Michigan Law Review

Volume 101 | Issue 2

2002

Towards Tribal Sovereignty and Judicial Efficiency: Ordering the Defenses of Tribal Sovereign Immunity and Exhaustion of Tribal Remedies

Kirsten Matoy Carlson
University of Michigan Law School

NOTE

Towards Tribal Sovereignty and Judicial Efficiency: Ordering the Defenses of Tribal Sovereign Immunity and Exhaustion of Tribal Remedies

Kirsten Matoy Carlson

TABLE OF CONTENTS

INTRODUCTION

In 1985, the Narragansett Indian Tribe ("Tribe")[1] created the Narragansett Indian Wetuomuck Housing Authority ("Authority").[2]

1. The word "tribe" has been used in several contexts to connote different meanings. The Federally Recognized Indian Tribe List Act of 1994 defines "Indian tribe" as "any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe." 25 U.S.C. § 479a(2) (1994). Currently, the Secretary of the Interior recognizes 557 tribes within the United States. DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 8 (4th ed. 1998). Of these 557 federally recognized tribes, 226 are native villages in Alaska. *Id.* Not all tribes, however, are federally recognized. *Id.* at 11. Federal recognition does not constitute a group as a tribe. Rather, federal recognition merely extends acknowledgement of tribal status. For a number of reasons, a tribe may not be federally recognized. For instance, in the 1950s, the United States government pursued a policy of termination. Under the termination policy, Congress unilaterally ended its federal relationship with more than 100 tribes. *Id.* Most tribes, which are not federally recognized, seek federal recognition through the Bureau of Indian Affairs. Further, status as a non-federally recognized tribe does not mean that the tribe may not retain rights vis-à-vis the United States. For more information on the reserved

The Authority, which acts on the Tribe's behalf in its housing development and operations, entered into a contract with the Ninigret Development Corporation for the construction of a low-income housing development.[3] After construction began, disputes developed over how to proceed with the construction. When conciliation efforts failed, the Authority cancelled the contract.[4] The Narragansett Tribal Council, the governing body of the Tribe, followed the forum selection clause[5] in the contract and notified the disputants that it would hold a hearing to resolve the dispute.[6] Ninigret refused to appear at the hearing, and the Tribal Council found that Ninigret had failed to fulfill its contractual obligations and had incurred liability for the costs to fix the problems encountered in the construction of the housing development.[7] Ninigret ignored the Tribal Council's decision and the avail-

---

rights of non-federally recognized tribes, see *id.* at 209-24. *See also* Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968); United States v. U.S. Fid. & Guar. Co., 309 U.S. 506 (1940).

2. *See* Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 25 (1st Cir. 2000). The Housing Authority was established under tribal ordinance and operated under regulations promulgated by the United States Department of Housing and Urban Development. *Id.* at 25-26.

3. *Id.* at 26. The Ninigret Development Corporation is a nontribal entity partially owned by a member of the Narragansett Indian Tribe.

4. *Id.*

5. Parties to a contract may choose the forum to hear the dispute by including a forum selection clause in the contract. In *Ninigret*, the parties agreed that the Narragansett Tribal Council would hear all the disputes. *Id.*

6. *Ninigret*, 207 F.3d at 26. A tribal forum — either a tribal court or a tribal council acting in the capacity of a tribal court — would have had jurisdiction to hear the issues presented in the dispute notwithstanding the forum selection clause in the contract. Since contact with Europeans, many tribes have adopted court systems to facilitate dispute resolution. Courts have also been imposed on tribes through United States legislation. For more information on tribal courts, see generally GETCHES ET AL., *supra* note 1, at 373-418; B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457 (1998). Under current federal law, tribal courts exercise both civil and criminal jurisdiction. *See generally* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (criminal jurisdiction); Bryan v. Itasca County, 426 U.S. 373 (1976) (civil jurisdiction under P.L. 280); Williams v. Lee, 358 U.S. 217 (1959) (civil jurisdiction). Even though federal law has limited the ability of tribal courts to exercise civil and criminal jurisdiction, in *Ninigret*, 207 F.3d at 21, the tribal council would have jurisdiction. The tribal court has jurisdiction for one of two reasons. First, some members of the Ningret Corp. are tribal members. *See* Williams v. Lee, 358 U.S. 217 (1950). The tribe would also have jurisdiction over the nonmember owners of Ninigret because their relationship with the tribe is consensual. *See* Montana v. United States, 450 U.S. 544, 565-66 (1981); *see also infra* note 46.

7. *Ninigret*, 207 F.3d at 26. Although exactly what occurred in the Tribal Council proceeding is not clear from the appellate court opinion, whether the Tribal Council entered a default judgement against Ninigret should not matter because federal courts can revisit jurisdictional issues regardless of whether or not a tribal court has made an actual determination of its jurisdiction. *See infra* notes 47-56 and accompanying text. The ability of federal courts to revisit jurisdictional issues differs from jurisdictional litigation in a state-to-state context, wherein a second state can only revisit the jurisdictional issue if it has not been fully

able appeals[8] and sued the Authority in federal court for breach of contract.[9] The Authority moved to dismiss the claims for want of jurisdiction, claiming that as a tribal agency it was entitled to tribal sovereign immunity,[10] and that the Tribal Council should have jurisdiction in the case pursuant to the exhaustion of tribal remedies doctrine ("tribal exhaustion").[11] The district court interpreted the forum selection clause, ruled the clause enforceable, and dismissed Ninigret's claims because the appellant had failed to follow the provisions of the clause.[12] Ninigret appealed. The First Circuit, in *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*,[13] determined that the district court properly exercised its jurisdiction by hearing the tribe's sovereign immunity defense and interpreting the forum selection clause before invoking tribal exhaustion.[14]

The procedural history in *Ninigret* demonstrates the jurisdictional banter between tribal and federal forums over dispute resolution actions involving tribes. In reaction to Ninigret ignoring the Tribal Council's decision and filing suit in federal court, the Authority raised two defenses — tribal sovereign immunity and tribal exhaustion — to clarify the jurisdictional question underlying the federal suit, namely whether the tribe or the federal government had the authority to resolve the dispute. The Authority's invocation of the two defenses, in turn, produced the additional question of how federal courts should

---

litigated in the first instance and has not been waived. *See* Durfee v. Duke, 375 U.S. 106, 111 (1963); DAVID P. CURRIE ET AL., CONFLICT OF LAWS 450-86 (2001).

8. *Ninigret*, 207 F.3d at 26. The contract provided Ninigret with an appellate procedure following the Tribal Council proceeding, which it ignored. *Id.*

9. *Id.* Even though Ninigret filed six separate claims against the Authority, only the breach of contract claim is discussed here in order to simplify the fact pattern. *Id.*

10. Black's Law Dictionary broadly defines the doctrine of sovereign immunity as precluding a "litigant from asserting an otherwise meritorious cause of action against a sovereign or a party with sovereign attributes unless the sovereign consents to suit." BLACK'S LAW DICTIONARY 1252 (5th ed. 1979). United States courts have acknowledged the sovereign immunity of federal, state, foreign, and tribal governments. *See* United States v. U.S. Fid. & Guar. Co., 309 U.S. 506 (1940) (holding that Indian tribes retain a defense of tribal sovereign immunity); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) (establishing a common law defense of sovereign immunity for the federal government); Schooner Exch. v. M'Fadden, 11 U.S. (7 Cranch) 116 (1812) (extending absolute sovereign immunity to foreign nations).

11. *Ninigret*, 207 F.3d at 26, 28. Tribal exhaustion has been defined as the doctrine by which "parties who challenge, under federal law, the jurisdiction of a tribal court to entertain a cause of action must first present their claim to the tribal court before seeking to defeat tribal jurisdiction in any collateral or parallel federal court proceeding." Basil Cook Enters., Inc. v. St. Regis Mohawk Tribe, 117 F.3d 61, 65 (2d Cir. 1997); *accord* Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987) (reaffirming the defense of tribal exhaustion); Nat'l Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985) (establishing the defense of tribal exhaustion).

12. *Ninigret*, 207 F.3d at 26.

13. 207 F.3d 21 (1st Cir. 2000).

14. 207 F.3d at 35.

treat the two defenses when filed simultaneously. The question of how federal courts should treat these two defenses in determining which government — federal or tribal — retains jurisdiction over the dispute should be resolved in a manner that recognizes the importance of tribal sovereignty and judicial efficiency.

Under federal civil procedure, tribal governments have a range of defenses when sued in federal courts. Tribal governments can file not only standard defenses,[15] but as governments, tribes may employ defenses that are unavailable to non-governmental defendants. In particular, the Supreme Court has established the defenses of tribal sovereign immunity and tribal exhaustion for tribal governments and entities.[16]

The defense of tribal sovereign immunity under federal law in federal courts ("tribal sovereign immunity")[17] stems from the sovereignty retained by Indian tribes and acknowledged by the United States government.[18] The predecessors of the United States government recognized tribal sovereignty upon initial contact between Indian tribes and European colonists.[19] In *Cherokee Nation v. Georgia*,[20] the Supreme Court distinguished Indian tribes from foreign states while acknowledging them as separate sovereigns.[21] The Court described Indian

15. *See generally* FED. R. CIV. P. 12.

16. *See, e.g.*, Kiowa Tribe v. Mfg. Tech., Inc., 523 U.S. 751 (1998) (holding that tribal entities retain tribal sovereign immunity in commercial and governmental transactions both on and off the reservation); Iowa Mutual Ins. Co., 480 U.S. 9 (1987); National Farmers Union Ins. Cos., 471 U.S. 845 (1985); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (reaffirming the defense of tribal sovereign immunity); U.S. Fid. & Guar. Co., 309 U.S. 506 (discussing tribal sovereign immunity). Nontribal defendants may also file the affirmative defense of tribal exhaustion; however, this Note deals specifically with the interplay between the two defenses. The interplay between the two defenses only arises when the defendant is a tribal entity.

17. A distinction exists between tribal sovereign immunity under tribal law in tribal courts and tribal sovereign immunity under federal law in federal courts. *See infra* Section II.B.

18. *See* GETCHES ET AL., *supra* note 1, at 73 ("The colonists required the creation of legal and political relationships with the tribes in order to legitimate land transactions, trade, and military partnerships with them, exclusive of other European powers. Choosing this method of dealing itself implied recognition of tribes as self-governing peoples.").

19. *See* Worchester v. Georgia, 31 U.S. (6 Pet.) 515, 558-59 (1832). After achieving independence from Great Britain, the United States decided to follow the same government-to-government relationship with tribes as fostered by the British government. *See Ninigret*, 207 F.3d at 29 ("Tribal sovereign immunity 'predates the birth of the Republic.' ").

20. 30 U.S. (5 Pet.) 1 (1831).

21. Three United States Supreme Court cases — *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) — form the basis of the federal-tribal relationship. In *Johnson v. M'Intosh*, the Supreme Court held a conveyance made by a tribal chief to a private individual invalid because under the doctrine of discovery only the European sovereign had the rights to acquire land from the natives. *Johnson*, 21 U.S. at 573. The Court, in *Cherokee Nation*, held it did not have jurisdiction over the Cherokee Nation's prayer for an injunction to restrain the state of Georgia from enforcing state laws that undermined the

tribes as "domestic dependent nations;"[22] as such, Indian tribes continue to have a government-to-government relationship with the United States.[23] Through this relationship, Indian tribes retain tribal sovereignty,[24] and, as a part of that sovereignty, a defense of sovereign immunity to suits filed against them in federal courts.[25]

Tribal sovereign immunity emerged as a doctrine out of federal common law.[26] In *United States v. United States Fidelity and Guaranty*

---

ability of the Cherokee Nation to govern itself because although the Cherokee Nation was sovereign, it did not qualify as a "foreign state" under Article III of the Constitution. *Cherokee Nation*, 30 U.S. at 17. The Court affirmed its *Cherokee Nation* decision in *Worcester v. Georgia*, holding that the state of Georgia could not pass or enforce laws over Indian lands because the Constitution expressly authorizes only the federal government to interact with tribes. 31 U.S. at 557, 561 (explaining that the Court "manifestly consider[ed] the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive.").

22. *Worcester*, 30 U.S. at 17.

