Volume 62 | Number 4 Article 5

4-1-1984

Indian Hunting and Fishing Rights: The Role of Tribal Sovereignty and Preemption

Laurie Reynolds

INDIAN HUNTING AND FISHING RIGHTS: THE ROLE OF TRIBAL SOVEREIGNTY AND PREEMPTION

LAURIE REYNOLDS†

American Indian tribes enjoy a federally-protected quasi-sovereign status within the states in which they are located. The vague limits of tribal sovereignty, however, result in overlapping state laws and tribal regulations and corresponding tensions between state and tribal authorities. Professor Reynolds suggests a presumption of tribal preemption of state regulation in such situations, which a state could overcome only by a showing of necessity. The suggestion is supported by analysis of the conflict between tribal hunting and fishing rights and state wildlife regulations. The nature and frequency of the problems in this area make it a helpful paradigm, but the conclusions reached are applicable to the full range of conflicts between state and tribal authority.

Because they possess certain attributes of sovereignty, Indian tribes frequently have challenged a state government's attempt to assert its power over the tribes' members or territories.[1] Tribal hunting and fishing rights have provided a fertile testing ground for clashes between state and tribal sovereignty.[2] In no other area of state-tribal disputes are the conflicting interests of both parties so clearly defined. Historically, the land and its resources have played a central role in tribal life. Hunting and fishing, aside from satisfying basic needs of subsistence, often have provided the tribe with a source of income and have played an important part in religious and ceremonial aspects of tribal life.[3] Moreover, the states' heightened awareness of the need to preserve

---

† Assistant Professor of Law, University of Illinois College of Law. B.S., 1972, Georgetown; M.A., 1974, J.D., 1980, Illinois.

1. Although the doctrine of tribal sovereignty has undergone extensive refinement and modification since first articulated, *see infra* text accompanying notes 245-50, recent Supreme Court cases have recognized the continued vitality of tribal sovereignty: "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . . [They] are a good deal more than 'private, voluntary organizations.'" United States v. Mazurie, 419 U.S. 544, 557 (1975) (quoting United States v. Mazurie, 487 F.2d 14, 19 (10th Cir. 1974)).

For a discussion of many aspects of the contours of state, tribal and federal sovereignty, see TASK FORCE ON FEDERAL, STATE, & TRIBAL JURISDICTION, REPORT ON FEDERAL, STATE AND TRIBAL JURISDICTION (1976) (Final Report to the American Indian Policy Review Commission).

2. Commentators have discussed various aspects of the problem. *E.g.*, Burnett, *Indian Hunting, Fishing and Trapping Rights: The Record and the Controversy*, 7 IDAHO L. REV. 49 (1970); Hobbs, *Indian Hunting and Fishing Rights II*, 37 GEO. WASH. L. REV. 1251 (1969); Johnson, *The State Versus Indian Off-Reservation Fishing Rights*, 47 WASH. L. REV. 207 (1972); Schmidhauser, *The Struggle for Cultural Survival: The Fishing Rights of the Treaty Tribes of the Pacific Northwest*, 52 NOTRE DAME LAW. 30 (1976); Comment, *Indian Hunting and Fishing Rights*, 10 ARIZ. L. REV. 725 (1968); Comment, *Indian Regulation of Non-Indian Hunting and Fishing*, 1974 WIS. L. REV. 499.

3. *See, e.g.*, United States v. Washington, 384 F. Supp. 312, 350-53 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); United States v. Michigan, 471 F. Supp. 192, 213 (W.D. Mich. 1979), *vacated and remanded per curiam*, 623 F.2d 448 (6th Cir.

valuable wildlife resources, on the one hand, and current federal policy encouraging maximum tribal self-government, on the other, have accentuated the conflicting assertions of state and tribal power. In addition, a long history of mutual distrust and lack of cooperation between the state and the tribes provides a strong undercurrent to present conflicts.

The disputes surface in various contexts because challenges to state or tribal assertions of control over hunting and fishing implicate two fundamental aspects of tribal sovereignty—control over territory and control over tribal members.[4] After reviewing the source and scope of Indian hunting and fishing rights, this Article defines the limits of federally protected tribal sovereignty over hunting and fishing. Subsequently, this Article reviews state attempts to regulate and suggests that state regulation of both on- and off-reservation hunting and fishing rights should be subjected to the same stringent analysis. This Article offers a preemption approach that would minimize state incursions on tribal sovereignty while protecting important state regulatory interests. Specifically, the analysis suggests a statutorily based presumption of preemption over a state's regulation in any area where tribal sovereign powers have received federal protection. This analysis, though especially applicable to hunting and fishing rights because of the traditional importance of game and wildlife to tribal life, also may find application in other areas in which tribal and state powers clash.

