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between—(1) citizens of different States . . . ." 28 U.S.C.A. § 1332(a) (West Supp. 1993).

9. It is not the purpose of this article to analyze the complex issues involving how much deference should be paid to the final judgments of tribal courts when litigants attempt to enforce these judgments in other forums such as state courts. For a comprehensive treatment of this subject, see Robert Laurence, *The Enforcement of Judgments Across Indian Reservation Boundaries: Full Faith and Credit, Comity, and the Indian Civil Rights Act*, 69 OR. L. REV. 589 (1990).

courts' decisions be reviewed de novo or should they be reviewed under a more deferential standard?[10]

I will argue that a more deferential standard should be applied by comparing the doctrines of exhaustion and deference as they have developed in federal Indian law and in administrative law. Because the Supreme Court has adopted a test which determines the existence of tribal jurisdiction by asking whether the exercise of such jurisdiction is vital to tribal self-determination or necessary to tribal self-government, it is concluded that such jurisdictional determinations are not questions of law. Rather, these determinations should more appropriately be termed, to use an administrative law terminology, "mixed" questions, involving the application of law to facts. Drawing an analogy with the doctrines of deference owed decisions of administrative tribunals upon judicial review, it is also concluded that jurisdictional determinations made by tribal courts should enjoy at least the same kind of deference that is given decisions of administrative tribunals. In other words, federal courts should uphold these jurisdictional determinations on review unless they are unreasonable or without any rational basis.

The conclusions concerning the deference owed tribal courts' jurisdictional determinations are not based on the fact that tribal courts are like administrative courts, for they are not.[11] As a matter of fact, quite the opposite is true.[12] Tribal courts have and should maintain a distinct political existence. Courts give deference to administrative agencies largely because they perceive administrative agencies as being experts in the field. Similarly, tribal courts should also be perceived as the experts in determining their own jurisdiction, especially if the jurisdictional questions

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10. Currently, although there are no Supreme Court decisions on point, at least one circuit court has held that these decisions are reviewed *de novo*. *See infra* text accompanying notes 84-86.

11. In one case, Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965), the Ninth Circuit did hold that tribal courts were indeed like administrative tribunals. This decision has not been followed and is obviously not the law today. Otherwise, every decision of a tribal court would be reviewable pursuant to the Administrative Procedure Act, Pub. L. No. 404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.), 471 U.S. 845 (1985). Instead, the only cases reviewable under *National Farmers Union* are the ones which present a federal question under 5 U.S.C. § 1331. Even under § 1332 diversity jurisdiction, *LaPlante* held that a federal court can only review the findings of the tribal court once it has found that the tribal court did not have jurisdiction. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19.

12. For an interesting discussion about the place of tribal courts within the United States justice system, see Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841 (1990). Professor Clinton describes three models of judicial relationships: the transnational sovereignty model, the federalism model and the administrative model. He then concludes that the relationship between federal and tribal courts does not fall in any of these models and concludes that "what is ultimately required is the clear delineation of a fourth model—a tribal model of intergovernmental relations." Among other things, this model would incorporate the application of the Full Faith and Credit Clause of the United States Constitution to judgments of tribal courts. For a different view, see Philip J. Smith, *National Farmers Union and its Progeny: Does It Create a New Federal Court System*, 14 AM. INDIAN L. REV. 333, 348-49 (1989), where the author argues that the effect of *National Farmers Union* was to create a new branch of the federal judiciary in which tribal courts are relegated to be adjuncts to federal courts. The author argues that tribal courts have become similar to military courts, tax courts, or territorial courts. While I cannot agree with Mr. Smith's conclusions, it is true that when it comes to the Courts of Indian Offenses, the so-called "CFR" Courts, we are literally speaking at least of quasi-federal administrative tribunals.

are determined by reference to what is necessary to tribal self-government or vital to self-determination. This argument is bolstered by the fact that Congress has adopted a policy of promoting tribal self-government and encouraging self-determination.[13] The development of a separate and distinct tribal jurisprudence in this area is vital to the survival of tribal culture and would, therefore, fulfill these congressional policies.

Legal scholars have argued that decisions of tribal courts should be given full faith and credit or should be upheld as a matter of comity between sovereigns.[14] Perhaps, in the best of all worlds, this could be the preferred solution. However, understanding the political realities, this article recommends a solution which would still allow tribal courts to survive as "tribal" institutions without being choked by the vise of surrogacy. Deference to tribal courts in this context is about acknowledging differences and recognizing that "difference" is beneficial to both the Indian nations and the United States.[15] In many ways, this article is about the proper relationship the United States should have with the Indian nations. To be sure, the relationship has not been an equal one. But the Supreme Court said that Indian nations were domestic dependent nations, not enslaved nations.[16] This article is about the continuing viability of Indian nations as distinct sovereigns within the United States.

In order for deference to be appropriate, it is of course necessary for tribal courts to hear the cases in the first place. Therefore, it is vital that the doctrine of exhaustion of tribal remedies, as first announced in *National Farmers Union*, be properly implemented. Accordingly, before proceeding to the deference analysis in Part III, an examination of the exhaustion issues is presented first.

II. THE EXTENT AND LIMIT OF THE EXHAUSTION OF TRIBAL REMEDIES DOCTRINE

An analysis of the tribal exhaustion requirement as mandated by the Supreme Court is presented below along with a survey regarding how the Court's decisions concerning exhaustion of tribal remedies have been implemented in the federal circuits. Finding a striking similarity between the reasons given for the doctrine of exhaustion of tribal remedies and

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13. Such policy is reflected in legislation such as the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203; the Indian Financing Act, Pub. L. No. 93-262, 88 Stat. 77; and the Indian Child Welfare Act, Pub L. No. 95-608, 92 Stat. 3069 (these three acts are codified as amended at scattered sections of 25 U.S.C.).

14. *See generally* Clinton, *supra* note 12.

15. Professor Judith Resnick wrote:

> The most difficult issues for federal courts' jurisprudence are to explain how to engender differences, how deep the respect should be for difference, when the federal government's right to assert baseline exists, and then to ascertain where that federal floor should be. Constitutional and case law exegesis alone cannot accomplish these tasks. Rather, on-going relational struggles illuminate the changing shapes of the floors that are continually to be sought.

Dependent Sovereigns: Indian Tribes, States, and the Federal Courts, 56 U. CHI. L. REV. 671, 757 (1989).

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

the reasons given for the doctrine of exhaustion of administrative remedies as developed in administrative law, it follows that the extent and limit of the exhaustion requirements in federal Indian law should generally conform to the principles set out in administrative law.

A. Supreme Court Precedents

The dispute in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*[17] arose when a Crow Indian minor was hit by a motorcycle in the parking lot of a school located on the Crow Indian reservation. The State of Montana owned the parking lot in fee. The minor, through his parents, sued the school district in Crow Tribal Court. The Tribal Court awarded a default judgment to the minor and the school district's insurer, National Farmers Union, sought injunctive relief in the federal district court, alleging that the Tribal Court did not have jurisdiction over the dispute and that this jurisdictional issue presented a federal question.

The district court granted a permanent injunction but the Supreme Court found the action premature. Although the Supreme Court agreed that the federal court had jurisdiction over such issues because the issue of tribal jurisdiction presented a "federal question" under section 1331 of the Judicial Code,[18] it also held that the federal district court should stay its hand until the tribal court had "a full opportunity to determine its own jurisdiction."[19]

The Supreme Court justified exhaustion of tribal court remedies because Congress was committed to a policy supporting tribal self-government and self-determination. That policy, the Court stated, "favors a rule that

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17. 471 U.S. 845 (1985).

18. *Id.* at 852. The Court stated:

> In this case the petitioners contend that the Tribal Court has no power to enter a judgment against them. Assuming that the power to resolve disputes arising within the territory governed by the Tribe was once an attribute of inherent sovereignty, the petitioners, in essence, contend that the tribe has to some extent been divested of this aspect of sovereignty . . . . The 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.

Id.

19. *Id.* at 857. Finding federal jurisdiction to review jurisdictional determinations of tribal courts under 5 U.S.C. 1331 is not the clear cut case that the Supreme Court made it to be in *National Farmers Union*. Commenting on the approach adopted in *National Farmers Union*, Professor Robert Clinton recently observed that the rule in *National Farmers Union* was novel because usually *res judicata* and similar finality doctrines should operate to prevent federal review of at least state cases. He then added:

> Prior to *National Farmers Union*, one therefore might have thought that any tribal court adjudication that addressed and resolved questions a tribal court subject matter jurisdiction would have been preclusive of federal court adjudication. Nevertheless, without any significant consideration of such finality problems, questions that lie at the heart of respect for the authority and sovereignty of the courts of another sovereign, the Court created a judge-made exhaustion rule that permits federal judges to directly review the decisions of tribal courts on such important jurisdictional questions . . . . Thus, *National Farmers Union* constituted a remarkable feat of judicial governance by a Court not known for its forays into judicial activism.

Clinton, *supra*, note 12, at 879-80.

will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge."[20] The Court also acknowledged that "the existence and extent of a tribal court's jurisdiction will require a careful examination of Indian sovereignty and the extent to which that sovereignty has been altered, divested, or diminished . . . ."[21] Exhaustion was also justified because the development of a full record by tribal courts would serve the orderly administration of justice in the federal courts. Finally, the exhaustion requirement would provide other courts with the benefit of the tribal courts' expertise in the event of judicial review.[22]

Two years later, in *Iowa Mutual Insurance Co. v. LaPlante*,[23] the Supreme Court reaffirmed the exhaustion requirement in a case in which the petitioner insurance company invoked federal court jurisdiction because of diversity of citizenship rather than the existence of a federal question.[24] At the time the federal action was filed, a law suit involving the same parties and the same issues was pending before the Blackfeet Tribal Court.[25] The question before the Court was whether a federal court may exercise diversity jurisdiction before the tribal court system has an opportunity to determine its own jurisdiction.