23. 31 U.S. at 557; *see also* United States v. Kagama, 118 U.S. 375, 381-82 (1886) (reaffirming the sovereignty of Indian tribes over their internal affairs). Despite the Supreme Court's early acknowledgment of internal tribal sovereignty, the federal government began to encroach upon tribal sovereignty at the end of the nineteenth century. *See* Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 97 (1993) ("While the first two hundred and fifty years of colonial expansion certainly had resulted in a loss of much of the Indian land base to Euro-American settlers, it had not deprived the Indians of sovereignty and self-governing authority over their remaining homelands. Instead, this deprivation resulted from late nineteenth century legal initiatives, again with the full support of legal theory and the courts."). For most of the twentieth century, federal Indian policy alternated between policies of assimilation and self-determination. *See* GETCHES ET AL., *supra* note 1, at 140-224. In the 1970s, President Nixon initiated a policy of self-determination for Indian tribes. *See id.* at 226. This policy of self-determination has been reaffirmed by every President and Congress since President Nixon. *See id.* at 230.

24. Under the reserved rights doctrine, Indian tribes retain any and all internal sovereign powers that they have not ceded by treaty or agreement to the United States government. *See* GETCHES ET AL., *supra* note 1, at 373-76.

25. *See* Kiowa Tribe v. Mfg. Tech., Inc., 523 U.S. 751 (1998); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); United States v. U.S. Fid. & Guar. Co., 309 U.S. 506 (1940); Turner v. United States, 248 U.S. 354 (1919).

26. Sovereign immunity developed in England prior to the colonization of the New World. English law assumed that "the King can do no wrong." ERWIN CHEMERINSKY, FEDERAL JURISDICTION 590 (3d ed. 1999). In transporting the English common law system, the United States adopted the defense of sovereign immunity into its legal system. *See* CHEMERINSKY, *supra*, at 590. Federal common law established defenses of sovereign immunity for the federal government, foreign governments, and Indian tribes. *See supra* note 10.

The relationships between defenses of sovereign immunity, however, remain unclear. To date, questions arise concerning interstate sovereign immunity. See Nevada v. Hall, 440 U.S. 410 (1979) for defenses of federal sovereign immunity against tribes, and defenses of state sovereign immunity against tribes. *See also* Seminole Tribe v. Florida, 517 U.S. 44 (1996). Since the early 1990s, the defense of state sovereign immunity against tribes has been increasingly litigated. In *Seminole Tribe*, the Supreme Court decided that the federal courts did not have jurisdiction over the tribe's suit against the state of Florida to enforce the Indian Gaming Regulatory Act because Congress did not have the power to waive the state's sovereign immunity through the Indian Gaming Regulatory Act. *Id.* Thus, defenses of sovereign immunity continue to be invoked and vigorously enforced against Indian tribes by both state and federal governments. *Id.*; *see also* Blatchford v. Native Vill. of Noatak, 501 U.S. 775 (1991).

Co.,[27] the Supreme Court held that tribes retain a defense of sovereign immunity as part of their retained sovereignty.[28] The Supreme Court reaffirmed the defense of sovereign immunity for tribes under federal law in *Santa Clara Pueblo v. Martinez*, holding that Congress did not waive the tribe's sovereign immunity from suit in the Indian Civil Rights Act ("ICRA").[29] Further, the Court in *Kiowa Tribe v. Manufacturing Technologies*[30] sustained a tribe's sovereign immunity from suit, stating that a tribe's sovereign immunity in federal court extends to tribal commercial and governmental activities both on and off the reservation.[31]

Although Article III of the Constitution grants federal courts subject matter jurisdiction in cases involving tribes,[32] a sovereign party, such as a tribe, can raise the defense of sovereign immunity to preclude litigation against it.[33] Sovereign parties also may waive the defense of sovereign immunity. Several statutes currently waive the United States' sovereign immunity.[34] States, tribes, and foreign nations may statutorily waive their sovereign immunity.[35] Tribes may waive tribal sovereign immunity in federal court through contract.[36] Congress

27. 309 U.S. 506 (1940).

28. Although the Court developed the defense of sovereign immunity for tribes in federal courts under federal law in *United States v. United States Fidelity and Guaranty Co.*, the Court first mentioned the defense in *Turner v. United States*, 248 U.S. 354 (1919). In *Turner*, the Court explained, "[w]ithout authorization from Congress, the Nation could not then have been sued in any court; at least without its consent." *Id.* at 358.

29. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978); *accord* Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991). The Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1994), extends some but not all of the rights guaranteed in the Bill of Rights to interactions between individuals and Indian tribes. For more information on the ICRA, see GETCHES ET AL., *supra* note 1, at 505-09.

30. 523 U.S. 751 (1998).

31. *See* 523 U.S. at 760 ("Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation."). The sovereign immunity of a tribe under federal law in federal court reflects a theory of absolute sovereign immunity and mirrors the sovereign immunity given to foreign sovereigns prior to the enactment of the Foreign Sovereign Immunities Act. *See* JOSEPH W. DELLAPENNA, SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS (1988).

32. *See* U.S. CONST. art. III.

33. The Federal Circuit discusses the difference between sovereign immunity and subject matter jurisdiction in *Quality Tooling, Inc. v. United States*, 47 F.3d 1569, 1573-74 (Fed. Cir. 1995).

34. CHEMERINSKY, *supra* note 26, at 593. Chemerinsky specifically lists three acts — the Administrative Procedure Act, the Federal Tort Claims Act, and the Tucker Act — that waive United States federal sovereign immunity.

35. *Id.*; *see also* Burlington N. R.R. Co. v. Crow Tribal Council, 940 F2d 1239 (9th Cir. 1991); DELLAPENNA, *supra* note 31, at 196-200 (waivers by foreign nations).

36. *See, e.g.*, C & L Enters., Inc. v. Citizen Band Potawatomi Tribe, 532 U.S. 411 (2001).

may also waive tribal sovereign immunity.[37] A waiver of tribal sovereign immunity by either the tribe or Congress "cannot be implied but must be unequivocally expressed."[38]

In addition to the acknowledgement of tribal sovereign immunity under federal law, tribes have adopted the notion of sovereign immunity and developed their own doctrine of tribal sovereign immunity under tribal law.[39] Like the state and federal governments, tribes have developed waivers of tribal sovereign immunity through contracts and tribal codes.[40] Thus, tribal sovereign immunity exists not only under federal law in federal courts, but also under tribal law in tribal courts.[41] When a question arises as to whether tribal sovereign immunity has been waived, the waiver may have occurred by either tribal or federal action.[42] When a waiver occurs, it usually occurs under tribal law.[43]

A second defense available to Indian tribes is tribal exhaustion.[44] In *National Farmers Union Insurance Cos. v. Crow Tribe*,[45] the

37. In *United States Fidelity & Guaranty*, the Supreme Court determined that a defense of tribal sovereign immunity under federal law in federal court could be waived by congressional consent. 309 U.S. 506, 512-13 (1940). The United States Congress has waived tribal sovereign immunity through statute, such as the Indian Tucker Act.

38. United States v. Testan, 424 U.S. 392, 399 (1976) (quoting United States v. King, 395 U.S. 1, 4 (1969)). Sovereign immunity for tribes exists in federal courts unless Congress has abrogated sovereign immunity for the tribe through legislation or the tribe has waived tribal sovereign immunity on its own. *See* Kiowa Tribe v. Mfg. Tech. Inc., 523 U.S. 751, 754 (1998). Increasingly, the doctrine of tribal sovereign immunity has been attacked as too extensive. The commentary in *Kiowa* implies that the Court's re-affirmation of the extent of tribal sovereign immunity under federal law stands on shaky ground. *See id.* The attack intensified with the introduction of a bill in Congress by Senator Slate Gorton to curtail tribal sovereign immunity under federal law. *See* GETCHES ET AL., *supra* note 1, at 385.

39. Rave v. Reynolds, 23 ILR 6150, 6161 (Winn. Sup. Ct. 1996) ("This court notes that notions of governmental immunity, such as tribal sovereign immunity, while adopted as tribal law as most tribal governments moved to western style forms of organization, nevertheless constitute distinctly Anglo-American legal doctrines, having no parallels in traditional Indian life where most positions of leadership were the result of earned respect of lineage and leaders ruled by example, wisdom, and respect, rather than coercion.").

40. A number of tribes, such as the Cheyenne River Sioux and Winnebago Tribe of Nebraska, have incorporated a defense of tribal sovereign immunity into their tribal codes. *See* WINNEBAGO TRIBE OF NEBRASKA CODE tit. 1 § 919 (1994); CHEYENNE RIVER SIOUX CODE ch. VIII § 1-8-4 (1978). Other tribes, such as the Mashantucket Pequot Tribe, have adopted tort waiver statutes similar to the Federal Tort Claims Act.

41. *See supra* note 39.

42. The Supreme Court acknowledged the difference between waivers by tribal action and waivers by federal action in *C & L Enters. v. Potawatomi Indian Tribe*, 532 U.S. 411 (2001).

43. A survey of tribal sovereign immunity cases indicates that tribal law applies or could apply under normal choice of law rules. *See, e.g.*, Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 25-26 (1st Cir. 2000); Davis v. Mille Lacs Band of Chippewa Indians, 193 F.3d 990 (8th Cir. 1999); Stock West Corp. v. Taylor, 964 F2d 912 (9th Cir. 1992).

44. When a tribe raises the defense of tribal exhaustion, the court first determines its own jurisdiction over the suit. Then the court addresses the question of whether the tribal court has jurisdiction over the underlying suit. At this point, unless the tribal court clearly

Supreme Court addressed the question of "the proper scope of tribal court jurisdiction."[46] Emphasizing the importance of tribal courts in promoting tribal self-determination,[47] the Court in *National Farmers*

---

does not have jurisdiction (such as in a case involving a criminal action involving a non-Indian perpetrator), the federal court invokes the tribal exhaustion doctrine, requiring the plaintiff to exhaust its tribal court remedies before bringing suit in federal court. *See, e.g.*, Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987); Nat'l Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985). Tribal exhaustion requires that tribal appellate courts have an opportunity to review the determinations of lower tribal courts. *See, e.g.*, Basil Cook Enters., Inc. v. St. Regis Mohawk Tribe, 914 F. Supp. 839 (N.D.N.Y. 1996). For more information on tribal exhaustion, see Melissa L. Koehn, *Civil Jurisdiction: The Boundaries Between Federal and Tribal Courts*, 29 ARIZ. ST. L.J. 705 (1997); Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Sovereignty While Expanding Federal Jurisdiction*, 73 N.C. L. REV. 1089 (1995).

The most analogous state law doctrines to exhaustion under federal law are the abstention doctrines, which contend that state court issues have to be decided before a case can be filed in federal court. *See* CHEMERINSKY, *supra* note 26, at 735. The tribal exhaustion doctrine functions like a state abstention doctrine because it stays the federal court's jurisdiction until after the tribal court has heard and decided the merits of the case. Abstention doctrines are judicially created rules that limit the ability of federal courts to decide issues before them even though the jurisdictional and justiciability requirements have been met. *See id.* at 735. State abstention doctrines include: *Pullman* abstention, which "is required when state law is uncertain and a state court's clarification of state law might make a federal court's constitutional ruling unnecessary," *id.* at 737, *Thibodaux* abstention, which establishes that "federal courts should abstain in diversity cases if there is uncertain state law *and* an important state interest that is 'intimately involved' with the government's 'sovereign prerogative,' " *id.* at 752, *Burford* abstention, which dismisses a case entirely because complex state administrative procedures completely displace federal court review, *id.* at 755, and *Colorado River* abstention, which provides for abstention to avoid duplicative litigation, *id.* at 820. Although there is no question that the tribal exhaustion doctrine is functionally similar to state abstention doctrines, scholars disagree on which state abstention doctrine the tribal exhaustion doctrine most parallels. *See* Jones, *supra* note 6, at 490-91; Koehn, *supra*, at 720-21. This disagreement, however, merely indicates that the tribal exhaustion doctrine, although functionally similar to state abstention doctrines, does not clearly parallel any of the state doctrines.

45. 471 U.S. 845 (1985).

46. *Id.* at 852. Tribes retain civil jurisdiction over tribal members on Indian lands. Tribal jurisdiction over nonmembers on Indian lands is more conflicted. The Supreme Court limited the criminal jurisdiction of tribes to member and nonmember Indians in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Tribal civil jurisdiction over nonmembers depends upon whether the activity takes place on Indian lands and whether the individual has consented to tribal jurisdiction or may endanger the health and welfare of the tribe. *See* Nevada v. Hicks, 533 U.S. 353 (2001) (holding that the tribal court could not assert jurisdiction over civil claims against state officials who entered tribal lands to execute a state search warrant); Strate v. A-1 Contractors, 520 U.S. 438 (1997) (holding that tribes do not have adjudicatory authority over the personal injury actions between two nonmembers on Indian lands); Montana v. United States, 450 U.S. 544, 565-66 (1981) (holding that a tribe may regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members ... [and 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 conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe"); *see also* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 141 (3d ed. 1998). For more information on Public Law 280, which grants some states limited civil jurisdiction on tribal lands, see Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535, 537-59 (1975).