I. SOURCE AND SCOPE OF INDIAN HUNTING AND FISHING RIGHTS

A. Aboriginal Rights

At an early stage in the development of the federal government's relationship with Indian tribes, the Supreme Court recognized that the tribes, as the original inhabitants of the country, possessed an aboriginal right to occupy the land. Deriving from the tribe's possession prior to discovery and settlement by Europeans, aboriginal title extends to all lands occupied exclusively by the

---

1980). For a general introduction to traditional Indian hunting and fishing activities, see R. SPENCER & J. JENNINGS, THE NATIVE AMERICANS (New York, 1965).

4. For purposes of federal criminal law, the relevant territorial distinction is "Indian country," which applies federal law to all land within the borders of the reservation, "notwithstanding the issuance of any patent." 18 U.S.C. § 1151 (1982). Although this statutory provision defines the scope of federal criminal jurisdiction on the reservation, it reflects general congressional intent to limit state powers on the reservation: "While § 1151 is concerned on its face, only with criminal jurisdiction, the Court has recognized that it generaly applies as well to questions of civil jurisdiction." DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975) (citations omitted).

Non-Indian land on the reservation is the product of the General Allotment Act of 1887, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-358 (1982)), and specific allotment acts relating to individual tribes, *e.g.*, the Crow Allotment Act of 1920, 41 Stat. 751 (1920), which authorized individual ownership of former tribal lands. *See generally* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 127-39 (1982); D. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS (1973).

See Special Recent Developments, *Tribal Sovereignty: An Analysis of* Montana v. United States, 8 AM. INDIAN L. REV. 175 (1980); Note, 17 LAND & WATER L. REV. 189 (1982); Note, Montana v. U.S.—*Effects on Liberal Treaty Interpretation and Indian Rights to Lands Underlying Navigable Waters*, 57 NOTRE DAME LAW. 689 (1982) for critical discussions of Montana v. United States, 450 U.S. 544 (1981), discussed *infra* text accompanying notes 127-47.

tribe since time immemorial; it is valid against all persons unless and until extinguished by the federal government.[5] Broadly defined to include all "beneficial incidents" of occupancy,[6] aboriginal title has uniformly been found to include the rights to hunt and fish.[7] Because the ultimate fee interest rests in the United States, however, the holder of aboriginal title cannot assert a real property interest in land; rather, the interest is a possessory one, a mere permissive right of occupancy.[8] Thus, efforts to transfer an interest in land held under claim of aboriginal title are invalid without congressional approval.[9]

Aboriginal title is further limited by the federal government's absolute power to modify or abrogate.[10] Congress[11] may extinguish aboriginal title "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise . . . . The manner, method and time of such extinguishment raise political, not justiciable issues."[12] Moreover, extinguishment of aboriginal title does not give rise to a taking claim under the fifth amendment.[13]

Although congressional power is unlimited, the courts will not lightly infer that the power to extinguish aboriginal title has been exercised; congressional intent must be clear. In *United States v. Dann*,[14] for example, the Ninth Circuit found that aboriginal Indian title had not been extinguished, notwithstanding several federal legislative enactments related to the disputed land.[15] First, the court determined that the Homestead Act,[16] which granted homesteads within the tribe's aboriginal holdings, did not constitute sufficient exercise of dominion to extinguish aboriginal title to unsettled land. Second, the court rejected the argument that Congress' administration of the lands under

5. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 587 (1823).

6. Shoshone v. United States, 299 U.S. 476, 496 (1937).

7. United States v. Minnesota, 466 F. Supp. 1382, 1385 (D. Minn. 1977), *aff'd per curiam sub nom.* Red Lake Band of Chippewa Indians v. Minnesota, 614 F.2d 1161 (8th Cir.), *cert. denied*, 449 U.S. 905 (1980); *In re* Wilson, 30 Cal. 3d 21, 26, 634 P.2d 363, 365, 177 Cal. Rptr. 336, 339 (1981). See also Winters v. United States, 207 U.S. 564, 576 (1908), in which the Supreme Court indicated that it would give broad protection to Indian claims of implied reservation of aboriginal rights.

8. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667 (1974); Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955).

9. Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

10. Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955); United States v. Santa Fe Pac. R.R., 314 U.S. 339 (1941).

11. Executive action unauthorized by Congress would not be effective to extinguish aboriginal title. United States v. Dann, 706 F.2d 919, 928 (9th Cir. 1983); United States v. Southern Pac. Transp. Co., 543 F.2d 676, 689-90 (9th Cir. 1976).

12. United States v. Santa Fe Pac. R.R., 314 U.S. 339, 347 (1941) (citations omitted).

13. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 284-85 (1955).

14. 706 F.2d 919 (9th Cir. 1983).