In this case, LaPlante, a member of the Tribe, was working for the Wellman Ranch, also owned by members of the Tribe. LaPlante's truck jackknifed while it was being driven by LaPlante on the reservation. LaPlante initially brought a law suit in tribal court against the Wellmans and Iowa Mutual, the insurer of the Wellman Ranch. The tribal court concluded that it had jurisdiction because the Tribe's adjudicative jurisdiction was coextensive with its legislative jurisdiction and the Tribe could regulate the conduct of non-Indians engaged in commercial relations with Indians on the reservation.[26] In its diversity suit in federal court, Iowa Mutual argued that it had no duty to indemnify LaPlante, a member of the Tribe, for an accident that occurred on the reservation because his injuries fell outside the coverage of the insurance policy.

After acknowledging that tribal courts play a vital role in tribal self-government, the Court stated that "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."[27]

The Court also stated, however, that exhaustion is required as a matter of comity, not as a jurisdictional prerequisite.[28] The exhaustion rule,

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20. *Id.* at 856.
21. *Id.* at 855-56.
22. *Id.* at 857.
23. 480 U.S. 9, 19 (1987).
24. *Id.* at 16; *see also* 28 U.S.C.A. § 1332 (West Supp. 1993).
25. Although the tribal court had ruled initially that it had jurisdiction, the tribal appellate process had not been completed.
26. *See* discussion *infra* note 107.
27. *Iowa Mut. Ins. Co.*, 480 U.S. at 16.
28. *Id.* at 15.

therefore, does not deprive federal courts of subject matter jurisdiction.[29] Thus, the Court concluded that "[a]lthough petitioner must exhaust available tribal remedies before instituting suit in federal court, the Blackfeet Tribal Court's determination of tribal jurisdiction is ultimately subject to review."[30] Yet, even though federal jurisdiction was requested because of diversity, the Court remarked that "unless a federal court determines that the Tribal Court lacked jurisdiction, however, proper deference to the tribal court system precludes relitigation of issues raised by the LaPlantes' bad-faith claim and resolved in the Tribal Courts."[31]

Since "exhaustion" is mandated only as a matter of comity and is not a jurisdictional prerequisite, the question that has confronted the circuits has been to delimit the situations in which exhaustion is required. In this respect, three issues have troubled the circuits. The first issue is whether exhaustion is mandated in all cases arising on the reservation or whether such cases should also concern "reservation affairs." The second issue is whether the exhaustion requirement should apply to cases involving purely questions of federal law. Within this second issue, a sub-issue to be explored is whether exhaustion applies to cases where federal court jurisdiction is premised on a federal question but the federal question is not whether the tribal court has jurisdiction.

In the next two sections, I will argue that when federal jurisdiction is premised on diversity or on the existence of a federal question but the federal question is whether the tribe has jurisdiction, the "reservation affair" inquiry should be recasted as an inquiry into whether there is a colorable claim of tribal jurisdiction. Next, I will argue that exhaustion of tribal remedies should be mandated even in cases involving pure questions of federal law as long as the issues involve an attack on the jurisdiction of the tribal court or the case involves a "reservation affair," in that the resolution of the issue will impact tribal interests or the governmental authority of the tribe over the reservation. In other words,

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29. For an article critical of both *National Farmers Union* and *LaPlante*, see Michael Pacheco, *Finality in Indian Tribunal Decisions: Respecting our Brothers' Vision*, 16 AM. INDIAN L. REV. 119 (1991). Commenting on *LaPlante*, the author stated:

> Ideally, the opinion would have made a plea for recognition of finality in Indian tribunal decisions. Those decisions should be accorded full faith and credit no less than the highest court of any state. Only by demonstrating this level of deference to Indian tribunals can Marshall's opinion approximate some semblance of coherence.
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> Although it appears internally inconsistent, the *LaPlante* holding adheres to the view that Indian tribunals are reviewable in federal courts, thus opening the door still further for potentially dangerous intrusions into what remains of Indian self-government.

Id. at 153. Mr. Pacheco argues for the creation of a Federal Indian Court of Appeals as one way to promote tribal self-government. In his article, Pacheco criticizes an approach similar to the one adopted in this article as lacking finality. In this article, however, I do not take issue with whether *National Farmers Union* was rightly decided and I agree that, in an ideal world, "Full Faith and Credit" would be the preferred solution. Taking stock of the political realities and the fact that *National Farmers Union* is not likely to be reversed in the near future, I argue instead that a deference to tribal courts' jurisdictional determinations similar to the one given administrative agencies in review of "mixed" questions of law and fact would substantially improve the current law in, to borrow Mr. Pacheco's words, "respecting our brothers' vision."

30. *Iowa Mut. Ins. Co.*, 480 U.S. at 19.

31. *Id.*

I take the position that the "reservation affair" requirement is only relevant when the jurisdiction of the federal court is invoked pursuant to its "federal question" jurisdiction and the argument is being made that exhaustion of tribal remedies is not applicable because the issue is a "pure" question of federal law which does not involve an attack on the jurisdiction of the tribe.

B. *Is Exhaustion Mandated in All Cases Arising on the Reservations? Reservation Affair vs. Colorable Claim of Tribal Jurisdiction Analysis.*

The Court in *National Farmers Union* mandated exhaustion of tribal court remedies in all but a few cases. The Court stated:

> We do not suggest that exhaustion would be required 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.[32]

This language seems to indicate that under *National Farmers Union*, exhaustion is mandated as long as none of the four above-quoted exceptions are found present and the case arose on the reservation. It is undoubtedly true, therefore, that exhaustion is mandated in all cases arising on the reservation where the "federal question" giving rise to federal jurisdiction is the existence of tribal court jurisdiction. In *LaPlante*, however, the Court stated that where the jurisdiction of the federal courts is based on diversity of citizenship, exhaustion is mandated because "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."[33] This language raises the question of whether there is a "reservation affair" requirement in diversity cases. If there is such a requirement, one has to ask what is a "reservation affair" and whether such a requirement makes any sense.

LaPlante's "reservation affair" language has certainly created some confusion among the courts. In *Crawford v. Genuine Parts Co.*,[34] the Ninth Circuit, relying on *Stock West Corporation v. Taylor*[35] ("*Stock West II*"), stated: "More recently, we held that deference to tribal courts is not required when the disputed issue is not a 'reservation affair' *or* did not 'arise on the reservation.'"[36] Later in the opinion, however, the court remarked: "As we recently held in *Stock West II*, the mandatory exhaustion requirement announced in *LaPlante* and *National Farmers*

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32. 471 U.S. at 856 n.21 (citations omitted).

33. 480 U.S. at 16.

34. 947 F.2d 1405 (9th Cir. 1991). *Crawford* involved an automobile accident which occurred on the reservation and involved Indian occupants suing a non-Indian corporation in a product liability case.

35. Stock West Corp. v. Taylor, 942 F.2d 655 (9th Cir. 1991) [hereinafter *Stock West II*].

36. 947 F.2d 1405, 1407 (emphasis added).

Union does not apply when the dispute is not a reservation affair *and* did not arise on the reservation."[37] Careless drafting in the *Crawford* opinion leaves one wondering whether exhaustion is required only if the case arose on the reservation *and* is a "reservation affair," or whether exhaustion is required as long as the case arose on the reservation *or* is a reservation affair.

The actual language used by the court in *Stock West II* stated that:

> [T]he exhaustion requirement cannot be absolute whenever tribal court jurisdiction is asserted. Where the civil action involves non-Indian parties, concerns incidents which occurred off of the reservation, and will not impact the tribe's authority, there is little reason to require that the tribal court have first crack at the case. . . . when the issue in dispute is truly a "reservation affair" *or* "arose on the reservation," the federal court has no option but to defer.[38]

Although the initial *Stock West II* decision never gave a comprehensive definition of what constituted a "reservation affair," it did state that reservation affairs were involved in cases which "directly implicated tribal interests on the reservation, both because an Indian was a party . . . and because the outcome of the suit would impact economic activity . . . on the reservation."[39]

Stock West II involved a non-Indian corporation, Stock West, which brought an action against a non-Indian reservation attorney to recover for legal malpractice. The malpractice involved an opinion letter the attorney had given Stock West in which he advised the corporation on whether certain contracts the corporation had with the Tribe should be approved by the United States Bureau of Indian Affairs. Stock West argued that the tribe had no jurisdiction because the law suit involved two non-Indians and the malpractice occurred when the tribal attorney's letter was delivered to the Corporation in Portland, Oregon, which is not part of the reservation. The district court dismissed *Stock West I* on the ground that Stock West had to first exhaust its tribal remedies in tribal court.[40]

The Ninth Circuit initially reversed, and in the opinion cited in *Crawford*, held that, since the transaction took place off the reservation and involved two non-Indians, it "falls without the nebulous confines of a reservation affair and does not arise on the reservation."[41] That initial Ninth Circuit decision was, however, reversed *en banc*.[42]

The Ninth Circuit *en banc* decision relied mainly on three facts to uphold the district court's decision to require exhaustion of tribal remedies. First, the tribe's attorney drafted the opinion letter on the reservation.

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37. *Id.* at 1407-08.
38. *Stock West II*, 942 F.2d at 660.
39. *Id.* at 662.
40. Stock West Corp. v. Taylor, 737 F. Supp. 601 (D. Or. 1990) [hereinafter *Stock West I*].
41. *Stock West II*, 942 F.2d at 663.
42. Stock West Corp. v. Taylor, 964 F.2d 912 (9th Cir. 1992) [hereinafter *Stock West III*].