47. Although tribal courts have been recognized as venues for the resolution of disputes since *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), explicit federal policy encouraging the creation and development of tribal courts commenced in 1934 with passage of the Indian

held that the plaintiff needed to exhaust its tribal court remedies before it could sue in federal court.[48] The tribal exhaustion doctrine mandates that when a defendant asserts a colorable claim of tribal court jurisdiction,[49] federal courts should give precedence to the tribal courts to determine their own jurisdiction and to hear the case prior to federal court adjudication.[50]

The Court extended tribal exhaustion in *Iowa Mutual Insurance Co. v. LaPlante*,[51] holding that a federal district court may not exercise diversity jurisdiction over a dispute before an appropriate tribal court first has an opportunity to determine its own jurisdiction. The Court in *Iowa Mutual* indicated that federal courts have limited powers of review after tribal remedies have been exhausted.[52] This limited review of tribal court action by federal courts after tribal exhaustion leaves no federal forum for adjudication on the merits if the tribal court has jurisdiction.[53]

Tribal defendants often assert defenses of tribal sovereign immunity and tribal exhaustion simultaneously, raising the question of which defense federal courts should hear first.[54] The Supreme Court

---

Reorganization Act. *See* Jones, *supra* note 6, at 470-71. Since 1934, tribal court systems have flourished; almost 150 tribal courts exist today. *See* Koehn, *supra* note 44, at 711.

48. *Nat'l Farmers*, 471 U.S. at 855-56 ("[T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions. We believe that examination should be conducted in the first instance in the Tribal Court itself."). The Court also held that the district court had subject matter jurisdiction. *Id.* The Court in *National Farmers* established three exceptions to tribal exhaustion. *Id.* at 856 n.21. According to the Supreme Court, exhaustion is not necessary "where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, when "the action is patently violative of express jurisdictional prohibitions," and if exhaustion "would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *Id.* The Court stated it would preclude tribal exhaustion in cases where a federal court could not review the tribe's assertion of its own jurisdiction. It is unclear whether a court has ever refused to apply the tribal exhaustion doctrine for this reason.

49. A colorable claim of tribal law occurs when the assertion of tribal court jurisdiction is plausible and appears to have a valid or genuine basis. *See* Stock West Corp. v. Taylor, 964 F.2d 912, 919 (9th Cir. 1992).

50. Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d. 21, 31 (1st Cir. 2000) ("The tribal exhaustion doctrine holds that when a colorable claim of tribal court jurisdiction has been asserted, a federal court may (and ordinarily should) give the tribal court precedence and afford it a full and fair opportunity to determine the extent of its own jurisdiction over a particular claim or set of claims.").

51. 480 U.S. 9 (1987).

52. *Id.* at 19.

53. *Id.* ("Unless a federal court determines that the Tribal Court lacked jurisdiction, however, proper deference to the tribal court system precludes relitigation of issues raised . . . and resolved in the Tribal Courts.").

54. A distinction may be drawn between the kinds of cases in which a tribe raises both defenses. Most often, interplay between the two defenses arises when a question exists as to whether the tribe's sovereign immunity has been waived. Interplay may emerge in other

cases as well, particularly when part of the claim may be governed by tribal law rather than federal law.

Cases involving a defense of sovereign immunity may be classified as either "nonwaiver" cases or "waiver" cases. Although some courts implicitly acknowledge this distinction, it has not been used explicitly. For instance, addressing the question of whether a tribe waived its sovereign immunity through an arbitration clause, the Supreme Court in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001), indicated the difference between a waiver and nonwaiver case without expressly classifying the two cases as such. The distinction between waiver and nonwaiver emerged in discussions about whether a waiver occurred. *See* Kiowa Tribe v. Mfg. Tech., Inc., 523 U.S. 751 (1998). In nonwaiver cases, a tribal entity asserts a defense of sovereign immunity and there is no dispute over whether the tribe's defense of sovereign immunity under federal law has been waived either by federal statute, tribal code, or contract. *See id.* at 751; Cherokee Nation v. Babbitt, 117 F.3d 1489 (D.C. Cir. 1997); Masayesva v. Zah, 792 F. Supp. 1178 (D. Ariz. 1992). Consequently, courts usually dismiss these cases because the tribe has sovereign immunity. *See Kiowa Tribe*, 523 U.S. at 751; *Cherokee Nation*, 117 F.3d at 1489; *Masayesva*, 792 F. Supp. at 1178. There are two kinds of waiver cases: waivers by Congress ("federal waivers") and waivers by the tribe ("tribal waivers"). For an example of a federal waiver case, see Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (addressing whether Indian Civil Rights Act waived tribal sovereign immunity). For an example of a tribal waiver case, see *C & L Enters*, 532 U.S. 411 (addressing whether arbitration clause in contract entered into by tribe waived tribal sovereign immunity). In cases where the question is one of federal waiver (usually through statute), the question is purely one of federal law. *See, e.g., Santa Clara Pueblo*, 436 U.S. 49; TTEA v. Ysleta Del Sur Pueblo, 181 F.3d 676 (5th Cir. 1999); N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty., 991 F.2d 458 (8th Cir. 1993) (holding that the Hazardous Materials Transportation Act clearly indicates that it applies to tribes and therefore, waives tribal sovereign immunity); Blue Legs v. U.S. Bureau of Indian Affairs, 867 F.2d 1094 (8th Cir. 1989) (holding that tribes may be sued in federal court under the Resource Conservation and Recovery Act). The lower courts are divided as to whether the Indian Gaming Regulatory Act waives tribal sovereign immunity for the limited purpose of enforcing compliance with the Act. *See, e.g.*, Montgomery v. Flandreau Santee Sioux Tribe, 905 F. Supp. 740 (D.S.D. 1995); Maxim v. Lower Sioux Indian Cmty., 829 F. Supp. 277 (D. Minn. 1993). *But see* Davids v. Coyhis, 869 F. Supp. 1401 (E.D. Wis. 1994). The most complicated cases are those involving tribal waiver. *See, e.g.*, Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991) (holding that a tribe does not waive its immunity from counterclaims by bringing an action); Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877 (1986); Puyallup Tribe, Inc. v. Dep't of Game, 433 U.S. 165 (1977); Burlington N. R.R. Co. v. Crow Tribal Council, 940 F.2d 1239 (9th Cir. 1991) (addressing whether a tribal ordinance waived sovereign immunity). The lower courts are divided as to whether tribes forming tribal corporations under a provision of the Indian Reorganization Act of 1934, 25 U.S.C. § 477 (1994), waive their tribal sovereign immunity because many of the charters issued confer the power to "sue and be sued." *See, e.g.*, Rosebud Sioux Tribe v. A & P Steel, Inc., 874 F.2d 550 (8th Cir. 1989); Fontenelle v. Omaha Tribe, 430 F.2d 143 (8th Cir. 1970); *cf.* Boe v. Fort Belknap Indian Community, 455 F. Supp. 462 (D. Mont. 1978); Atkinson v. Haldane, 569 P.2d 151 (Alaska 1977). These cases most often emerge in contract disputes involving the tribe and a non-governmental third party. *See, e.g., C & L Enters.*, 532 U.S. at 414 (holding that arbitration clause waived tribal sovereign immunity); Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assoc., 86 F.3d 656 (7th Cir. 1996) (holding that immunity was waived when the agreement contemplates possible judicial enforcement); Rosebud Sioux Tribe v. Val-U Construction Co, 50 F.3d 560 (8th Cir. 1995), *cert. denied*, 516 U.S. 819 (1995); *see also* Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21 (1st Cir. 2000); Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 893 (7th Cir. 1993); Stock West Corp. v. Taylor, 964 F.2d 912 (9th Cir. 1992). Although the parties may include a forum selection clause in the contract, and therein specify the law that applies to the contract and the proper forum in which to adjudicate any conflicts arising under the contract, *see C & L Enters.*, 532 U.S. at 415-16 (determining that the arbitration clause in the proposed contract specified both the choice of law and the forum for adjudication), more often than not the parties do not specify either a choice of law or a forum for adjudication. *See, e.g., Altheimer*

has failed to establish with sufficient clarity how to address a case in which the tribal defendants present defenses of both tribal exhaustion and tribal sovereign immunity.[55] The order that federal courts hear defenses of sovereign immunity and tribal exhaustion implicates judicial efficiency and tribal sovereignty, and may determine the outcome of the case.[56] Further, courts' divergent invocation of the tribal exhaustion doctrine has resulted in an uneven application of the two doctrines, allowing for differing standards and treatment for similarly situated tribal defendants.[57] Thus, the lack of clear direction from the Court, accompanied by the complexity of the federal-Indian relationship, has left the courts of appeal in disarray.[58]

& Gray, 983 F.2d at 893; *Stock West Corp.*, 964 F.2d at 912. Further, even when contracts do include such a clause, the forum selection or choice of law clause may not be clear. For instance, in *C & L Enterprises*, even though the Supreme Court decided that the provisions of the arbitration and the forum selection clauses were clear, the three courts that heard the case differed in how they interpreted the clauses. 532 U.S. at 414-420; *see also Ninigret Dev. Corp.*, 207 F.3d at 21. In these cases, the tribe raises both defenses of tribal sovereign immunity and tribal exhaustion. Tribal exhaustion is normally sought in waiver cases so that the tribe is given the first opportunity to interpret the meaning of the waiver clause. *See* Davis v. Mille Lacs Band of Chippewa Indians, 193 F.3d 990 (8th Cir. 1999); *Stock West*, 964 F.2d at 912. Tribal exhaustion, however, may also be sought in nonwaiver cases to resolve tribal law issues that do not pertain to questions of whether tribal sovereign immunity has been waived.

55. *See* Reynolds, *supra* note 44, at 1113-14 ("When the Supreme Court first articulated the tribal exhaustion rule, it provided few hints about when the lower courts should apply it.... Predictably, the federal courts have disagreed about when to require tribal exhaustion.").

56. In cases where a tribal entity has sovereign immunity, the federal court dismisses the case without prejudice. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). The plaintiff can file a suit against a tribe in federal court but sovereign immunity precludes litigation on the merits and ends the case. Tribal exhaustion merely stays the exercise of the federal court's jurisdiction and adjudication of the question of whether the tribal court has jurisdiction. *See, e.g.*, Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987). Tribal exhaustion allows the tribal court to determine its own jurisdiction and then for the federal court to rehear the case if necessary. *Id.*

57. For instance, when a court applies the tribal exhaustion doctrine in a nonwaiver case, the tribe may have to reappear in federal court to defend on the grounds of its sovereign immunity.

58. Both the Eighth and Ninth Circuits have held that plaintiffs need to exhaust their claims in tribal court before a federal court can hear the tribal entity's defense of tribal sovereign immunity. *Davis*, 193 F.3d 990; *Stock West*, 964 F.2d 912. In *Davis*, the Eighth Circuit argued that a purported waiver of sovereign immunity by the tribe does not prevent invocation of the tribal exhaustion doctrine when the waiver concerns issues of tribal law. *See Davis*, 193 F.3d at 992. The court explained that exhaustion is required because the Supreme Court determined that issues of tribal sovereign immunity are exactly the kind of questions that need to be decided by tribal courts. *Id.* The Ninth Circuit, in *Stock West Corp.*, contended that all tribal law issues have to be exhausted in the tribal courts before a federal court can hear a defense of tribal sovereign immunity. *Stock West*, 964 F.2d at 920. Other circuits have decided the issue differently. The First, Fifth, and Seventh Circuits have held that the defense of tribal sovereign immunity should be heard before invocation of the tribal exhaustion doctrine. In *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, the First Circuit argued that federal courts should hear defenses of sovereign immunity first as long as federal subject-matter jurisdiction exists even though the purported waiver in the case identified the tribal council as the mediator of all disputes. 207

This Note will show that, in tribal waiver cases, federal courts should address sovereign immunity first, but conditionally deny sovereign immunity in ambiguous cases and proceed directly to the tribal exhaustion defense. When a federal court finds tribal exhaustion, the case then has to be heard in tribal court before a federal court can revisit the case.[59] This allows the tribal court to determine whether or not the tribe has waived its sovereign immunity.

This Note argues that federal courts should hear defenses of tribal sovereign immunity before hearing those of tribal exhaustion. Part I argues that courts should hear defenses of tribal sovereign immunity first because federal courts treat sovereign immunity like jurisdiction: whereas, most courts treat tribal exhaustion as a matter of comity similar to abstention. Part II proposes a model for hearing tribal defenses in federal courts. It asserts that the immunity defense should be heard first in both federal and tribal waiver cases. In tribal waiver cases, however, courts should provisionally deny tribal sovereign immunity and proceed to address tribal exhaustion, so that the tribal court can interpret the waiver. This Note concludes that hearing defenses of tribal sovereign immunity before tribal exhaustion promotes judicial efficiency and tribal sovereignty.

I. COURTS SHOULD HEAR TRIBAL SOVEREIGN IMMUNITY FIRST BECAUSE SOVEREIGN IMMUNITY IS JURISDICTIONAL

This Part argues that federal court practice supports the hearing of sovereign immunity defenses prior to defenses based on abstention doctrines. Section I.A asserts that because federal courts treat sovereign immunity like jurisdiction, courts should hear defenses of tribal sovereign immunity first. While general federal rules do not always apply to Indian tribes,[60] the nature of the application of tribal sover-

F.3d at 29. Similarly, the Fifth Circuit in *TTEA v. Ysleta Del Sur Pueblo* dismissed an action against a tribe for an alleged breach of contract on the grounds of tribal sovereign immunity without ever getting to the exhaustion defense. 181 F.3d at 680. In another contract case, *Altheimer & Gray v. Sioux Mfg. Co.*, the Seventh Circuit found that the tribe had waived its sovereign immunity and denied application of the tribal exhaustion doctrine because the case did not present any questions of tribal law and the tribe had consented to the jurisdiction of the Illinois state courts in the letter of intent to contract. 983 F.2d at 812-13.

59. *See, e.g.*, *Iowa Mut. Ins. Co.*, 480 U.S. 9; Nat'l Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985).

60. Because tribes retain sovereignty, general rules set out by the federal courts do not always apply when a tribe or a tribal member is involved. For instance, the Court in *Durfee v. Duke*, 375 U.S. 106, 111 (1963), explained that a court's jurisdiction cannot be reviewed by another court. *Id.* at 111, 113 ("From these decisions there emerges the general rule that a judgment is entitled to full faith and credit — even as to questions of jurisdiction — when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment. . . . One trial of an issue is enough. The principles of *res judicata* apply to questions of jurisdiction as well as to other issues.") (internal citation and quotation marks omitted). Conversely, the Court in

eign immunity and tribal exhaustion requires federal courts to follow the general rule of hearing jurisdictional issues, including the defense of sovereign immunity, first. Section I.B argues that the tribal exhaustion doctrine is not jurisdictional but rather a matter of comity, and thus should be heard second.

A. *Courts Treat Defenses of Sovereign Immunity Like Jurisdiction*

Federal courts hear jurisdictional questions prior to other questions because the Supreme Court decided in *Ex Parte McCardle* that "[w]ithout jurisdiction the court cannot proceed at all in any cause."[61] Furthermore, federal courts prefer to hear jurisdictional issues first because it is more efficient.[62] Although a court can hear a claim of lack of subject matter jurisdiction at any time,[63] courts usually hear these claims as early in the litigation as possible to prevent the expenditure of court time and resources on a case that the court lacks the authority to hear.[64]

Although federal courts have discretion over the order in which they hear defenses, federal courts should hear defenses of tribal sovereign immunity first because sovereign immunity pertains to the court's jurisdiction.[65] While sovereign immunity is not jurisdictional per se, courts under common law practice treat sovereign immunity like jurisdiction by dealing with it before addressing other issues because sovereign immunity acts as a bar to the court's exercise of jurisdiction.[66]

National Farmers Union held that federal courts can review the jurisdiction of tribal courts. 471 U.S. 845 (1987).

61. *Ex Parte* McCardle, 74 U.S. 506, 514 (1868).

62. *See, e.g.*, Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 587-88 (1999) ("[W]e recognize that in most instances subject-matter jurisdiction will involve no arduous inquiry. In such cases, both expedition and sensitivity to state courts' coequal stature should impel the federal court to dispose of that issue first. Where, as here, however, a district court has before it a straightforward personal jurisdiction issue presenting no complex question of state law, and the alleged defect in subject-matter jurisdiction raises a difficult and novel question, the court does not abuse its discretion by turning directly to personal jurisdiction.") (internal citations omitted).

63. FED. R. CIV. P. 12(h)(3).

64. *See, e.g.*, *Ruhrgas*, 526 U.S. at 577, 587-88; Steel Co. v. Citizens for Better Env't, 523 U.S. 83 (1998); *McCardle*, 74 U.S. at 514.

65. Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 28 (1st Cir. 2000) ("[T]ribal sovereign immunity is jurisdictional in nature.").

66. Although federal Indian law does not always parallel federal law, *see supra* note 43, federal court procedure for tribal sovereign immunity defenses closely follows federal court procedure for other sovereign immunity defenses. *See* Quality Tooling, Inc. v. United States, 47 F.3d 1569, 1574 (Fed. Cir. 1995) ("Regarding the relationship between waivers of sovereign immunity and grants of jurisdiction, the Court observed that '[t]he fact that Congress grants *jurisdiction* to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claim.' ") (quoting Blethchford v. Native Vill. of Noatuk, 501 U.S. 775, 786-87 n.4 (1991)).

Because immunity defenses preclude the litigation of the case, these defenses go to the jurisdiction of the court and prevent the court from proceeding if the governmental entity has sovereign immunity.[67]

Courts should address defenses of sovereign immunity prior to other defenses because courts have defined the nature of sovereign immunity as immunity from process.[68] The Supreme Court in *Hunter v. Bryant* explained that the entitlement to immunity provides for immunity from suit rather than "a mere defense to liability."[69] Similarly, the Supreme Court in *Turner v. United States* differentiated between a defense to liability, where the defendant presents a defense to the claims alleged against him, and the defense of tribal sovereign immunity, which does not require the sovereign to defend the claim, but rather bars the litigation as a whole.[70] Under this interpretation, sovereign immunity is not viewed as a defense to liability, but rather prevents suits against the sovereign entity.[71] Because the defense of sovereign immunity prevents the sovereign from having to defend its action, it functions differently from other defenses which merely address the defendant's liability.[72] For instance, while abstention doctrines require a defense and mandate that the parties go through the legal process, sovereign immunity automatically results in the dismissal of the case.[73]

Sovereign immunity pertains to jurisdiction in that the defense bars the court from exercising its jurisdiction. For example, in *Santa Clara Pueblo v. Martinez*, the Supreme Court dismissed the question of whether the tribal government violated the ICRA by excluding certain individuals from its tribal membership because it determined that Congress had not waived tribal sovereign immunity in the ICRA.[74] Al-

67. *See* Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867, 880 (1970) ("[T]his defense [sovereign immunity] goes to the jurisdiction of the court, so that an appellate court will not only refuse to find a 'waiver' in the failure to raise the defense below, but will remedy, sua sponte, the failure to raise it upon appeal, and will dismiss the case, if necessary, over the objections of both parties.") (internal citations omitted).

68. *See, e.g.*, Hunter v. Bryant, 502 U.S. 224, 227 (1991); Turner v. United States, 248 U.S. 354, 357-58 (1919).

69. *Hunter*, 502 U.S. at 227.

70. *Turner*, 248 U.S. at 357-58. The Supreme Court in *Turner* held that the Creek Nation, like other governments, "was free from liability" under the doctrine of tribal sovereign immunity. *Id.*

71. *See id.*

72. *See id.*

73. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

74. *Id.* at 59 ("Nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief. . . . In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit."). After addressing the defense of sovereign immunity asserted by the tribe, the Court

though the Court had the subject matter and personal jurisdiction to hear the merits, the Court never reached the merits of the case because the tribe's sovereign immunity precluded the litigation.[75] Similarly, in *Kiowa Tribe v. Manufacturing Technologies, Inc.*,[76] the Court dismissed the company's breach of contract claim because of the tribe's sovereign immunity.

The fact that courts hear defenses of tribal sovereign immunity either prior to or along with other defenses suggests that courts treat immunity defenses like jurisdiction because the merits of the case cannot be litigated if the governmental entity has immunity. For instance, the defense of sovereign immunity often arises in cases where a federal court has to determine whether or not a tribe is an indispensable party.[77] The courts hear defenses of tribal sovereign immunity in conjunction with indispensable party defenses because the court has no jurisdiction if the party has sovereign immunity.[78] If courts cannot join an indispensable party because the party has sovereign immunity, the

---

in *Santa Clara Pueblo* considered whether an officer of the Pueblo was protected by the tribe's sovereign immunity and if the federal court could provide declaratory and injunctive relief. *Id.* ("As an officer of the Pueblo, petitioner Lucario Padilla is not protected by the tribe's immunity from suit. We must therefore determine whether the cause of action for declaratory and injunctive relief asserted here by respondents, though not expressly authorized by the statue, is nonetheless implicit in its terms.") (internal citations omitted).

75. The Court in *Santa Clara Pueblo* determined that it could not grant declaratory or injunctive relief to the plaintiffs because "the structure of the statutory scheme and the legislative history of Title I suggest that Congress' failure to provide remedies other than habeas corpus was a deliberate one." 436 U.S. at 61. The Court stated "[c]reation of a federal cause of action for the enforcement of rights created in Title I, however useful it might be in securing compliance with § 1302, plainly would be at odds with the congressional goal of protecting tribal self-government." *Id.* at 64. The Court did not indicate why it heard the tribal sovereign immunity claim first; however, by resolving the issue of tribal sovereign immunity before addressing the question of subject matter jurisdiction over the nonimmune defendants, the Court suggested the primacy of tribal sovereign immunity as the first defense to be heard.

76. 523 U.S. 751, 760 (1998).

77. *See* Cherokee Nation v. Babbitt, 117 F.3d 1489 (D.C. Cir. 1997); Masayesva v. Zah, 792 F. Supp. 1178 (D. Ariz. 1992).

78. In *Cherokee Nation v. Babbitt*, the D.C. Circuit decided that the issue of tribal sovereign immunity had to be heard as a part of determining whether the Delaware Tribe was an indispensable party to be joined under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(7). *See* 117 F.3d at 1503. Similarly in *Masayesva v. Zah*, the Arizona District Court heard the San Juan Southern Paiute Tribe's defense of tribal sovereign immunity in conjunction with its determination of whether the tribe was an indispensable party to the suit. *See* 792 F. Supp. at 1178. The Arizona District Court explained that the tribe's defense of tribal sovereign immunity was integral to the second part of its analysis of whether the tribe was an indispensable party under Fed. R. Civ. P. 19. *Id.* at 1182. The court indicated that it had to hear the defense of tribal sovereign immunity in conjunction with the motion of indispensable party in order to determine whether the case could proceed or should be dismissed. *Id.* at 1182. In *Masaysva v. Zah*, the court determined that the tribe was an indispensable party, but it could only be joined if it had waived its sovereign immunity. *Id.* at 1185. In making the defense of tribal sovereign immunity integral to the indispensable party analysis, the D.C. Circuit and the Arizona District Courts suggest that defenses of tribal sovereign immunity influence the outcomes of cases.

case has to be dismissed.[79] Further, federal courts indicate that sovereign immunity relates to the jurisdiction of the court over the case because they can raise the issue of sovereign immunity as a bar to the court's exercise of subject matter jurisdiction sua sponte[80] and dismiss the case over the objection of both parties if necessary.[81] The fact that courts can raise issues of sovereign immunity sua sponte stems from the centrality of jurisdiction to the authority of a court to decide a case; in evaluating whether it has jurisdiction, a court must determine whether one of the parties has sovereign immunity.

Federal courts should treat sovereign immunity as jurisdictional because doing so promotes the efficient use of the court's time and resources.[82] Dismissing cases early in the litigation prevents the court from adjudicating issues over which it lacks authority.[83] By not dismissing the case initially, the federal courts act inefficiently and potentially waste the tribal court's valuable, and limited, resources.[84]

B. *Exhaustion of Tribal Remedies Is Not Jurisdictional*

Section I.B explains that tribal sovereign immunity differs significantly from the tribal exhaustion doctrine and therefore provides another reason why federal courts should consider tribal sovereign immunity prior to tribal exhaustion. First, this Section suggests that tribal exhaustion resembles state abstention doctrines rather than jurisdictional issues.[85] Second, it maintains that tribal exhaustion differs from

79. *See Cherokee Nation*, 117 F.3d 1489; *Masayesva*, 792 F. Supp. 1178.