Second, the letter involved a loan negotiated and signed on tribal lands. Third, the loan was essential for the tribal corporation to build a saw mill on the reservation. The Ninth Circuit resolved the issue by stating:

> We conclude that the record presents a colorable question whether the alleged malpractice and false representations arose out of a contractual relationship between Stock West and the Colville Tribes that commenced on tribal lands. By colorable we mean that on the record before us, the assertion of tribal court jurisdiction is plausible and appears to have a valid or genuine basis.[43]

In order to be legitimate, the "reservation affair" requirement in diversity cases should be tied to or recasted as a jurisdictional inquiry into whether there is a colorable claim of tribal jurisdiction. Initially focusing the inquiry on whether there is a colorable claim of tribal court jurisdiction (colorable means plausible in that context) makes sense since this is the one issue which will be reviewed by the federal court after the tribal court's remedies are exhausted. In this respect, it would be absurd and a waste of time for the "reservation affair" requirement to be more encompassing than a "colorable claim" requirement since it would mean that some cases would be sent back to tribal court even though the assertion of tribal court jurisdiction is not even colorable. Under such circumstances, it seems that any finding by a tribal court that it has jurisdiction would be virtually certain to be reversed on appeal by the federal court.

In any case, the jurisdictional inquiry based on a colorable claim requirement is not meaningfully different than the "reservation affair" inquiry which asks whether tribal interests are implicated.[44] The reason for this is that for a lawsuit arising on the reservation not to be considered a "reservation affair" it would have to at least involve non-Indians. Yet, the civil jurisdiction of tribal courts over non-Indians is co-extensive with the legislative jurisdiction of tribal governments and as further explained below, in many cases, the tribal legislative jurisdiction over non-Indians depends on whether the exercise of tribal jurisdiction is necessary to tribal self-government or vital to self-determination.[45]

The initial confusion in *Crawford* concerning whether exhaustion is only required if the case both arose on the reservation *and* is a reservation affair was probably first generated from language in cases such as *Wellman v. Chevron*,[46] which summarized *LaPlante* as follows:

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43. *Id.* at 919.

44. Except for Part III's discussion on the nature of the "implicit divestiture of tribal sovereignty" test as it relates to the proper amount of deference that should be allocated to tribal courts' decisions by federal courts, this article does not focus on what should be the proper extent and scope of the tribal courts' jurisdiction. This subject was comprehensively addressed in Michael J. Dale's article, *Tribal Courts Civil Jurisdiction Over Reservation Based Claims: The Long Walk to the Courthouse*, 66 Or. L. Rev. 753 (1987). I agree with the conclusions presented by Professor Dale that the tribal courts should have jurisdiction over all claims that arise on an Indian reservation. I do not believe, however, that this is the prevailing view among the federal courts.

45. *See* discussion *infra* notes 101-120.

46. 815 F.2d 577 (9th Cir. 1987).

> The Supreme Court held that a federal court may not exercise diversity jurisdiction over a civil dispute relating to reservation affairs before an appropriate Indian tribal court system has first had an opportunity to determine its own jurisdiction.[47]

Wellman, which involved a suit brought by an Indian contractor against a non-Indian corporation for work done on an Indian reservation, also had opined *in dicta* that "it is in non-Indian matters only that non-Indians can go to district court directly."[48]

It is not legally correct to assert that because the dispute involves non-Indians, exhaustion is not required. If federal jurisdiction is premised on a "federal question" and the federal question concerns the jurisdiction of the tribal court, exhaustion should always be mandated. Even if federal jurisdiction is based on diversity and does not involve an attack on the jurisdiction of the tribal court, the case can still be a reservation affair even though non-Indians are the only parties.

For instance, in *Tom's Amusement Co. v. Cuthbertson, d/b/a/ Tepee Amusements*,[49] a federal district court mandated exhaustion of tribal court remedies in a case involving a contract dispute between two non-Indians operating a gaming establishment on the Eastern Band of Cherokee Indian Reservation pursuant to a gaming license and ordinances established by the tribe. More specifically, one non-Indian was claiming that the other non-Indian had breached a contract to pay for some gaming machines which had been delivered to him on the Cherokee reservation. The court acknowledged that the interpretation of a contractual arrangement for the operation of a gaming establishment involved issues governed by federal law.[50] Nevertheless, relying on the fact that federal court jurisdiction would impair the tribal courts' authority over reservation affairs, the district court mandated exhaustion. That the case involved two non-Indians arguing over questions of federal law was not, in and of itself, sufficient to prevent exhaustion of tribal court remedies.

C. *Extension of the Exhaustion Requirement to Determinations Involving Pure Questions of Federal Law*

Some federal courts have taken the position that exhaustion is not mandated if the issues to be decided represent purely questions of federal law. In addition, there seems to be a legitimate question whether exhaustion of tribal remedies is mandated when the federal court jurisdiction is premised on the existence of a federal question and this federal question is not the existence of tribal court jurisdiction.

For instance, in the initial *Stock West II* decision, after finding that the case did not arise on the reservation and did not concern a "reservation

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47. *Id.* at 578.
48. *Id.* at 579.
49. 20 Indian L. Rep. (Am. Indian Law. Training Program) 3102 (1993).
50. *Id.* at 3103; *see generally* 25 U.S.C.A. §§ 1701-12 (West 1983); 43 U.S.C.A. §§ 851-52 (West 1986).

affair," the Ninth Circuit, citing *Burlington Northern Railroad v. Blackfeet Tribe*,[51] added that a review of the record did not support exhaustion because "the principal issues presented are of state or federal law, and the tribal court possesses no special expertise in the subject matter."[52]

In *Burlington Northern Railroad v. Blackfeet Tribe*, Burlington Northern sought a declaration that the Tribe lacked the sovereign power to tax Burlington's on-reservation rights-of-ways. The Blackfeet Tribe filed a motion to dismiss, arguing that it had sovereign immunity from suit. The district court refused to grant the tribe's motion to dismiss on sovereign immunity grounds but granted the tribe's motion for summary judgment on the merits. In affirming, the Ninth Circuit stated in a footnote that it was proper for the district court to reach the merits without mandating exhaustion of tribal remedies because "[t]he complaint presents issues of federal, not tribal, law; no proceeding is pending in any tribal court; the tribal court possesses no special expertise; and exhaustion would not have assisted the district court in deciding federal law issues."[53]

Another case relied upon in the initial *Stock West II* decision is *Myrick v. Devils Lake Sioux Manufacturing Corp.*[54] *Myrick* involved a sixty-four-year-old American Indian male who resided on the Devils Lake Sioux Indian Reservation and brought an action against a corporation which was fifty-one percent owned by the Devils Lake Sioux Tribe. He alleged race discrimination under Title VII of the Civil Rights Act of 1964,[55] age discrimination under the Age Discrimination in Employment Act,[56] and a claim under the Fair Labor Standards Act.[57] The federal district court did not require exhaustion of tribal remedies. The court distinguished both *National Farmers Union* and *LaPlante* on the ground that they involved challenges to the jurisdiction of the tribal courts which were termed "issues of particular application and importance to the tribes themselves,"[58] while "the present case predominately presents issues of federal law."[59]

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51. 924 F.2d 899 (9th Cir. 1991).
52. *Stock West II*, 942 F.2d at 663.
53. *Burlington Northern R.R.*, 924 F.2d at 901 n.2.
54. 718 F. Supp. 753 (D.N.D. 1989).
55. 42 U.S.C. §§ 2000e to 2000e-15 (1988).
56. 29 U.S.C. §§ 621-634 (1988 & 1992 Supp.).
57. *Id.* §§ 201-219.
58. *Myrick*, 718 F. Supp. at 755.
59. *Id.* Another example of an erroneous ruling is Pittsburgh and Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387 (10th Cir. 1990). The issue in *Yazzie* involved the tribe's power to tax the mine of a coal company. The resolution of this issue turned on whether the mine was located on the reservation. The coal company argued that the part of the reservation where the mine was located had been disestablished by congressional action. Ruling that the mine was not on reservation lands, the Tenth Circuit recognized that both *National Farmers Union* and *Iowa Mutual* mandated exhaustion but stated: "The holdings of the cases, however, did not extend to issues where reservation boundaries, in contrast to subject matter jurisdiction, were at issue, as is the case here." *Id.* at 1422. Because the tribe had not raised the exhaustion issue on appeal, the Tenth Circuit declined to rule on this issue *sua sponte*.

Cases like *Burlington Northern Railroad v. Blackfeet Tribe* and *Myrick* were wrongly decided. Exhaustion of tribal court remedies should extend to all cases involving pure questions of federal law as long as these cases arise on lands arguably under tribal jurisdiction and either attack the jurisdiction of the tribal courts or concern reservation affairs. This conclusion is derived from the same reasons which guided the Supreme Court to require exhaustion of tribal remedies in *National Farmers Union* and *LaPlante*. If tribal courts are truly vital to tribal self-government, there is no reason to limit exhaustion only to cases that do not involve "pure" issues of federal law. All the reasons given for mandating exhaustion: encouraging tribal self-government, protecting tribal control over reservation affairs, preserving the autonomy of tribal courts, facilitating judicial economy by having the tribal court develop the factual record, and availing federal courts of the expertise of tribal courts, apply as long as the federal law in question concerns the jurisdiction of the tribal court or affects the tribal interests or authority over reservation affairs. For instance, in *Myrick*,[60] where the issue was whether the Age Discrimination in Employment Act (ADEA) was applicable on Indian reservations and reservation Indians, it is disingenuous to argue that the potential applicability of the ADEA would not have an impact on tribal self-government.[61]

One argument supporting exhaustion in cases involving pure questions of federal law appears in the text of *National Farmers Union*. In that case, the Court took the position that exhaustion is not required in cases where the tribal action was "patently violative of express jurisdictional prohibitions."[62] Although the question that remains to be answered after *National Farmers Union* is how express the jurisdictional prohibition has to be before that exception to the exhaustion requirement can be invoked, the very existence of this exception implies that exhaustion of tribal court remedies is mandated in those "not so clear" cases. Since it seems obvious that the "express jurisdictional prohibitions" referred to by the Court have to be contained in federal statutes or treaties, it follows that the Court assumed that exhaustion would be mandated even in cases that only concern interpretation of federal statutory law.