80. Mellos v. Brownell, 250 F.2d 35 (D.C. Cir. 1957); *accord* Tribal Smokeshop, Inc. v. Alabama-Coushatta Tribes, 72 F. Supp. 2d 717, 718 n.1 (E.D. Tex. 1999) ("[S]overeign immunity goes to subject matter jurisdiction, not personal jurisdiction.").

81. *E.g.*, Armstrong v. United States, 283 F.2d 122 (3d Cir. 1960).

82. *See* CHEMERINSKY, *supra* note 26, at 591.

83. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

84. *See, e.g.*, Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 587-588 (1999). Although most courts do not state explicitly that jurisdiction has to be heard first for efficiency reasons, jurisdiction jurisprudence explains that jurisdiction is heard first to prevent the courts from hearing cases on the merits when the court does not have the authority to hear the case. *See, e.g.*, Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 94 (1998); Mansfield, Coldwater & L. Mich. Ry. Co. v. Swan, 111 U.S. 379, 382 (1884); *Ex Parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1867).

85. Conceptually, the tribal exhaustion doctrine may resemble the exhaustion of administrative remedies doctrine more than state abstention doctrines. *See supra* note 50. The tribal exhaustion doctrine, however, does not parallel completely either the state abstention doctrines or the exhaustion of administrative remedies doctrine. Thus, the analogy made in this Part to the state abstention doctrines is meant to be merely illustrative in that it provides the reader with another more familiar doctrine as a way of showing how the tribal exhaustion doctrine differs from sovereign immunity. Thanks to Padraic McCoy for suggesting the conceptual/functional distinction to me.

The reasons the Court created the tribal exhaustion doctrines mirror those underlying the exhaustion of administrative remedies doctrine. *See* Burlington N. R.R. Co. v. Crow Tribal Council, 940 F.2d 1239, 1245-47 (9th Cir. 1991); *cf.* ALFRED C. AMAN, JR. &

sovereign immunity in that it developed as a matter of comity, and thus does not pertain to the jurisdiction of the court.

Unlike tribal sovereign immunity, which is analogous to jurisdiction, invocation of the tribal exhaustion doctrine is a matter of comity.[86] As a matter of comity, tribal exhaustion is conceptually like the doctrine of the exhaustion of administrative remedies but functionally like abstention doctrines. Conceptually tribal exhaustion is like the exhaustion of administrative remedies because both advocate the hearing of the case in another forum before allowing federal court review.[87] The two doctrines, however, differ because the Administrative Procedure Act provides clear guidelines for the levels of review which exist in the exhaustion of administrative remedies;[88] no such guidelines exist regarding tribal exhaustion.[89] Functionally, the tribal exhaustion doctrine is like state abstention doctrines, which by definition differ from, and are heard subsequent to, jurisdictional issues.[90] State abstention doctrines developed as a matter of comity, allowing federal courts to defer to state court decisions in cases primarily concerning state law.[91] These doctrines serve to promote federalism and harmony between state and federal courts.[92] Similarly, the tribal exhaustion doc-

---

WILLIAM T. MAYTON, ADMINISTRATIVE LAW 404-05 (1993). Both doctrines were developed to increase judicial efficiency and promote the expertise of tribal courts and administrative agencies. *See Burlington N. R.R. Co.*, 940 F.2d at 1245-47; *cf.* AMAN & MAYTON, *supra*, at 404-05.

86. *See* Koehn, *supra* note 44, at 705. Comity is the general principle that the courts of one state or jurisdiction give effect to the laws and judicial decisions of another jurisdiction out of deference and mutual respect. BLACK'S LAW DICTIONARY 242 (5th ed. 1979). Courts exercise comity by acknowledging the validity of another court's decisions.

87. AMAN & MAYTON, *supra* note 85, at 409. The exhaustion of administrative remedies doctrine holds that plaintiffs are not entitled to judicial relief until after they have exhausted all of their administrative remedies. *Id.* at 406. The exhaustion of administrative remedies also serves many of the same purposes as the tribal exhaustion doctrine. The courts justify the administrative remedies doctrine on the grounds that (1) it gives the agency the first chance to resolve issues in light of its own policies and priorities, (2) it reduces litigation costs and judicial interference into the agency's work, and (3) the exhaustion of administrative remedies is more efficient than judicial review because the specialization of agencies allows for the streamlining of the adjudication. *Id.* at 404-05. These reasons resemble the ones given by the Court in *National Farmers Union*. *See* Nat'l Farmers Union Ins. Cos. V. Crow Tribe, 471 U.S. 845, 856-57 (1985).

88. Administrative Procedure Act, 5 U.S.C. §§ 554, 556, 557 (1994).

89. *See* AMAN & MAYTON, *supra* note 85, at 410. A major distinction exists between the tribal exhaustion doctrine and the exhaustion of administrative remedies in that the exhaustion of administrative remedies only involves subdivisions of one sovereign. Tribal exhaustion, however, involves the courts of two sovereigns — tribes and the federal government. In this respect, the tribal exhaustion doctrine is more like state abstention doctrines.

90. *See* CHEMERINSKY, *supra* note 26, at 735-37.

91. *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Louisiana Power & Light Co. v. City of Thibodeaux, 360 U.S. 25 (1959); Burford v. Sun Oil Co., 319 U.S. 315 (1943); R. R. Comm'n Texas v. Pullman Co., 312 U.S. 496 (1941); *see also supra* note 90 and accompanying text.

92. *See* CHEMERINSKY, *supra* note 26, at 737.

trine exists as a matter of comity, fostering mutual respect between federal and tribal courts.[93]

Because abstention doctrines developed as a matter of comity, they do not pertain to the ability of the court to exercise jurisdiction over the case.[94] Invocation of an abstention doctrine does not preclude a finding of federal court jurisdiction. Rather, once the court has determined that it has jurisdiction,[95] abstention mandates that the federal court either stay or dismiss the federal court proceedings so that the state court can hear the case.[96] Similarly, tribal exhaustion requires that "the federal court stay [federal proceedings] in order to give the tribal court a 'full opportunity to determine its own jurisdiction.' "[97] Abstention doctrines allow the federal court to revisit the issues in the case after they have been litigated in the forum to which the federal court deferred.[98] Because it is based on comity, the tribal exhaustion defense functions differently than tribal sovereign immunity. Sovereign immunity, like jurisdiction, is a question of whether a court can hear a case; comity, however, merely refers to the deference a court gives to another court by staying the proceedings until the other court decides the issues relevant to the application of its law.[99]

Courts have not treated tribal exhaustion defenses like jurisdiction.[100] For example, in *National Farmers Union Insurance Cos. v. Crow Tribe*,[101] the Supreme Court held that even though the district

93. *See* Koehn, *supra* note 44, at 726 ("Exhaustion is required as a matter of comity not as a jurisdictional prerequisite.").

94. *See id.* at 725 ("It is clear from the Court's decisions in *National Farmers Union* and *Iowa Mutual* that the tribal exhaustion rule is not jurisdictional. . . . As a matter of comity, however, the Court declared that the federal courts should stay their hand until the tribal courts had an opportunity to look at the issue.").

95. *See* Nat'l Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985).

96. *See* CHEMERINSKY, *supra* note 26, at 735-37.

97. *See* Koehn, *supra* note 44, at 725.

98. *Pullman* Abstention, which is mandated when a state law is uncertain and a state court's interpretation of state law may prevent a federal court's constitutional ruling, provides for the matter to return to federal court if the constitutional issue is still viable. *See* CHEMERINSKY, *supra* note 26, at 737-38. Other forms of state abstention, such as *Burford* Abstention, do not merely stay federal jurisdiction, but completely displace federal court review. *See id.* at 755. After the tribal court proceeding, the amount of review available in the federal courts is uncertain. In *Iowa Mutual*, the Supreme Court implied that federal courts are limited to review of questions of tribal court jurisdiction. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987). *But see* Nevada v. Hicks, 533 U.S. 353 (2001).

99. *See* DELLAPENNA, *supra* note 31, at 9 ("Immunity rules, on the other hand, depend on the nature of the relation between the parties involved in the transaction or event, rather than on the relation of either of them to a court.").

100. *See, e.g.*, El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 484 (1999) (exhaustion as prudential); Bank of Okla. v. Muscogee Nation, 972 F.2d 1166, 1170 (10th Cir. 1992) (exhaustion as comity); Burlington N. R.R. Co. v. Crow Tribal Council, 940 F.2d 1239, 1245 n.3 (9th Cir. 1991) ("[T]he exhaustion requirement is not a jurisdictional bar.").

101. 471 U.S. 845 (1985).

court had subject-matter jurisdiction over a dispute between a tribe and a non-Indian plaintiff, the plaintiff needed to exhaust its tribal court remedies before it could sue in federal court.[102] The Court determined that courts have to hear all jurisdictional issues prior to invocation of the tribal exhaustion doctrine.[103] Thus, it was only after the Court determined that it had subject matter jurisdiction, and that no bars to the exercise of the court's jurisdiction existed, that it invoked the tribal exhaustion doctrine.[104] If tribal exhaustion pertained to the jurisdiction of the court, the court would have heard this defense either prior to or along with the other jurisdictional issues raised in the case.[105]

Federal courts should hear defenses of sovereign immunity prior to tribal exhaustion defenses. Unlike tribal exhaustion, sovereign immunity pertains to the jurisdiction of the court and its ability to decide the merits of the case, and a finding of sovereign immunity prevents further litigation of the case and conserves court resources.

II. A MODEL FOR HEARING TRIBAL DEFENSES IN FEDERAL COURTS

This Part advances a model for federal courts to use in hearing tribal defenses based on the two types of cases in which the defenses of tribal sovereign immunity and tribal exhaustion arise. These cases include "nonwaiver" cases, in which no question exists as to whether tribal sovereign immunity has been waived, and "waiver" cases, in which a question of whether tribal sovereign immunity has been waived exists. Section II.A contends that federal courts should hear tribal sovereign immunity defenses prior to tribal exhaustion defenses in nonwaiver cases because no question exists as to whether the tribe's sovereign immunity has been waived. Section II.B distinguishes between waiver by the federal government and waiver by the tribe. It argues that in both cases courts should hear sovereign immunity defenses first but that, in cases of tribal waiver, courts should conditionally deny the defense of tribal sovereign immunity pending an interpretation by the tribe.

---

102. *Id.* at 845.

103. *See Nat'l Farmers*, 471 U.S. at 857; *see also* Koehn, *supra* note 44, at 717 ("As expected the Court first addressed the issue of jurisdiction since, of course, the Court needed jurisdiction to hear the merits."). The Supreme Court has not held that sovereign immunity is jurisdictional. The Court has only treated sovereign immunity like jurisdiction; thus, confusion over the nature of sovereign immunity arises.

104. *Nat'l Farmers*, 471 U.S. at 849.

105. *See supra* Section I.A.

A. *Nonwaiver Cases*

This Section maintains that federal courts should hear tribal sovereign immunity defenses prior to tribal exhaustion defenses in nonwaiver cases. It also maintains that hearing sovereign immunity defenses first protects tribal sovereignty by promoting tribal courts as an appropriate forum for litigation. Finally, this Section argues that hearing sovereign immunity defenses first does not preclude litigants from adjudication on the merits of the case.

In nonwaiver cases, rather than purporting that the tribe waived tribal sovereign immunity, the plaintiff argues that initially the tribe did not have sovereign immunity.[106] For instance, *Kiowa Tribe v. Manufacturing Technologies, Inc.* is a straightforward nonwaiver case because the plaintiff argued not that the tribe's sovereign immunity had been waived either through congressional or tribal action,[107] but that the tribe did not retain tribal sovereign immunity under the facts specific to the case.[108] Because the Supreme Court determined that the Kiowa Tribe had sovereign immunity, the Court dismissed the case without hearing any further defenses or claims.[109] Hearing tribal sovereign immunity defenses first in nonwaiver cases not only is consistent with current federal court procedure but also ensures judicial efficiency and does not impede upon tribal sovereignty. Courts should hear defenses of tribal sovereign immunity first in nonwaiver cases because it promotes judicial efficiency by making productive use of judicial resources and preventing unnecessary litigation.