There are other good arguments to be made for the proposition that the federal system would benefit from allowing tribal courts to play a

60. *See* Myrick v. Devils Lake Mfg. Corp., 718 F. Supp. 753 (D.N.D. 1989).

61. In cases where the issue is whether a federal statute of general applicability applies on an Indian reservation, the courts have adopted a test which determines the applicability of such statutes on Indian reservations by reference to whether application of the statute would affect a specific right of tribal self-government. It is obvious that such issues do impact tribal self-government and are, therefore, "reservation affairs." For a recent case on this issue, see EEOC v. Fond Du Lac Heavy Equipment & Constr. Co., 20 Indian L. Rep. (Am. Indian Law. Training Program) 2075 (1993), where the issue was the applicability of the Age Discrimination in Employment Act (ADEA). For a comprehensive treatment of this issue, see Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 U.C. DAVIS L. REV. 85 (1991).

62. 471 U.S. at 856 n.21.

role in the resolution of questions of law. For example, in a recent article on the importance of tribal courts' adjudications concerning interpretation of tribal constitutions, Professor Frank Pommersheim stated:

> Constitutional decision making in tribal courts can also potentially perform other important functions, in addition to its central task of illuminating the distinctive markers of tribal sovereignty. These functions include delineating the relationship of tribal courts to federal courts, providing tribal interpretations of federal standards, and incorporating international legal norms into tribal jurisprudence.[63]

The reasons supporting the importance of the function of tribal constitutional decisions in its relation to the federal system are equally applicable to tribal courts' decisions concerning pure questions of federal law if the federal law is a law which affects the jurisdiction of the tribal court or concerns "reservation affairs" in the sense that resolution of the federal question will have an impact on tribal self-government or tribal interests.

Another important reason to extend exhaustion to cases even if they involve pure questions of federal law is derived from a comparison between the reasons given in federal Indian law for the exhaustion of tribal remedies and the reasons given in administrative law for the exhaustion of administrative remedies. This does not mean that tribal courts are like administrative agencies or occupy the same position within the federal system.[64] An analysis of the exhaustion doctrine as it exists in the field of administrative law, however, reveals that the policies which have driven the courts to mandate exhaustion of administrative remedies are essentially similar to the ones that have guided the courts to require exhaustion of tribal court remedies. It is therefore logical to conclude that the doctrine of exhaustion of tribal remedies should follow the same principles which have been applied to the doctrine of exhaustion of administrative remedies.

Summarizing the reasons for exhaustion of administrative remedies for the D.C. Circuit, Judge Skelly Wright wrote:

> The exhaustion requirement serves four primary purposes. First, it carries out the congressional purpose in granting authority to the agency by discouraging the . . . flouting of the administrative process. Second, it protects agency autonomy by allowing the agency the opportunity in the first instance to apply its expertise . . . . Third, it aids judicial review by allowing the parties and the agency to develop the facts of the case in the administrative proceeding. Fourth, it promotes judicial economy by avoiding needless repetition of administrative and judicial factfinding, and by perhaps avoiding the necessity of any judicial involvement at all if the parties successfully vindicate their claims before the agency.[65]

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63. Frank Pommersheim, *A Path Near the Clearing: An Essay on Constitutional Adjudication in Tribal Courts*, 27 GONZ. L. REV. 393, 410 (1991-92).

64. *See* discussion *supra* note 11.

65. Andrade v. Lauer, 729 F.2d 1475, 1484 (D.C. Cir. 1984).

Comparing these reasons with the reasons given in *National Farmers Union* and *LaPlante* we can draw the following similarities. First, congressional policy: the Supreme Court mandated the exhaustion of tribal remedies in recognition of the congressional policy of promoting tribal self-government and encouraging self-determination.[66] Second, autonomy: the tribal exhaustion requirement was adopted to protect the autonomy of tribal courts because the Supreme Court realized that federal courts' exercise of jurisdiction over matters relating to reservation affairs could impair the authority of tribal courts.[67] Third, aid to judicial review: the *National Farmers Union* Court stated that exhaustion would provide other courts with the benefit of the expertise of tribal courts in the event of further judicial review.[68] Fourth, judicial economy: the Court in *National Farmers Union* noted that exhaustion would serve the orderly administration of justice by allowing a full record to be developed in the tribal courts.[69]

Just as there are some recognized exceptions to the tribal exhaustion of remedies requirement there are also some exceptions to the requirement of administrative exhaustion of remedies. In its footnote 21, *National Farmers Union* had found no need for exhaustion when assertion of tribal jurisdiction is motivated by a "desire to harass," or is made in "bad faith," or is contrary to "express jurisdictional prohibitions," or would be "futile" because of a lack of an adequate opportunity to challenge the tribal court's jurisdiction.[70] Similarly, exhaustion of administrative remedies is generally not mandated when the remedies are inadequate or futile,[71] or when the agency is clearly exceeding its jurisdiction.[72] In addition, exhaustion of administrative remedies is generally not required when a party has alleged agency bias amounting to constitutional violations, or when the federal statute is clearly unconstitutional on its face.[73]

As can be seen, the administrative exhaustion exceptions are similar in spirit to the tribal exhaustion exceptions. Thus, the futility exceptions are the same and the tribal "express jurisdictional prohibition" exception is similar to the "clearly exceeding jurisdiction" exception in administrative law.

More importantly, there is no exception in administrative law similar to those invoked in *Burlington Northern Railroad v. Blackfeet Tribe* and *Myrick*. That is, the issue is purely a question of federal law. It is true that in some cases involving additional factors, the fact that the issues

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66. National Farmers Union v. Crow Tribe, 471 U.S. 845, 856 (1985).
67. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1986).
68. *National Farmers Union*, 471 U.S. at 857.
69. *Id.* at 856.
70. *Id.*
71. *See* Bethesda Hosp. Ass'n v. Bowen, 485 U.S. 399 (1988); Coit Indep. Joint Venture v. FSLIC, 489 U.S. 561 (1989).
72. *See* Leedom v. Kyne, 358 U.S. 184 (1958).
73. For a concise yet informative discussion of the exhaustion of administrative remedies doctrine and its exceptions see BERNARD SCHWARTZ, ADMINISTRATIVE LAW 730-43 (3rd ed. 1988).

to be resolved were purely questions of law has influenced the Supreme Court not to require exhaustion of administrative remedies.[74] On the whole, however, since providing federal courts with the expertise of administrative agencies is only one of the reasons for exhaustion, exhaustion is generally required unless the question of law at issue involves a clear statutory or constitutional violation. In conclusion, because the standards for granting an exception to the exhaustion of remedies are relatively the same in administrative and tribal contexts, the fact that a case involves questions of federal law should not, in and of itself, be a sufficient excuse not to mandate exhaustion of tribal court remedies as long as the resolution of the federal question affects the jurisdiction of the tribal court or implicates tribal interests.

Although federal courts have not to date drawn on the analogy with administrative law, the trend is towards requiring exhaustion even in cases involving purely questions of federal law. For instance, in a later Burlington Northern case, *Burlington Northern Railroad v. Crow Tribal Council*,[75] the court mandated exhaustion of tribal remedies. In that case, the Crow Tribe had enacted an ordinance establishing a commission to regulate railroads crossing on the Crow Reservation. Burlington Northern sought a declaratory judgment in federal court that the ordinance was invalid because the Crow Tribe did not have the sovereign power to enact it. Burlington Northern claimed that the exhaustion requirement was not applicable because the proceedings in tribal court exceeded tribal sovereign jurisdiction. The Ninth Circuit resolved the issue by stating:

> Both the Supreme Court and this circuit have held that non-Indian defendants *must exhaust tribal court remedies* before seeking relief in federal court, even where defendants allege that proceedings in tribal court exceed tribal sovereign jurisdiction . . . . The requirement of exhaustion of tribal remedies is not discretionary; it is mandatory.[76]

In *Middlemist v. Lujan*,[77] the federal district court compared the two Burlington cases in order to resolve the question of whether the aquatic lands conservation ordinance of the Confederated Salish and Kootenai Tribes applied to non-Indian landowners. In holding that exhaustion was indeed mandated, the court first remarked that the challenged ordinance was important to the well being of the Tribes and their members for both health and economic reasons and that through the ordinance, the Confederated Tribes had asserted their commitment to sovereign authority over reservation affairs by establishing governmental mechanisms for the

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74. For instance, in McKart v. United States, 395 U.S. 185 (1969), a person subject to the draft had not appealed his draft reclassification from an exempt category and was being prosecuted for draft evasion. The government argued that because he had failed to exhaust his administrative remedies with the Selective Service during the reclassification, he should not be able to argue now that he was exempt from the draft. The Supreme Court disagreed because the penalty, going to jail, was severe and all the issues were purely questions of law.

75. 940 F.2d 1239 (9th Cir. 1991).

76. *Id.* at 1244-45 (emphasis in original).