As discussed in Section I.B, federal courts should hear sovereign immunity defenses prior to tribal exhaustion defenses in nonwaiver cases because hearing sovereign immunity defenses first promotes judicial efficiency.[110] This is particularly true in nonwaiver cases. Federal courts act most efficiently when they hear tribal sovereign immunity defenses first because it allows them to dismiss the case upon finding that the tribe has sovereign immunity.[111] This prevents the court from

106. *See, e.g.*, Kiowa Tribe v. Mfg. Tech., Inc., 523 U.S. 751 (1998).

107. *Id.* at 753.

108. Manufacturing Technologies did not argue that the tribe had waived its tribal sovereign immunity but that tribal sovereign immunity did not exist in the first place because tribal sovereign immunity did not extend to the tribe in business transactions occurring off the reservation. *Id.* at 753. The Court rejected this claim, holding that tribal sovereign immunity does extend to commercial transactions entered into by a tribe off its reservation. *Id.* at 760.

109. *Id.*

110. *See supra* note 107 and accompanying text.

111. Dismissing a case in which the tribal sovereign immunity is clear, as the Court did in *Kiowa* Tribe, prevents the unnecessary and prolonged litigation that could occur if courts heard exhaustion defenses before sovereign immunity defenses. When exhaustion defenses are heard first, the possibility exists that after tribal court proceedings the case will return to federal court. Thus, requiring exhaustion without addressing the tribe's sovereign immunity

engaging in unnecessary litigation and saves the federal courts and tribal defendants time and resources.[112]

Even though some circuits advocate the hearing of tribal exhaustion defenses prior to tribal sovereign immunity defenses in order to protect and strengthen tribal courts, the hearing of sovereign immunity defenses first does not undermine the existence and activity of tribal courts.[113] Some circuits argue that federal courts should hear tribal exhaustion first because this promotes tribal court development by allowing the tribe to determine its own jurisdiction in the first instance.[114] This position, while admirable, ignores the fact that in these cases tribal courts may have jurisdiction to hear the case regardless of whether a federal court has jurisdiction or grants an abstention through the tribal exhaustion doctrine.[115] Because the tribal court's jurisdiction over the case is independent of that of the federal court, the federal court does not have to require tribal exhaustion for the tribal court to have jurisdiction unless one of the parties challenges the tribal court's jurisdiction.[116] Thus, even if a federal court does not hear tribal exhaustion first, tribal courts still have jurisdiction. Furthermore, the existence of tribal court jurisdiction even when a federal court has not ordered tribal exhaustion promotes tribal court jurisdiction, because the tribal court exists as a forum in which the plaintiff can bring suit even if no federal forum has jurisdiction.[117]

The ability of plaintiffs to sue in tribal court not only provides the litigant with an appropriate forum for adjudication but also strengthens the tribal court system. When a federal court finds sovereign immunity, the tribal court becomes the only forum in which the plaintiff

---

could lead to a full adjudication in tribal court followed by proceedings in the federal courts in which the federal court then determines whether the tribe had tribal sovereign immunity. By dismissing the case, hearing defenses of sovereign immunity first conserves the resources of both federal and tribal courts.

112. Sovereign immunity saves federal courts time and resources because it bars the exercise of jurisdiction. *See, e.g.*, Kiowa Tribe v. Mfg. Tech. Inc., 523 U.S. 751 (1998); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); United States v. U.S. Fid. & Guar. Co., 309 U.S. 506 (1940).

113. *See* Davis v. Mille Lacs Band of Chippewa Indians, 193 F.3d 990 (8th Cir. 1999); Stock West Corp. v. Taylor, 964 F.2d 912 (9th Cir. 1992).

114. *Davis*, 193 F.3d at 992 ("[T]he Supreme Court has stated that the issue of a tribe's sovereign immunity is the very kind of question that is to be decided in the first instance by the tribal court itself.").

115. *See* GETCHES ET AL., *supra* note 1, at 520.

116. *See id.* at 520, 635-43.

117. For example, in *Santa Clara Pueblo*, the plaintiff could seek a tribal remedy even though the federal court decided that it could not exercise its jurisdiction due to tribal sovereign immunity. 436 U.S. 49.

may seek relief.[118] The lack of federal court jurisdiction provides tribal courts with more opportunities to develop their own jurisprudence because they are the only fora able to hear the merits of the case. Although some commentators and plaintiffs suggest that tribal courts are biased,[119] federal courts have acknowledged the exclusive jurisdiction of tribal courts as providing claimants with an appropriate forum for the adjudication of claims.[120] Thus, dismissing nonwaiver cases on sovereign immunity grounds does not deny the plaintiff a forum for adjudication, because the plaintiff may be able to sue the tribe in tribal court.[121]

Tribal sovereign immunity does not deprive litigants of a forum because hearing a defense of tribal sovereign immunity prior to a tribal exhaustion defense merely dismisses the federal court case; thus, it does not affect the ability of the litigant to sue in tribal court. The dismissal of a case in federal court due to a finding of tribal sovereign immunity in the federal courts does not preclude litigation in tribal court because the tribe may not have tribal sovereign immunity in tribal court.[122] A tribe may in fact have sovereign immunity under fed-

118. State courts do not have independent civil jurisdiction over most cases arising in Indian country. For more information on state, federal, and tribal jurisdiction, see GETCHES ET AL., *supra* note 1, at 520, 635-43.

119. Although instances of tribal court bias exist, this argument is often overstated and used spuriously in attempts to preclude tribal court jurisdiction. Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285 (1998); Laurie Reynolds, *"Jurisdiction" in Federal Indian Law: Confusion, Contradiction, and Supreme Court Precedent*, 27 N.M. L. REV. 359, 381-82 (1997). Consequently, federal courts often reject this argument. *See, e.g., Davis*, 193 F.3d at 992 (rejecting plaintiff's claim of tribal court bias as superfluous); A & A Concrete, Inc. v. White Mountain Apache Tribe, 781 F.2d 1411, 1416-17 (9th Cir. 1986) (rejecting argument that tribal judge was biased); Landmark Golf Ltd. P'ship. v. Las Vegas Paiute Tribe, 49 F. Supp. 2d 1169, 1176 (D. Nev. 1999); Bowen v. Doyle, 880 F. Supp. 99, 126-27 (W.D.N.Y. 1995) (rejecting claim of Peacemakers court bias); AG Organic, Inc. v. John, 892 F. Supp. 466 (W.D.N.Y. 1995) (asserting that plaintiff's claims of tribal court bias had to be heard first in the tribal court). Moreover, state court bias does not necessitate federal court jurisdiction. For instance, no matter how biased a state court may be, a case can only be heard in federal court if it meets the requirements for federal court jurisdiction. *See* GETCHES, ET AL., *supra* note 1, at 641-43.

120. *See, e.g., Santa Clara Pueblo*, 436 U.S. at 65 ("Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.").

121. *See supra* Section II.A. For examples of cases which suggest that tribal sovereign immunity deprives litigants of a forum, see, for example, *Davis*, 193 F.3d 990, and Stock West Corp. v. Taylor, 964 F.2d 912 (9th Cir. 1992).

122. In *Quality Tooling, Inc. v. United States*, 47 F.3d 1569 (Fed. Cir. 1995), the court explained that a waiver of sovereign immunity in one court does not imply a waiver of sovereign immunity in another court. *Id.* at 1574 ("That the Government has waived its immunity in the Court of Federal Claims does not imply that the Government has waived its immunity in other courts."). Just as the federal government can waive sovereign immunity in one court but not another, in the tribal law context, it is entirely possible that a tribe would have sovereign immunity under federal law but not in tribal court. Tribal codes, such as the Mashantucket Pequot Tribal Code, may provide for waivers of tribal sovereign immunity under tribal law but not federal law.

eral law, but not under tribal law because the tribe may have waived its sovereign immunity under tribal law either through a tribal code or contract.[123] Thus, if the federal court dismisses the case, the plaintiff can still pursue the case in tribal court.[124]

Federal courts should hear defenses of tribal sovereign immunity first in nonwaiver cases. Hearing defenses of tribal sovereign immunity first prevents the inefficient use of court resources. Further, this order does not infringe on tribal sovereignty. Finally, hearing sovereign immunity defenses first does not preclude the litigants from having their claims heard by an appropriate forum.

B. *Waiver Cases*

This Section argues that in both kinds of waiver cases, federal courts should hear sovereign immunity defenses first. This Section, however, goes on to assert that federal courts should provisionally deny sovereign immunity in tribal waiver cases, and should then invoke the tribal exhaustion doctrine so that the tribal court can determine its own jurisdiction in the case and interpret the waiver in question.

1. *Federal Waiver*

Federal courts should hear tribal sovereign immunity defenses first because federal waiver cases do not present questions of tribal law. For example, *Santa Clara Pueblo* is a federal waiver case because the question of waiver is controlled by an interpretation of federal law.[125] The issue in *Santa Clara Pueblo* was whether Congress waived the tribe's sovereign immunity under federal law through the ICRA.[126] The Court decided that Congress had not waived the tribe's sovereign immunity through the ICRA and then dismissed the case against the tribe.[127] If in federal waiver cases federal courts hear and invoke tribal exhaustion first, tribal courts would be required to interpret federal law. Even though tribal courts can interpret federal law,[128] federal courts are better equipped to hear claims under federal law than tribal courts.[129] Tribal courts do not have as much experience in the applica-

123. *See, e.g.*, Bank of Okla. v. Muscogee Nation, 972 F.2d 1166, 1171 (10th Cir. 1992) ("When read together, the contract clauses are at best ambiguous regarding sovereign immunity in any court except tribal court.").

124. *See, e.g., Santa Clara Pueblo,* 436 U.S. at 65.

125. Namely, the Indian Civil Rights Act. *See Santa Clara Pueblo*, 436 U.S. at 59, 61-64.

126. *Id.* at 59.

127. *Id.* at 59.

128. *See, e.g.*, El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 485 n.7 (1999).

129. *See infra* Section II.B.2.

tion of federal law as federal courts do.[130] Further, having multiple tribal courts interpret federal law could lead to inconsistent application of the law.[131] Because the issue of waiver in these cases falls under federal rather than tribal law, tribal exhaustion should not be required in federal waiver cases.

Hearing tribal sovereign immunity defenses first in federal waiver cases, as in nonwaiver cases, promotes judicial efficiency.[132] As mentioned above, hearing defenses of tribal sovereign immunity first ensures the efficient use of court resources by preventing the relitigation of the case in federal court after full tribal court proceedings.[133] In federal waiver cases, the application of the tribal exhaustion doctrine is especially inefficient because tribal court interpretation of federal law provides the federal courts with an additional reason to review the tribal court's assertion of its jurisdiction.[134] The federal court could decide to review the tribal court decision to determine whether the tribe correctly interpreted federal law.[135] Thus, hearing defenses of tribal sovereign immunity first in federal waiver cases is more efficient than hearing tribal exhaustion defenses first.

Federal courts should hear tribal sovereign immunity defenses prior to tribal exhaustion defenses in federal waiver cases because it promotes tribal sovereignty. Because sovereign immunity acts as a bar to the exercise of jurisdiction, hearing sovereign immunity defenses first and dismissing cases in which the tribe has sovereign immunity advances tribal sovereignty by keeping tribal defendants out of federal court.[136] Further, the dismissal of a case in federal court advocates the increased use of tribal courts because it encourages litigants to pursue any remedies open to them in tribal court.

2. *Tribal Waiver*

This Section argues that in tribal waiver cases defenses of tribal sovereign immunity should be addressed first, for many of the same

130. Justice Brennan's argument that permitting state courts to interpret federal law leads to inconsistent and incorrect applications of federal law can also be extended to tribal courts. *See* Merrill Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 828 (1986) (Brennan, J., dissenting) ("[T]he possibility that the federal law will be incorrectly interpreted in the context of adjudicating the state law claim implicates the concerns that led Congress to grant the district courts power to adjudicate cases involving federal questions.").

131. *Id.*

132. *See supra* note 84 and accompanying text.

133. *See supra* Section II.A.

134. This area of the law (federal review of tribal court decisions) remains unclear and federal courts may think they have more of a reason to review tribal court cases if tribal courts are interpreting federal law.

135. *See Merrill Dow Pharm.*, 478 U.S. at 828 (Brennan, J., dissenting).