77. 20 Indian L. Rep. (Am. Indian Law. Training Program) 3072 (1993).

protection of aquatic habitat on the reservation.[78] The court then added:

> The fact that issues of federal law are involved does not diminish the benefits of exhaustion. The growing expertise of tribal courts need not be limited solely to interpretations of internal laws and regulations. To the contrary, the continuous exposure of tribal courts to jurisdictional questions involving issues of federal law increases the value of their explanations to subsequent reviewing courts.[79]

Although the *Middlemist* court recognized that in *Burlington Northern Railroad v. Blackfeet Tribe*, "the circuit court did not require exhaustion because the case presented issues of federal law and no proceedings were pending in tribal court,"[80] it concluded that "this particular holding has been called an anomaly by the circuit court itself in a subsequent case."[81]

Recently, the Ninth Circuit had a chance to revisit this issue in *United States v. Plainbull*.[82] In *Plainbull*, the United States had brought an action in federal district court against members of the Crow Tribe to recover penalties for grazing livestock on an Indian reservation without a valid grazing permit and without paying grazing fees.[83] The district court had abstained from taking jurisdiction. The Ninth Circuit acknowledged that because the federal government was attempting to enforce federal legislation, the district court did have jurisdiction. Nevertheless, relying on *National Farmers Union* and *LaPlante*, the Ninth Circuit, held that abstention was proper, and stated: "The fact that the government is attempting to enforce federal law is immaterial. The alleged trespass was on tribal land and considerations of comity require that the tribal courts get first opportunity to resolve this case."[84] The fact that the case involved

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78. *Id.* at 3074.

79. *Id.*

80. *Id.* at 3073.

81. *Id.*; the court relied on footnote 7 of the first *Stock West Corp. v. Taylor* case, 942 F.2d at 663. Although the holding of that case was reversed in the *en banc* decision, 964 F.2d 912 (9th Cir. 1992), the reversal had nothing to do with the court's statement concerning *Burlington Northern R.R. v. Blackfeet Tribe*. The *Middlemist* court also relied on Crawford v. Genuine Parts Co., 947 F.2d 1405 (9th Cir. 1991) to conclude that the fact that no case was currently pending in tribal court was irrelevant and that, therefore, "the lack of tribal proceeding does not negate the exhaustion requirement." *Middlemist*, 20 Indian L. Rep. (Am. Indian Law. Training Program) at 3073.

82. 957 F.2d 724 (9th Cir. 1992).

83. *Id.* at 725. Title 25 provides in part that "[e]very person who drives or otherwise conveys any stock of horses, mules, or cattle, to range and feed on any lands belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of $1 for each animal or such stock." 25 U.S.C.A. § 179 (West 1983).

84. *Plainbull*, 957 F.2d at 728. In the Tenth Circuit, pure questions of federal law were involved in Tillett v. Lujan, 931 F.2d 636 (10th Cir. 1991). In *Tillett*, a member of the tribe alleged that the tribal court's exercise of jurisdiction over her was unconstitutional and that the federal regulations creating the tribal court were invalid. The suit arose out of an action commenced in a Court of Indian Offenses. Courts of Indian Offenses are established pursuant to regulations promulgated by the Bureau of Indian Affairs. Because the courts are established and governed by regulations published in the Code of Federal Regulations, they are commonly referred to as "CFR" courts. *Id.* at 638. The purpose of these courts is to provide adequate mechanisms of law enforcement to tribes that have not yet established traditional tribal courts. Although the Tenth Circuit upheld the district court, which had ruled that the federal regulations creating the tribal court were valid without waiting for the tribal court to make an initial determination on that issue, it also upheld the district

questions of federal law was not enough to avoid exhaustion of tribal court remedies.

The similarities between the two exhaustion doctrines leads one to make a further comparison with administrative law, and that is in the area of deference owed administrative decisions on judicial review. Part III analyzes the amount of deference that should be given by federal courts when they review the jurisdictional determinations of tribal courts.

III. THE LEVEL OF DEFERENCE OWED TRIBAL COURTS' JURISDICTIONAL DETERMINATIONS

This Part first looks at the current standard of deference given tribal courts' jurisdictional determinations when they are appealed to the federal courts pursuant to their federal question and diversity jurisdiction.[85] After examining why there should be some deference given to the decisions of tribal courts, the particular type of deference that should be given tribal courts' jurisdictional determinations is analyzed. Because jurisdictional decisions based on implicit divestiture of tribal sovereignty is treated differently from decisions based on federal statutes and treaties, an extensive analysis of the implicit divestiture test is also presented. Finally, borrowing again from the concept of deference as developed in administrative law, recommendations are made about the proper level of deference that should be owed the jurisdictional determinations of tribal courts.

A. The Existing Law

In *FMC v. Shoshone Bannock Tribes*,[86] the Tribes brought an action against FMC in tribal court, alleging violation of a tribal employment ordinance. FMC argued that the Tribes did not have jurisdiction to enforce the ordinance because FMC was a non-Indian employer operating on non-Indian fee lands within the reservation. The tribal court held that the tribe did have jurisdiction. On appeal, the federal district court reversed. The Ninth Circuit reversed the district court and found that the Tribes did have jurisdiction over FMC because there was a consensual relationship between FMC and the tribe.[87]

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court's ruling requiring Tillett to exhaust her tribal remedies on her other claims. *Id.* at 642. As already stated, one of those claims alleged that the exercise of tribal court jurisdiction over her was in violation of the United States Constitution. *Id.* at 639.

Whitebird v. Kickapoo Hous. Auth., 751 F. Supp. 928 (D. Kan. 1990), also involved pure questions of federal law where a tribal member sued a tribal housing authority claiming that a letter sent by the defendant to her employer violated the Federal Privacy Act of 1974. The Housing Authority filed a motion to dismiss based in part on the fact that the plaintiff had failed to exhaust her tribal remedies. The district court, citing *LaPlante*, agreed without even discussing whether it was appropriate to extend *LaPlante* to such non-jurisdictional cases.

85. 28 U.S.C. §§ 1331-32 (1988).

86. 905 F.2d 1311 (9th Cir. 1990).

87. *See* discussion *infra* note 107.

In the course of its decision, the Ninth Circuit elaborated on the correct standard of review for federal courts to adopt in reviewing tribal court decisions and stated:

> The standard of review of a tribal court decision regarding tribal jurisdiction is a question of first impression among the circuits . . . . The *Farmers Union* Court contemplated that tribal courts would develop the factual record in order to serve the "orderly administration of justice in the federal court." This indicates a deferential, clearly erroneous standard of review for factual questions . . . . As to legal questions, the *Farmers Union* Court stated that the fact that a tribal court reviews a question first is helpful because other courts might "benefit [from] their expertise." This indicates that federal courts have no obligation to follow that expertise, but need only be guided by it. Moreover, federal courts are the final arbiter of federal law, and the question of tribal court jurisdiction is a federal question. Federal legal questions should therefore be reviewed *de novo*.[88]

There are some problems with *FMC*'s analysis of *National Farmers Union*. First and foremost, *National Farmers Union* never distinguished between questions of fact and questions of law when it enumerated its reasons for mandating exhaustion. For instance, the Supreme Court did not use the words "factual record" but instead used the words "full record" in connection with the orderly-administration-of-justice justification for exhaustion.[89] In addition, *FMC* failed to discuss what were perhaps the Court's two most important reasons for requiring exhaustion: respecting the congressional policy of encouraging tribal self-government and respecting the autonomy and authority of tribal courts.

Finally, it is not entirely clear that all "questions" of law should be subjected to the same standard of review. For instance, it seems clear that if the jurisdictional question depends on the interpretation of a *tribal* law, there should be more deference than if the jurisdictional determination involves interpretation of a federal statute.[90] These considerations lead one to ask anew what should be the deference owed the jurisdictional determinations made by tribal courts.

B. The Case for Deference

Perhaps the best reasons to advocate for judicial deference to jurisdictional decisions of tribal courts have to do with the realization that

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88. *FMC*, 905 F.2d at 1313-14 (citations omitted).

89. 471 U.S. at 856.

90. As one scholar stated:

> There are intriguing questions about the potential deference to, rather than review of, some tribal court jurisdictional decision making. While it is clear, for example, that federal courts may review tribal court jurisdictional decision making in light of alleged mistakes about the contours of federal law relevant to tribal jurisdiction, it is less clear what a federal court should do when the alleged tribal court mistake is not one of federal law, but rather of tribal law.

Frank Pommersheim, *A Path Near the Clearing: An Essay on Constitutional Adjudication in Tribal Courts*, 27 GONZ. L. REV. 393, 410-11 (1991-92).

after centuries of colonization and assimilationist policies designed to result in the dissolution of tribal life into the dominant culture, it is time to show some respect for tribal institutions that are vital to the continuation of tribal political and cultural life. Moreover, since in many cases, the existence of jurisdiction is related to what is vital to tribal self-government,[91] the determinations of tribal judges are important because they have some significant contributions to make to the development of a fair and non-culturally biased jurisprudence in this area. Tribal courts must have a chance to develop their own jurisprudence concerning what self-determination means to them and define their own vision of tribal self-government.[92] There are currently over 250 tribes with judicial systems, each with its own different vision of sovereignty. Therefore, where the existence of tribal jurisdiction depends on what is necessary to tribal self-government or vital to self-determination, federal courts cannot promote generic rules applicable to all tribes.

After warning that the exercise of jurisdiction by federal courts can be jurispathic, meaning that it can kill law created by communities, Professor Resnick wrote:

> At the core of federal courts' jurisprudence is a question that has often gone under the name of "sovereignty" but may more fruitfully be explored in the context of difference. If the word "sovereign" has any meaning in contemporary federal courts' jurisprudence, its meaning comes from a state's or a tribe's ability to maintain different modes from those of the federal government. The United States has often made claims about the richness of its pluralistic society—made claims that the loss of state or tribal identity would not only be a loss to states and tribes, but would also harm all citizens because of the benefit of living in a country in which not all are required to follow the same norms.[93]

And, writing on the importance of tribal courts, Professor Frank Pommersheim stated:

> Tribal courts do not exist solely to reproduce or replicate the dominant canon appearing in state and federal courts. If they did, the process of colonization would be complete and the unique legal cultures of the tribes fully extirpated. Nevertheless, tribal legal cultures—given even the most benign view of Indian-non-Indian history—also do not reflect pre-Columbian tribal standards and norms. This is so because there has always been a unique legal reality created by tribal resistance

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91. *See* discussion *infra* notes 101-119.

92. For a persuasive account of the importance of respecting the decisions of tribal courts as well as the vital role tribal courts play in both American and tribal culture, see Frank Pommersheim, *Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411. Professor Pommersheim starts his essay by stating that: "The two most important—and indeed complementary—projects in the field of contemporary Indian law are the decolonization of federal Indian law and the simultaneous construction of an indigenous version of tribal sovereignty and self-rule." *Id.* at 411.

93. Judith Resnick, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 750-51 (1989).

> to the process of colonization and assimilation. The riprap created by these forces provides an opportunity for tribal courts to forge a unique jurisprudence along the fault line created by the ravages of colonialism and the persistence of tribal commitment to traditional cultural values. Along this fault line one can see, and feel, the additional pressures facing tribal courts. A concern about the role "differences" might play in tribal court jurisprudence generates these forces. This fault line, in turn, rests on the shifting tectonic plate of tribal sovereignty."[94]

C. *The Amount of Deference*

Generally speaking, there are two ways that a tribe could lose its jurisdiction. Jurisdiction may be lost by a specific treaty or act of Congress. This type of loss would be considered a pure question of law. Most of the cases, however, do not deal with this situation. Instead, the most frequently made argument is that the tribes have been "implicitly" divested of their jurisdiction. Borrowing from the jurisprudence of administrative law, it is clear that the test adopted by the Supreme Court to determine implicit divestiture of tribal jurisdiction does not involve strictly questions of law but is more akin to applying the law to the facts. As such, it involves "mixed questions." Yet, in administrative law these mixed questions are not reviewed *de novo* but are upheld as long as they are reasonable or have a rational basis.

Before proceeding to a comparison between the doctrines of deference in administrative law, an analysis regarding the implicit divestiture test is necessary in order to show why the test involves the application of law to facts.

1. From Inherent Sovereignty to Tribal Self-Government: The Current Test for Determining Whether Tribal Sovereignty has been Implicitly Divested

Originally, Indian tribes retained all of their inherent sovereign powers unless such powers had been specifically taken from them by acts of Congress or given up in a treaty with the United States.[95] In 1978, however, the Court in *Oliphant v. Suquamish Indian Tribe*[96] announced

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94. Frank Pommersheim, *Liberation, Dreams and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 412, 420-21.

95. In 1942, Felix Cohen, perhaps the leading scholar in the field of Indian Law, stated:

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses . . . all the powers of any sovereign state; (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe . . . but does not by itself affect the internal sovereignty of the tribe, (i.e., its powers of local self-government); (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.

FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 123 (1942) (citations omitted).

96. 435 U.S. 191 (1978).

a new principle concerning tribal sovereignty. At issue was whether the Suquamish Indian Tribe had retained the criminal jurisdiction to prosecute a non-Indian.[97] The Court held that the Tribe had lost the sovereign power to prosecute non-Indians.[98] The Court stated that:

> the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments . . . Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers '*inconsistent with their status.*'[99]

In further defining what kind of tribal power was inconsistent with tribal status, the Court stated that "[u]pon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty."[100]

Furthermore, the Court concluded that tribal criminal jurisdiction over non-Indians was in conflict with the interest of United States sovereignty because:

> [F]rom the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected . . . from unwarranted intrusions on their personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. 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.[101]

It is important to note that under *Oliphant*, a tribal power is inconsistent with tribal status if it conflicts with the overriding national sovereignty of the United States as determined by an Act of Congress or, as was the case in *Oliphant*, with values originating in the United States Constitution.[102]

The *Oliphant* doctrine was somewhat modified, however, in *Montana v. United States*.[103] The issue in *Montana* was whether the Crow Tribe had jurisdiction to regulate hunting and fishing by non-Indians on lands located within the Crow reservation but belonging in fee simple to non-Indians.[104] The Court found that the tribe did not have jurisdiction. To

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97. *Id.* at 196.
98. *Id.* at 195.
99. *Id.* at 208 (emphasis in original). Since the landmark decision of Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), the status of Indian tribes has been considered one of "domestic dependent nations."
100. *Oliphant*, 435 U.S. at 209.
101. *Id.* at 210.
102. *Id.* at 108.
103. 450 U.S. 544 (1981).
104. *Id.* at 547.

arrive at this conclusion, the *Montana* Court relied on a 1978 case, *United States v. Wheeler*.[105] *In dicta*, *Wheeler* suggested that Indian tribes had implicitly lost jurisdiction over non-tribal members because the exercise of such jurisdiction involved external relations.[106] According to the *Wheeler* Court, it was inconsistent with the status of Indian tribes as domestic dependent nations to determine their external relations without congressional authorization.[107] The Court did not explain the reasons for its unfounded conclusion that the exercise of jurisdiction by a tribe over the activities of non-members inside its own Indian reservation is somehow an exercise in "external relations" in the way, for instance, that signing a treaty with Russia would be.[108] Although the Court acknowledged that Indian tribes retain powers of self-government, it described these powers as involving "only the relations among members of a tribe."[109] Again, the *Wheeler* Court did not give any reasons for adopting such a narrow and ultimately meaningless definition of "powers of self-government."

Although the *Montana* Court agreed with *Wheeler* in stating that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation,"[110] it did not seem to follow *Wheeler* in limiting tribal powers of self-government to "relations" among members. *Montana* did not give much direction on how courts are to conduct a judicial inquiry in determining what is "necessary" to tribal self-government. In discussing the extent of tribal jurisdiction over non-tribal members on non-Indian fee lands, however, the *Montana* Court did state:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that

105. 435 U.S. 313 (1978).

106. The issue in *Wheeler* was whether the Double Jeopardy Clause of the Fifth Amendment barred a federal prosecution of a tribal member for rape when he had already been convicted in tribal court of the lesser included offense of contributing to the delinquency of a minor. *See id.* at 316. The Court held that the Clause was not applicable because Indian tribes derive their power to prosecute from their own inherent sovereignty and not from the U.S. Constitution. *Id.* at 329-30. The Double Jeopardy Clause only forbids subsequent prosecutions for the same crime in the court of the same sovereign. *Id.*

107. *Wheeler*, 435 U.S. at 326.

108. The only previous decisions mentioning restrictions on the Indian nations' powers over external relations were the two landmark *Cherokee* decisions authored by Chief Justice John Marshall, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 15 (1931) and Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832). The text of these cases makes it clear, however, that by "external relations," Chief Justice Marshall was referring to the relations between Indian nations and foreign nations.

109. 435 U.S. at 326.

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

> conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[111]

Montana, therefore, adopted the view that, as a general principle, the exercise of tribal jurisdiction over non-members is inconsistent with tribal status because it involves the exercise of "external relations." There are, however, exceptions. Indian tribes can continue to exercise civil jurisdiction over non-members if it is necessary to tribal self-government such as when the conduct of the non-Indians has some direct effect on the political integrity, the economic security or the health and welfare of the tribe. In the process of adopting its own theory of Indian Sovereignty, however, *Montana* completely transformed the original *Oliphant* test which had relied on statutes, treaties, and Constitutional values to find a tribal power in conflict with an overriding national interest and therefore inconsistent with tribal status.

There seems to be a fundamental disagreement concerning the correct interpretation of *Oliphant* between the *Montana* Court and the *National Farmers Union* and *LaPlante* Courts. While the *National Farmers Union* and *LaPlante* interpretations may, arguably, support *FMC*'s conclusion that jurisdictional determinations are essentially questions of law, the implicit divestiture test as understood by *Montana* and later decisions of the Supreme Court transforms these jurisdictional determinations into questions of applying the law to the facts.

Thus, *National Farmers Union* stated that the Court in *Oliphant* "adopted the reasoning of early opinions of two United States Attorneys General, and concluded that federal legislation conferring jurisdiction on the federal courts to try non-Indians for offenses committed in Indian Country had implicitly preempted tribal jurisdiction."[112] Similarly, in *LaPlante*, the Court stated:

> Indian tribes retain "attributes of sovereignty over both their members and their territory," to the extent that sovereignty has not been withdrawn by federal statute or treaty . . . .
> . . . civil jurisdiction over such [non-Indian] activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.[113]

This statement is decidedly different from the statement in *Montana* which further limits tribal jurisdiction to what is necessary to protect tribal self-government. It is important to note that I am not arguing that *National Farmers Union* and *LaPlante* were wrong in their interpretation of *Oliphant* and that, conversely, *Montana* and *Wheeler* were

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111. *Id.* at 565-66 (citations omitted). Whether this quoted statement is only applicable to tribal authority over non-Indian activity on non-Indian fee land and does not operate as a restriction of tribal authority over conduct occurring on Indian land is debatable.

112. National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 853-54 (1985).

113. 480 U.S. at 14-18 (citations omitted).

right.[114] The exact nature of the test devised by the Supreme Court in determining whether tribal jurisdiction has been implicitly divested is important, however, because the test should influence the deference given jurisdictional determinations made by tribal courts.