136. *See supra* Part I.

reasons that federal courts should hear sovereign immunity defenses first in federal waiver cases. In tribal waiver cases, however, the question of whether or not the tribe's sovereign immunity has been waived is one of tribal law. The Section asserts that in tribal waiver cases federal courts should conditionally deny the tribe's defense of sovereign immunity and proceed directly to the question of tribal exhaustion. This enables the tribe to interpret the waiver clause under tribal law.[137]

In the course of its consideration of a tribe's defense of tribal sovereign immunity, a federal court must determine the nature of the waiver. If the waiver is one that purportedly occurred under tribal law, the federal court should not address it. Instead, the court should conditionally deny the defense, which would give it the authority to invoke the tribe's exhaustion defense.[138] The court could then stay proceedings and mandate that the plaintiff return to tribal court. After the tribal court proceedings, the federal court could revisit the question of waiver if necessary, and would have the benefit of the tribal record to inform its determination.[139] This procedure will preserve tribal sovereignty, promote the development of tribal courts, and ensure that plaintiffs retain the opportunity to request federal court review.[140]

A conditional denial promotes the three purposes underlying the creation of the tribal exhaustion defense: (1) to promote Congress' policy of tribal self-determination, (2) to practice judicial efficiency, and (3) to facilitate the expertise of tribal courts.[141] Since the 1970s, the

---

137. By granting a conditional denial of tribal sovereign immunity, the federal court could reconsider its denial after the tribal court proceedings. In this sense, the conditional denial functions like *Pullman* abstention, which requires a federal court to stay proceedings "when state law is uncertain and a state court's clarification of the state law might make a federal court's constitutional ruling unnecessary." CHEMERINSKY, *supra* note 26, at 737; *see also* R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941). After the court stays its proceedings and the state court decides the uncertain question of state law, the matter may return to federal court for a decision on the constitutional issue if necessary. CHEMERINSKY, *supra* note 26, at 738.

138. The federal court, however, cannot invoke exhaustion without determining whether it has jurisdiction, and thus, it should address the sovereign immunity defense first. Because the federal court needs jurisdiction to reach exhaustion, a conditional denial of the sovereign immunity defense allows the court to require exhaustion so that it can benefit from the record developed in the tribal court proceeding.

139. The federal court should hear issues of tribal sovereign immunity and allow the tribal court to decide issues of tribal sovereign immunity first because the tribal court's interpretation of the waiver clause under tribal law will inform the federal court as to whether it has jurisdiction over the case. *See, e.g.*, Basil Cook Enters. v. St. Regis Mohawk Tribe, 117 F.3d 61, 65 (2d Cir. 1997) ("Requiring that litigants present their jurisdictional arguments to tribal courts in the first instance promotes tribal autonomy and dignity and encourages administrative efficiency by permitting the tribal courts to develop a full record prior to potential federal court involvement."); Stock West Corp. v. Taylor, 964 F.2d 912, 919 (9th Cir. 1992).

140. Plaintiffs retain the opportunity to request federal court review through the tribal exhaustion doctrine.

141. *See* Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803, 813 (7th Cir. 1993); Burlington N. R.R.Co. v. Crow Tribal Council, 940 F.2d 1239, 1245-46 (9th Cir. 1991).

United States Congress has developed a policy of tribal self-determination.[142] Congress is concerned with protecting Indian tribes because they remain dependent domestic sovereigns within the United States.[143] Conversely, Congress is not concerned with protecting the laws of an entirely separate sovereign because, as an independent sovereign, it can protect its own laws.[144] The congressional concern for tribal law follows the fiduciary relationship that has developed between the tribes and the United States.[145] Because tribes are considered domestic dependent nations within the United States, the United States has a duty to protect their existence and development.[146]

Federal courts act contrary to congressional policy by ignoring the distinction between tribal and federal waivers in interpreting waivers of tribal sovereign immunity. As a result, they undermine tribal law and the tribal courts.[147] When federal courts ignore the distinction between tribal waivers and federal waivers, they blur the distinction between federal and tribal law and apply federal law in cases where the tribal court should be able to review the case in the first instance.[148] For example, in *Ninigret Development Corp. v. Narragansett Indian*

142. Congress has promoted Indian self-determination through legislation, such as the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (1994) (giving tribes significant control over the adjudication of child custody cases involving tribal children), the American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (1994) (recognizing the importance of traditional tribal religion), the Indian Land Consolidation Act, 25 U.S.C. §§ 2201-2211 (1994) (allowing for the expansion of the Indian land base), the National Indian Forest Resources Management Act, 25 U.S.C. §§ 3101-3120 (1994) (giving tribes greater control over the management of Indian forest resources), the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108 (1994) (providing tribes greater flexibility in entering into agreements for mineral development, the Indian Education Act of 1988, 25 U.S.C. §§ 2601-2651 (1994), and the Tribal Self-Governance Act of 1994, 25 U.S.C. §§ 458n, 458aa note, 458aa-458gg (1994)).

143. *See supra* note 23 and accompanying text.

144. *Id.*

145. A fiduciary or trust relationship exists between the United States and Indian tribes. Under this relationship, the United States protects Indians from their own improvidence such as entering into swindling contracts. *See* GETCHES ET AL., *supra* note 1, at 328-57.

146. Aspects of the fiduciary relationship between the United States and Indian tribes include the ability of the Secretary of the Interior to take land into trust for Indian tribes under the Indian Reorganization Act of 1934. *See id.* at 192-200.

147. For instance, in *Ninigret*, the First Circuit ignored the distinction between tribal and federal law in the context of interpreting waivers of tribal sovereign immunity. Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 28 n.3 (1st Cir. 2000) ("In *Davis*, the panel referred to *National Farmers*, but apparently confused the Court's reference to 'sovereignty' with 'sovereign immunity.' ") (internal citations omitted).

148. The court in *Ninigret* blurred the distinction between tribal and federal law by insisting that the question of tribal sovereign immunity was as much a question of federal law as it was of tribal law. *Id.* at 29 n.5 ("Principles of comity strongly suggest that the tribal court be allowed to determine, in the first instance, the scope of its own jurisdiction, whereas the issue of whether a suit may be brought against a tribe at all, in any forum, is of equal interest to the federal and tribal courts.").

Wetuomuck Housing Authority,[149] the First Circuit insisted that tribal sovereign immunity is a question of federal law rather than tribal law because it viewed tribes — and presumably tribal law — as subject to absolute congressional control.[150] The First Circuit argued that subject matter jurisdiction enables federal courts to interpret waivers of tribal sovereign immunity regardless of the law — tribal or federal — governing the waiver.[151] The court thus used subject matter jurisdiction to subsume Congress' absolute control over tribal sovereignty. In allowing federal rather than tribal courts to determine the question of waiver, the court made the application of the tribal exhaustion doctrine completely irrelevant to the question of waiver,[152] and, moreover, ignored Congress' stated policy preferring the development of tribal courts.

The Supreme Court has ruled that Congress has plenary power over Indian tribes.[153] When federal courts ignore stated congressional policy regarding tribes, they undermine that plenary power.[154] Such

149. For the facts of this case, see *supra* notes 1-12 and accompanying text.

150. *Ninigret*, 207 F.3d at 29.

151. *Id.* at 29 ("[A]s long as federal subject-matter jurisdiction exists a defense predicated on tribal sovereign immunity is susceptible to direct adjudication in the federal courts, without reference to the exhaustion of tribal remedies doctrine.").

152. *Id.* The *Ninigret* court interpreted the waiver and then invoked tribal exhaustion on other issues because it determined that congressional plenary power over tribes allowed the court to read tribal sovereign immunity as a matter of federal rather than tribal law. This interpretation of plenary power made the issue of tribal exhaustion irrelevant to the question of waiver by assuming that federal law rather than tribal law controlled the question of waiver. *Id.* ("[T]his conclusion flows naturally from the reality that the sovereignty of Indian tribes is subject to congressional control, with the result that tribal sovereign immunity is necessarily a matter of federal law.").

153. United States v. Kagama, 118 U.S. 375 (1886); Worcester v. Georgia, 31 U.S. 515 (1832); Cherokee Nation v. Georgia, 30 U.S. 1 (1831). Several scholars, however, suggest that the plenary power doctrine lacks textual support and note that the Supreme Court created the doctrine during the nineteenth century. *See, e.g.*, Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 3; Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 260-265; Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes: Reflections on Polishing the Chain of Friendship by Reconsidering the Legal Legacy of American Colonialism*, 34 ARIZ. ST. L.J. 113 (2002).

154. Here, the First Circuit focused on the plenary power claimed by Congress over Indian tribes while ignoring Congress's use of its own power to promote the development of tribal courts and tribal sovereignty. Similarly, the Seventh Circuit claimed to draw a distinction between federal and tribal law but failed to address how this distinction could interplay with questions of waiver. Rather, in determining that the tribe had waived its sovereign immunity, the Seventh Circuit interpreted the tribal code provisions dealing with tribal sovereign immunity. Altheimer & Gray v. Sioux Mfg. Corp., 983 F.3d 803, 812 (7th Cir. 1993) ("SMC points to Sections 2-2-103 and 10-4-106 of the Sioux's Tribal Law and Order Code . . . which reserve sovereign status and immunity for tribal entities. . . . The Tribe, itself, by passing Section 10-4-106(1) of the Code, provides that sovereign immunity may be limited by a tribal entity's charter."). The Seventh Circuit did not apply the tribal exhaustion doctrine even after dismissing tribal sovereign immunity because it said there were no issues of tribal law. *Id.* at 814 ("Here, there has been no direct attack on a tribal court's jurisdiction, there is no case pending in tribal court, and the dispute does not concern a tribal ordi-

disregard for congressional policy places the courts in potential conflict with Congress and raises serious separation of powers concerns.[155] In order to avoid such conflicts, federal courts should refrain from taking action that undermines the ability of tribal courts to hear tribal law issues.

Not hearing defenses of tribal sovereign immunity first not only places the judiciary in direct conflict with the congressional policy of tribal self-determination, but also threatens the sovereign-to-sovereign relationship between tribes and the United States government.[156] The longstanding sovereign-to-sovereign relationship between the United States government and Indian tribes exists in a vast body of codified federal law.[157] The defense of sovereign immunity developed out of respect for separate sovereigns and this respect extends to tribal sovereigns as well.[158] Although federal courts can certainly apply foreign law, and arguably tribal law is analogous to foreign law, congressional policy distinguishes the application of tribal law from simple choice of law doctrine.[159] Congress has not developed a policy protecting or encouraging the development of foreign courts, nor has it established a fiduciary relationship with foreign governments.[160] Federal courts that ignore the distinction between federal and tribal law undermine this established fiduciary sovereign-to-sovereign relationship.

Federal courts should be able to grant conditional denials of tribal sovereign immunity and allow for the renewal of the defense of tribal

---

nance as much as it does state and federal law."). The Seventh Circuit, however, only maintained that there were no issues of tribal law because it failed to consider the interpretation of the tribal code as a tribal law issue. Consequently, the Seventh Circuit, like the First Circuit, failed to grant tribal courts comity and thus, undermined the congressional policy of advocating tribal courts.

155. Conflicts between Congress and the courts over federal Indian policy are not new. Most recently, such conflicts have arisen in two sets of cases. The first line of cases, dealing with the Free Exercise Clause of the Constitution, has led to a prolonged constitutional dialogue over constitutional protections. The Supreme Court's decision in *Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990) led to the passage of the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.* (1994). The Court's response to the legislation in *City of Boerne v. Flores*, 521 U.S. 507 (1997), led Congress to enact the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc. An earlier conflict arose over the Supreme Court's decision in *Duro v. Reina*, 495 U.S. 676 (1990), and led to Congress altering the Court's decision through subsequent legislation, which reaffirmed the power of tribes to exercise criminal jurisdiction over all "Indians" on their reservation. *See* Indian Civil Rights Act of 1968, 25 U.S.C. § 1301(4) (1994).

156. *See supra* note 18 and accompanying text.

157. Codified federal Indian law includes treaties and congressional statutes. *See* GETCHES ET AL., *supra* note 1, at 305-72.

158. *See supra* note 18 and accompanying text.

159. Congress distinguishes the application of tribal law from simple choice of law doctrine by encouraging the development of tribal law. *See supra* note 142 and accompanying text.