Although *National Farmers Union* and *LaPlante* were decided after *Montana*, it seems that in more recent years, the Court has followed the *Montana* approach. For instance, in *Duro v. Reina*,[115] the issue was whether the tribe had retained criminal jurisdiction over non-member Indians. In holding that the tribes did not have inherent criminal jurisdiction over non-member Indians, the Court could have just extended the *Oliphant* test to cover non-member Indians, but Justice Kennedy's opinion went further. *Duro* attempted to synthesize *Oliphant*, *Wheeler* and *Montana* by stating that:

> The retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members. Indians like all others citizens share allegiance to the overriding sovereign, the United States. A tribe's additional authority comes from the consent of its members, and so in the criminal sphere membership marks the bounds of tribal authority.[116]

Earlier in the opinion, the Court's discussion had already implied that non-tribal members could not consent to tribal criminal jurisdiction because the exercise of such jurisdiction involves a serious and unwarranted intrusion into personal liberty. *Duro*, however, only dealt with criminal jurisdiction; the Court's dicta is ambivalent concerning civil jurisdiction. After first stating that "the retained sovereignty of the tribes is that needed to control their own internal relations, and to preserve their own unique customs and social order,"[117] the Court added:

> It is true that our decisions recognize broader retained tribal power outside the criminal context. Tribal courts, for example, resolve civil disputes involving nonmembers, including non-Indians . . . . Civil authority may also be present in areas such as zoning where the exercise of tribal authority is vital to the maintenance of tribal integrity and self-determination.[118]

Duro speaks in terms of the existence of tribal jurisdiction as long as it is "vital" to self-determination, while *Montana* speaks in terms of what is "necessary" to protect self-government. It seems that, in this context, the Court attributes the same meaning to the words "self-government" and "self-determination." Although "vital" to self-deter-

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114. It is not the purpose of this article to undertake an in-depth criticism of the *Wheeler* and *Montana* line of reasoning. For a comprehensive critical review of these cases, see Alex Tallchief Skibine, *Duro v. Reina and the Legislation that Overturned It: A Power Play of Constitutional Dimensions*, 66 S. CAL. L. REV. 767 (1993).

115. 495 U.S. 676 (1990).

116. *Id.* at 693.

117. *Id.* at 685-86.

118. *Id.* at 687-88.

mination appears to embody a higher threshold than "necessary" to self-government, it seems fair to say that the Court has not, up to now, noted a difference between the two phrases and, therefore, one can conclude that the two terms could be used interchangeably.[119]

In its most recent decision on this issue, *South Dakota v. Bourland*,[120] the Court seemed to uphold *Montana*'s holding that tribes can continue to exercise tribal sovereign powers over non-Indians as long as they are necessary to tribal self-government. Having first found that the tribe's treaty right to control the non-members had been abrogated by Congress,[121] the *Bourland* court considered the applicability of the two *Montana* exceptions to the general proposition that the inherent sovereign powers of Indian tribes do not extend to the activities of non-members of the tribe on non-Indian fee land. The Court, however, endorsed the District Court's findings that neither of these exceptions applied in this particular case.[122]

In spite of potential inconsistencies[123] and theoretical flaws, both *Duro* and *Bourland* recognized that tribes do have civil jurisdiction over non-

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119. The *Duro* Court cited Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408 (1989), to support its "vital to self-determination" statement. *Duro*, 495 U.S. at 688. *Brendale* involved the tribal power to zone non-Indian fee land within an Indian reservation. Because of its peculiar factual situation and because there is no majority opinion, *Brendale* is not often relied upon as an authority. It is interesting to note, however, that the plurality opinion authored by Justice White talked in terms of a "demonstrably serious impact" on the political integrity, economic security or health and welfare of the tribe. *Brendale*, 492 U.S. at 410. This seems to have a somewhat higher threshold level than the one devised in *Montana* which talked in terms of what "threatens or has a direct effect" on the political integrity, economic security or health and welfare of the tribe. 450 U.S. at 566.

120. 113 S. Ct. 2309 (1993).

121. The issue in *Bourland* was whether the Cheyenne River Sioux Tribe retained the right to control hunting and fishing by non-members over land which had been ceded by the tribe to the United States for a flood control project. *Id.* at 2319. The Court stated that "[h]aving concluded that Congress clearly abrogated the Tribe's pre-existing regulatory control over non-Indian hunting and fishing, we find no evidence in the relevant treaties or statutes that Congress intended to allow the Tribe to assert regulatory jurisdiction over these lands pursuant to inherent sovereignty." *Id.* at 2319-20.

122. *Bourland*, 113 S. Ct. at 2320. The two exceptions are the consensual relation exception and the "direct effect" exception under which the tribe continues to retain jurisdiction over non-Indians when their conduct has a direct effect on the political integrity, economic security or health and welfare of the tribe. *Id.* The *Bourland* Court concluded that:

> The District Court made extensive findings that neither of these exceptions applies to either the former trust lands or the former fee lands. And although the Court of Appeals instructed the District Court to undertake a new analysis of the Montana exceptions on remand as to the 18,000 acres, it did not pass upon the district court's previous findings regarding the taken areas as a whole. Thus, we leave this to be resolved on remand.

Id. (citations omitted).

123. Although the mention of *Montana's* two exceptions seemed like an endorsement that they are still good law, Justice Thomas made a strange turnaround in responding to Justices Blackmun and Souter's dissenting opinion by adding a footnote to his own opinion stating in part that "While the dissent refers to our 'myopic' focus on the Tribe's prior treaty right to absolute and undisturbed use and occupation of the taken area, it shuts both eyes to the reality that after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation,' 450 U.S. at 564, and is therefore not inherent." These last words, quoted from *Montana*, however, are taken out of context and mischaracterized the opinion. *Montana* stated that it is only "tribal power beyond what is necessary to protect tribal self-government or to control internal relations" that cannot survive without express congressional delegation. This is markedly different from Thomas' blunt assertion that all tribal sovereignty over nonmembers is forbidden unless delegated by Congress.

Indians in certain cases. The focus of the inquiry regarding the existence of tribal jurisdiction has changed, however, from a determination of whether treaties and statutes have divested the tribe of jurisdiction to include an additional inquiry as to whether assertion of tribal jurisdiction is "necessary to tribal self-government" or "vital to the maintenance of tribal integrity and self-determination."

As explained earlier, the Ninth Circuit held in *FMC* that *National Farmers Union* mandated *de novo* review of tribal courts' jurisdictional determinations because it viewed these determinations as involving purely legal questions such as interpretation of treaties and statutes. As this section showed, however, more recent cases direct tribal courts to focus their jurisdictional findings not only on statutes and treaties, but also on whether tribal jurisdiction exists because it is vital to tribal self-government. In the next section, I will argue that the *Montana* approach and its focus on what is vital to tribal self-government does not involve purely questions of law but involves, instead, the application of law to the facts. A different scope of judicial review should, therefore, be adopted. *National Farmers Union* did not consider this possibility because it interpreted *Oliphant* differently than the prevailing interpretations given in *Montana*, *Duro*, and *Bourland*.

2. A Practical Analogy to the Doctrine of Deference as Developed in the Field of Administrative Law

In determining the exact nature and scope of the deference owed jurisdictional determinations of tribal courts by the federal courts, a practical analogy can be made to the jurisprudence involving judicial review of actions of administrative agencies. As recently stated by a leading text on administrative law:

> This question of the scope of review is of crucial importance. Upon it hinges both the efficacy of the administrative process and the judicial ability to protect individuals against agency abuses of power . . . . If the scope of review is too broad, agencies are turned into little more than media for the transmission of cases to the courts.[124]

In order to strike the proper balance between the interest of the individuals in having recourse to judicial review and the interest of the government in respecting the autonomy and expertise of the administrative agencies, the courts have fashioned standards of judicial review in administrative law which take into account the different expertise of the courts and the agencies. Thus, questions of law are generally reviewed *de novo* while questions of fact are only reversed by the courts if the findings of the agency are not supported by substantial evidence or are found to be arbitrary and capricious.

The Supreme Court has described "substantial evidence" as "such relevant evidence as a reasonable mind might accept to support a con-

124. BERNARD SCHWARTZ, ADMINISTRATIVE LAW 624 (3d ed. 1991).

clusion."[125] The landmark decision of *Overton Park v. Volpe*[126] defined the scope of the arbitrary and capricious test when the Supreme Court described its inquiry as "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[127]

Some have argued persuasively that the substantial evidence test is not really different from the arbitrary and capricious test. In *Association of Data Processing Organizations v. Board of Governors*,[128] then-Judge Scalia remarked that the substantial evidence test was only a specific application of the arbitrary and capricious test. Substantial evidence applies when there is a formal hearing whereas arbitrary and capricious applies in informal settings.

Although the exact meaning of the substantial evidence test and the arbitrary and capricious test has preoccupied many administrative law scholars, the tests ultimately consider the question of reasonableness; an agency's finding of facts will be upheld if these facts have a rational basis.[129] As stated in a leading treatise on administrative law:

> Where a question of law is at issue, the court determines the *rightness* of the agency answer with its own independent judgement . . . . Where a question of fact is at issue, the Court does not weigh the quality or quantity of the evidence for sufficiency; the court determines only the reasonableness of the agency answer.[130]

Not every question to be determined, however, is either a pure question of law or a question of fact. Some questions have been termed "mixed" questions, or to put it another way, questions of applying the law to the facts. In cases that have analyzed "mixed" questions, courts have given the same amount of deference to agency findings as if they were purely questions of fact. The landmark decision in this area is *NLRB v. Hearst*.[131] The employees (called newsboys) in *Hearst* sought protection under the National Labor Relations Act.[132] The NLRA gave jurisdiction to the National Labor Relations Board (NLRB) where an employer-employee relationship existed. Before taking jurisdiction over the matter, the NLRB had to find that the newsboys were "employees" under the Act. In reviewing the decision of the NLRB that an employer-employee

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125. *See* Consolidated Edison v. NLRB, 305 U.S. 197, 229 (1938).
126. 401 U.S. 402 (1971).
127. *Id.* at 416.
128. 745 F.2d 677 (D.C. Cir. 1984).
129. The implementation of these tests in an administrative law context is, of course, vastly influenced by the 1946 Administrative Procedure Act, 5 U.S.C. §§ 706 (2)(a) & (2)(e) [hereinafter "APA"]. Section 2(A) directs a reviewing court to hold unlawful any agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Section 2(E) directs an agency action to be set aside if it is "unsupported by substantial evidence in a case subject to section 556 and 557." Sections 556 and 557 involve cases where there was a "formal" hearing, meaning one held "on the record." It is to be remembered that the APA itself was a codification of principles which had been developed by the courts through the common law.
130. BERNARD SCHWARTZ, ADMINISTRATIVE LAW 641 (3d ed. 1991).
131. 322 U.S. 111 (1944).
132. 29 U.S.C. § 152 (1988).

relationship did exist, the Supreme Court stated that the Board's determination that specified persons are "employees" under the Act is to be accepted if it has "warrant in the record and a reasonable basis in law."[133] In other words, the test was one of reasonableness.

At one time, determinations such as the one made in *Hearst* were reviewed *de novo* because they were considered to involve "jurisdictional facts."[134] This involved the determination of "facts" which affected the issue of whether the agency had jurisdiction. Nevertheless, in *O'Keefe v. Smith*,[135] the Supreme Court reviewed a case involving a jurisdictional fact and stated, "[w]hile this court may not have reached the same conclusion as the [agency] it cannot be said that [its decision] is irrational or without substantial evidence on the records as a whole."[136] Cases such as *O'Keefe* have influenced a recent treatise on Administrative Law to pronounce that "the decisions since *Hearst* show clearly that jurisdictional facts are now entitled to no broader scope than non-jurisdictional facts."[137]

The nature of the test to determine tribal jurisdiction should influence the deference given jurisdictional determinations made by tribal courts. If the test involves the determination of questions of law, the tribal decision should, in most cases, be reviewed *de novo*.[138] Tribal courts' jurisdictional determinations that are based on what is vital to tribal self-government, however, involve the application of law to facts, or "mixed" questions of law and fact. Therefore, these determinations should not be reviewed *de novo* but should be upheld if reasonable or rational.

In administrative law, it is not always easy to determine whether the question to be decided is a question of law calling for *de novo* review or a "mixed" question calling for a reasonableness or rational basis test. As stated in one treatise on administrative law:

> An agency's application of law to fact requires it to make two distinct determinations: it must decide what legal constraints govern the problem at hand, and then it must decide what action to take within those constraints. The former of these two steps involves a determination of law . . . . Only if the agency's view survives a relatively independent judicial examination does a court proceed to the second step: the task of law application in which the reviewing court's function is considerably more deferential.[139]

Applying these principles of administrative law to federal judicial review of tribal courts' jurisdictional determinations, a federal court would review independently whether the tribal court has adopted the correct test for determining if tribal jurisdiction had not been implicitly divested. The

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133. *Hearst*, 322 U.S. at 131.
134. *See* Crowell v. Benson, 285 U.S. 22 (1932).
135. 380 U.S. 359 (1965).
136. *Id.* at 363.
137. BERNARD SCHWARTZ, ADMINISTRATIVE LAW 687 (3rd ed. 1991).
138. *But see* discussion *infra* notes 139-144.
139. ERNEST GELLHORN & RONALD LEVIN, ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL 81-82 (3d ed. 1990).

second step of the process, however, the task of determining, under *Montana*, if a consensual relation existed or if the activity is necessary to tribal self-government or vital to tribal integrity and self-determination, would only be reviewed under a reasonableness or rational basis test.

3. Tribal Courts' Jurisdictional Determinations Involving Purely Questions of Law

As stated earlier, in both *National Farmers Union* and *LaPlante* the Court took the position that in determining whether the tribe had been implicitly divested of jurisdiction, the tribal court should focus on treaties and federal statutes. Although it was argued that other Supreme Court cases had adopted a different approach, focusing instead on what was vital to tribal self-government, it is undoubtedly true that some cases will depend on statutory or treaty construction. These types of cases represent pure questions of law, and the question examined is whether the tribal court decisions in this context should be reviewed *de novo*.

In continuing the analogy with administrative law, it is clear that questions of law should be reviewed *de novo* unless the case involves the interpretation of ambiguous provisions contained in treaties or statutes which were passed expressly for the benefit of the tribe whose tribal court heard the case.

This conclusion is derived from the landmark decision of *Chevron v. NRDC*.[140] The issue in *Chevron* was whether under the Clean Air Act the Environmental Protection Agency (EPA) could issue a regulation which would allow a state to adopt a plant-wide definition of stationary source so as to treat all the pollution emitting devices within the same industrial grouping as though they were contained within a single "bubble." This "bubble" concept would allow an industrial grouping to modify new or existing pollution sources within the grouping without having to obtain a new permit from the EPA as long as the alteration did not increase the total emissions from the plant. The question was whether the Clean Air Act's definition of "stationary source" allowed the EPA to proceed with its "bubble" concept.

Under traditional doctrines of judicial review in administrative law, a question of law would have been reviewed *de novo* by the courts. The *Chevron* Court, however, took a different approach and reviewed the decision of the EPA on a *reasonable* standard. The Court stated:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise ques-

140. 467 U.S. 837 (1984).

> tion at issue, the court does not impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[141]

The Court granted deference to the agency because the EPA's interpretation represented a reasonable accommodation of conflicting policies which Congress had, for one reason or another, decided not to resolve in the Act.[142] The Court recognized that judges are not experts in making political choices, and it believed that it was to the agency that Congress had delegated policy-making responsibilities. The Court also found the EPA an appropriate forum to determine policy choices because unlike judges, agencies through the President of the United States are more accountable to the people who elected the Congress.[143]

Following in the footsteps of *Chevron*, an argument can be made that if a statute or treaty is silent on tribal jurisdiction or if tribal jurisdiction depends on a statute or a treaty which is ambiguous in its terms, the tribal court's initial determination should be upheld if it has a reasonable basis and the statute or treaty was passed for the benefit of the Tribe.[144] This principle would be consistent with other venerable principles of statutory construction in the field of federal Indian law which direct the courts to resolve ambiguous provisions in treaties or statutes to the benefit of the Indians and to construe treaties the way the Indians would have understood them.[145]

CONCLUSION

Although tribal courts are not administrative agencies, the same policy reasons should guide the courts to mandate exhaustion of administrative remedies and of tribal court remedies. It has been argued that the same principles concerning exceptions to the exhaustion doctrine should be applied to both tribal and administrative forums. As long as the case arose on the reservation, exhaustion should be mandated if the four

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141. *Id.* at 842-43. The wisdom of the *Chevron* doctrine has been widely debated and it is not the purpose of this article to add to this debate. For a sample of the current controversy, see Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549 (1985), Abner J. Mikva, *How Should Courts Treat Administrative Agencies*, 36 AM. U. L. REV. 1 (1986). For a strong endorsement of *Chevron*, see Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 DUKE L.J. 511.

142. 467 U.S. at 865.

143. *Id.*

144. One of the most highly debated issues in many cases of the post-*Chevron* era is whether there is, in fact, an ambiguity or a silence in the statute being litigated. *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); and NLRB v. United Food & Commercial Workers Union, 484 U.S. 112, 413 (1987).

145. *See* Choctow Nation v. United States, 318 U.S. 423, 431-32 (1943); Choctow Nation v. Oklahoma, 397 U.S. 620, 631 (1970); Washington v. Washington Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675-76 (1979); *see also* Charles Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as the Water Flows or Grass Grows Upon the Earth"- How Long A Time Is That*, 63 CAL. L. REV. 601 (1975).

National Farmers Union exceptions do not apply and there is a colorable claim of tribal jurisdiction. In addition, exhaustion should be extended to all cases arising on Indian reservations even if they involve purely questions of federal law as long as resolution of the federal question will have an impact on the jurisdiction of the tribal courts or otherwise implicates tribal interests.

Similarly, the deference routinely given by the courts to decisions of administrative agencies should also be awarded to decisions of tribal courts when these decisions are being reviewed by federal courts under their federal question jurisdiction or their diversity jurisdiction. This is especially true for jurisdictional determinations based on whether the exercise of tribal jurisdiction is vital to tribal self-government or self-determination.

It is undoubtedly true that tribal courts have more expertise in determining whether control of a certain activity is essential to tribal self-government. To ignore the determinations of tribal courts, or to leave the amount of deference owed to tribal courts to the discretion of district court judges will indeed relegate tribal courts to "media for the transmission of cases" and render the exhaustion requirement almost meaningless. It would also make the implicit divestiture test adopted by the Supreme Court to determine the existence of tribal jurisdiction a political and culturally-biased test because determinations concerning what is vital to tribal self-government would be made by federal judges, most if not all of whom are non-Indians, without having to pay any attention to what the Indians themselves think about the matter. The implicit divestiture test is already laden with political subjectivity, and therefore a complete lack of deference to the decisions of tribal courts would be greatly detrimental to tribal self-government. Lack of deference to tribal courts would also be directly contrary to the congressional policy of protecting tribal self-government and encouraging tribal self-determination, the very policies which have persuaded the Supreme Court to mandate exhaustion of tribal remedies in the first place.

This article began with a fifteen-year-old anecdote, and it is appropriate to conclude it with another anecdote which occurred around the same time. Not long after the take-over at Wounded Knee by members of the American Indian Movement (AIM), I attended an Indigenous Rights Conference in Geneva, Switzerland. Russell Means, the co-founder of AIM and the leader of the Wounded Knee take-over told the assembled delegates, most of whom were not United States citizens, that his Nation, the Sioux Nation, lived in the "belly of the Beast;" the "Beast" being the United States. In many ways, this article has been about altering that perception. The recommendations given in this article regarding deference are not ideal, but if implemented, they would represent a meaningful step towards co-existence with Indian norms and values. It should be recognized that these norms and values are "different," and as strange as it may seem, they are "alien" within a country made from lands which, not long ago, were exclusively "Indian" lands. Perhaps such a step would begin to change the perception of Indians like Russell

Means who feel that Indian people have been swallowed by a beast. This Beast, whether you call it racism, colonialism, or hegemony, would then appear in the belly of the Indian nations, being slowly digested into nothingness.