160. *See supra* notes 145-146 and accompanying text.

sovereign immunity in federal court in order to ensure judicial efficiency and prevent unnecessary litigation. This would resemble the Court's decision in *Neely v. Martin K. Eby Construction Co., Inc.*, which affirmed the conditional denial procedures under Rule 50(c) of the Federal Rules of Civil Procedure and explained the flexibility inherent in the interplay between motions for judgment as a matter of law and for a new trial.[161] In *Neely*, the Court considered whether a Court of Appeals can order a dismissal or direct entry of judgment for the defendant after reversing the denial of a defendant's Rule 50(b) motion for judgment notwithstanding the verdict.[162] The Court held that a Court of Appeals can order a dismissal because not allowing a court to order a dismissal would undermine the efficiency goal of Rule 50, which serves to prevent unnecessary retrials.[163] As in *Neely*, unnecessary litigation will be prevented by allowing the federal court to make an informed decision on the question of tribal sovereign immunity.[164] A conditional denial prevents unnecessary litigation because the tribal court develops a record on the question of the waiver of tribal sovereign immunity for the federal court to review in determining whether it has jurisdiction.[165] The tribal court record may clarify the tribal sovereign immunity issue. Thus, the federal court can dismiss the case without engaging in further litigation.

Although cases do not necessarily return to the federal courts after tribal adjudication, if one does and is dismissed for lack of jurisdiction,[166] then allowing federal courts to conditionally deny claims to

161. 386 U.S. 317 (1967). Rule 50 gives courts a wide range of flexibility in addressing whether a judgment as a matter of law should be granted. To begin with, parties to a case can raise a motion for a judgment as a matter of law on several occasions throughout the trial. RICHARD B. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH 583 (2d ed. 1995). If a movant's original motion under Rule 50 is denied by the court, the party can renew the motion at a latter stage in the trial, usually after all of the evidence has been presented. *Id.* at 584. The ability to renew the motion allows the court to seek more information prior to granting a judgment as a matter of law.

162. 386 U.S. at 317.

163. 386 U.S. at 326 ("But these considerations do not justify an ironclad rule that the court of appeals should never order dismissal or judgment for defendant when the plaintiff's verdict has been set aside on appeal. Such a rule would not serve the purpose of Rule 50 to speed litigation and to avoid unnecessary retrial. Nor do any of our cases mandate such a rule.").

164. *See supra* note 98.

165. *See* Basil Cook Enters. v. St. Regis Mohawk Tribe, 117 F.3d 61, 65 (2d Cir. 1997). The main difference between the ability to renew a judgment as a matter of law and a conditional denial of sovereign immunity pending tribal court adjudication would be that in the latter, the information the federal court was seeking would come not from continuance of the case in federal court, but from the expertise of another adjudicatory body, namely the tribal court.

166. For instance, after the federal court conditionally denies tribal sovereign immunity and invokes tribal exhaustion, the case has to be heard in tribal court before the federal court will rehear the issues in the case. Once the tribal court hears the case and all potential tribal remedies are exhausted, then the plaintiff can challenge the tribal court's jurisdiction

tribal sovereign immunity appears to undercut the efficiency achieved by the general rule of hearing defenses of tribal sovereign immunity first. Federal courts apply both foreign and state law regularly[167] so litigants could argue that the conditional denial further undermines efficiency by prolonging litigation in cases when the federal court could just apply tribal law.[168] The efficiency goal, however, would not be undermined by a conditional denial because federal courts would only grant conditional denials in tribal waiver cases. Federal courts would still dismiss cases on grounds of tribal sovereign immunity in cases where questions of waiver did not exist.[169] Further, allowing the tribal court to develop a record on the question of the waiver would actually encourage administrative efficiency by promoting the orderly administration of justice.[170]

Federal courts should grant conditional denials of tribal sovereign immunity pending tribal court interpretation in tribal waiver cases because tribal exhaustion provides federal courts with a tribal court record which will inform the federal court's analysis of the waiver question.[171] For example, in cases where no forum selection or choice of law provision unambiguously delegates jurisdiction to a particular court or jurisdiction, the law that pertains to the contract remains unclear.[172] In these cases, standard choice of law analysis indicates that

---

in federal court. At this point, the federal court could decide that the tribe retains tribal sovereign immunity under federal law and dismiss the case. *See supra* note 98 and accompanying text.

167. *See* CURRIE ET AL., *supra* note 7, at 82-89.

168. For instance, federal courts apply substantive state law in diversity jurisdiction proceedings. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). For more information on the Erie Doctrine, see CURRIE ET AL., *supra* note 7, at 651-704.

169. *See supra* Sections II A-B.1.

170. *See Basil Cook Enters.*, 117 F.3d at 65; Stock West Corp. v. Taylor, 964 F.2d 912, 919 (9th Cir. 1992) ("[T]he risks of the kind of 'procedural nightmare' that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made. Exhaustion of tribal court remedies, moreover, will . . . also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.").

171. *See, e.g.*, Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d at 27-29 n.5 (1st Cir. 2000); *Stock West*, 964 F.2d at 919. Ambiguous waiver cases are cases in which it is not clear that the provisions of the contract waive the tribe's sovereign immunity. The federal courts have held repeatedly that a tribe only waives its sovereign immunity if the waiver is clear and explicit. *See, e.g.*, Kiowa Tribe v. Mfg. Tech. Inc., 523 U.S. 751, 754 (1998). The Supreme Court has explained that *C & L Enterprises* is an example of a clear waiver case. In contrast, *Bank of Oklahoma v. Muscogee Nation*, 972 F.2d 1166 (10th Cir. 1992), is an example of an ambiguous waiver case. *See id.* at 1171 ("When read together, the contract clauses are at best ambiguous regarding sovereign immunity in any court except tribal court. We hold that the contract provisions do not reach the high threshold required by *Santa Clara Pueblo* for clear expression of the Nation's waiver of sovereign immunity.").

172. A forum selection or choice of law provision within the contract does not ensure that the applicable law is clear. *See, e.g.*, *Bank of Okla.*, 972 F.2d at 1171.

tribal law most likely would apply.[173] Thus, federal courts should grant a conditional denial of tribal sovereign immunity, which allows for a reconsideration of the tribal sovereign immunity defense after tribal adjudication that is informed by the tribal record.

Federal courts should conditionally deny tribal sovereign immunity defenses in tribal waiver cases because federal courts prefer not to interpret tribal law.[174] Not only do federal courts resist having to apply foreign law in general,[175] but federal courts are particularly wary of applying tribal law because they argue that tribal courts present a better forum for deciding issues of tribal law.[176] Some federal courts have asserted that the federal courts are not competent to decide matters of tribal law and that for them to do so undermines notions of tribal-federal comity.[177] Federal courts also hesitate to apply tribal law because it impedes upon the dignity and autonomy of the tribe, which in most cases could easily apply its own law.[178] Allowing federal courts to apply tribal law could also lead to inconsistent interpretation and application of the law. Some federal courts observe this concern by maintaining that they should not hear tribal law issues because tribes and tribal laws retain "unique ethnic and cultural patterns" that may be misapplied or misinterpreted by other courts.[179] This argument underlies the long-standing federal court recognition of "the exclusive responsibility of Native American tribes to construe their own law."[180] Finally, the fact that federal courts prefer not to apply tribal law is evidenced by the very existence of the tribal exhaustion doctrine.

Further, even though federal courts can interpret tribal, state, and foreign law, federal courts should hear defenses of sovereign immunity first and allow for tribal exhaustion in tribal waiver cases because tribal courts are better at interpreting tribal law than federal courts.

---

173. *See supra* note 43.

174. *See, e.g.*, TTEA v. Ysleta Del Sur Pueblo, 181 F.3d 676, 681 (5th Cir. 1999); Basil Cook Enters. v. St. Regis Mohawk Tribe, 117 F.3d 61, 66 (2d Cir. 1997); Clark v. Land & Forestry Comm. of the Cheyenne River Sioux Tribal Council, 380 F. Supp. 201, 204 (D.S.D. 1974).

175. *See generally* DAVID P. CURRIE, ET AL., CONFLICT OF LAWS: CASES-COMMENTS-QUESTIONS 83-88 (6th ed. 2001).

176. *See supra* note 174.

177. *Basil Cook Enters.*, 117 F.3d at 66 ("Federal courts, as a general matter, lack competence to decide matters of tribal law and for us to do so offends notions of comity underscored in *National Farmers*.").

178. *See id.* at 65.

179. *See Clark*, 380 F. Supp. at 204 ("It is not for the federal courts to become a general clearing house for these cases, but rather it is the function and affirmative obligation of the tribe in view of their unique ethnic and cultural patterns to exercise original jurisdiction in these matters.").

180. *See* Indian Tribal Justice Act, 25 U.S.C. §§ 3601, 3611 (1994); *Basil Cook Enters.*, 117 F.3d at 66 ("The Supreme Court has long recognized the exclusive responsibility of Native American tribes to construe their own law.").

Just as state courts are more expert at applying state law than federal courts are,[181] the expertise of tribal courts ensures that they are better at applying tribal law.[182] Several federal courts have recognized that tribal courts are better at applying tribal law than they are.[183] In advocating the hearing of tribal exhaustion defenses first, the Ninth Circuit emphasized the need for tribal courts to interpret tribal law in the first instance.[184] The expertise of tribal courts also underlies the purpose of the tribal exhaustion doctrine,[185] and has long been recognized by both Congress and the judiciary of the United States.[186] Further, tribal law differs from both state and foreign law, which federal courts interpret regularly.[187]

In tribal waiver cases, federal courts should follow the general rule of hearing defenses of tribal sovereign immunity first but grant conditional denials of tribal sovereign immunity, pending tribal court interpretation of the waiver clause. Federal courts should grant conditional denials and invoke tribal exhaustion because this remains consistent with the federal court practice of hearing jurisdictional issues first. Second, the granting of the conditional denial remains consistent with Congress' policy of self-determination for Indian tribes. The conditional denial also promotes the efficient use of federal and tribal court resources. Further, granting a conditional denial allows tribal courts to hear tribal law issues. Not only are tribal courts better at resolving issues of tribal law, but allowing tribal courts to hear tribal law issues promotes tribal sovereignty. The use of a conditional denial also allows for tribal courts to develop a record on the case to facilitate federal court proceedings.

181. On several occasions, the Supreme Court has deferred to a state supreme court's interpretation of state law based on the principle that state courts are better at applying state law. *See, e.g.*, Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974). Further, abstention doctrines support the view that state courts are better at deciding state law issues than federal courts are. *See* CHEMERINSKY, *supra* note 26, at 737.

182. *See* Burlington N. R.R. Co. v. Crow Tribal Council, 940 F.2d 1239, 1246 (9th Cir. 1991).

183. *See supra* note 174.

184. Stock West Corp. v. Taylor, 964 F.2d 912, 920 (9th Cir. 1992) ("Because a determination of this issue will require a careful study of the application of tribal laws, and tribal court decisions, the district court should have stayed its hand until after the Colville Tribal Courts have had the opportunity to resolve the question.").

185. *See, e.g.*, Basil Cook Enters. v. St. Regis Mohawk Tribe, 117 F.3d 61, 65 (2d Cir. 1997); *Burlington N. R.R. Co.*, 940 F.2d 1239.

186. *See supra* note 180 and accompanying text.

187. *See supra* note 158 and accompanying text.

CONCLUSION

Generally, federal courts should hear defenses of tribal sovereign immunity prior to tribal exhaustion defenses because this remains consistent with federal court procedure, promotes judicial efficiency, and does not impede upon tribal sovereignty. Defenses of tribal sovereign immunity should be heard first because the federal courts treat immunity questions like jurisdictional issues. Further, the federal courts should hear defenses of tribal sovereign immunity first in nonwaiver cases because no question exists as to whether the tribe's sovereign immunity has been waived. Thus, by hearing defenses of tribal sovereign immunity first, federal courts can easily dismiss nonwaiver cases and save judicial resources.

Federal courts should also hear tribal sovereign immunity defenses first in waiver cases. In federal waiver cases, hearing defenses of tribal sovereign immunity first allows the federal court to determine waiver questions arising under federal law and dismiss such cases when the tribe's sovereign immunity has been waived by Congress. In tribal waiver cases, federal courts should still hear defenses of tribal sovereign immunity first; however, they should conditionally grant denials of tribal sovereign immunity, pending tribal court adjudication, in order to ensure that tribal courts have the first opportunity to interpret tribal law. Allowing tribal courts to do so prevents the inefficient use of judicial resources, promotes tribal sovereignty and the development of tribal courts, and develops a record to inform further federal court proceedings.