15. The Indian parties in *Dann* asserted aboriginal title as a defense to a trespass suit brought by the federal government to stop the Danns from grazing their cattle on federal lands without a permit. Although the Supreme Court had already established that Indian aboriginal rights had survived on lands incorporated into the United States by treaty with Mexico, United States v. Santa Fe Pac. R.R., 314 U.S. 339, 345-46 (1941), of which the disputed lands in *Dann* were a part, the government nevertheless contended that several federal statutes evidenced clear congressional intent to extinguish aboriginal title. *See* 706 F.2d at 922.

16. Ch. 75, 12 Stat. 392 (1862) (repealed 1976).

the Taylor Grazing Act[17] had extinguished Indian title. Nor did the treaty establishing a reservation for the tribe evidence sufficient intent to destroy the tribe's title to its vast expanse of aboriginal territory. Thus, the court concluded, the Indian defendants could raise their aboriginal title as a defense to a prosecution for trespass on federal lands.[18] If, however, a court concludes that the federal government's actions do manifest an absolute and unconditional intent to extinguish aboriginal title, the court must hold that the United States or its grantee has acquired a "perfect and unburdened title."[19] Thus, unless otherwise excluded from extinguishment, loss of aboriginal title results in loss of all incidents of that title, including hunting and fishing rights.[20]

The original treaty with the particular Indian tribe is the primary tool for determining whether aboriginal hunting and fishing rights have survived the extinguishment of Indian title. In some instances, the tribe retains those hunting and fishing rights that were incidents of its aboriginal title[21] although it had agreed to cede its aboriginal title to a particular parcel of land. Reservation of aboriginal hunting and fishing rights need not be expressly stipulated in the treaty, however. A court could find that events prior to the treaty, circumstances surrounding the treaty's negotiations, and subsequent actions by the parties to the treaty revealed an oral or implied agreement that the tribes could continue to hunt and fish on areas over which they had relinquished their aboriginal title.[22]

A finding that aboriginal rights have received either express or implied federal recognition has important legal consequences. "Recognized" title, as distinguished from aboriginal title, gives the holder a property interest that, if taken by the government, gives rise to a claim for just compensation.[23] Recognized hunting and fishing rights are entitled to the same protection against uncompensated takings.[24] Moreover, federal recognition of aboriginal hunt-

17. 43 U.S.C. § 315 (1976). Pursuant to this Act, the Secretary of the Interior can issue permits for cattle grazing on the public domain.

18. *But cf.* United States v. Gemmill, 535 F.2d 1145 (9th Cir.), *cert denied*, 429 U.S. 982 (1976) (forcible expulsion of the Indians, followed by continuous use of the land as a national forest, culminating in final payment of a tribal claim, provided ample evidence of congressional intent to extinguish aboriginal title).

19. Minnesota v. Hitchcock, 185 U.S. 373, 389 (1902).

20. *E.g.*, United States v. Minnesota, 466 F. Supp. 1382 (D. Minn. 1979), *aff'd per curiam sub nom.* Red Lake Band of Chippewa Indians v. Minnesota, 614 F.2d 1161 (8th Cir.), *cert. denied*, 449 U.S. 905 (1980); *In re* Wilson, 30 Cal. 3d 21, 634 P.2d 363, 177 Cal. Rptr. 336 (1981). For an argument that aboriginal hunting and fishing rights are not extinguished with aboriginal title, see *Wilson*, 30 Cal. 3d at 37, 634 P.2d at 373, 177 Cal. Rptr. at 346 (Mosk, J., dissenting).

21. *See, e.g.*, Treaty of Medicine Creek, Dec. 26, 1854, United States-Nisquallys Tribe, 10 Stat. 1132 (reserving "the right to fish at all usual and accustomed fishing grounds and stations."); Treaty of 1855, art III, June 11, 1855, United States-Nez Perce Tribe, 12 Stat. 957 (reserving the "privilege of hunting . . . upon open and unclaimed land."); Fort Bridger Treaty, art. IV, June 6 1900, United States-Bannock and Shoshone Tribes, 31 Stat. 672 (reserving the right to hunt and fish on ceded lands "so long as any of the lands . . . remain part of the public domain").

22. *See, e.g.*, United States v. Michigan, 471 F. Supp. 192, 216 (W.D. Mich. 1979), *vacated and remanded per curiam*, 623 F.2d 448 (6th Cir. 1980); United States v. Minnesota, 466 F. Supp. 1382 (D. Minn. 1979), *aff'd per curiam sub nom.* Red Lake Band of Chippewa Indians v. Minnesota, 614 F.2d 1161 (8th Cir.), *cert. denied*, 449 U.S. 905 (1980).

23. *See* Menominee Tribe v. United States, 391 U.S. 404, 413 (1968).

24. *See* Confederated Tribes of the Umatilla Indian Reservation v. Alexander, 440 F. Supp.

ing and fishing rights carries a much greater degree of protection against state interference with, and regulation of, these rights. Whereas unextinguished aboriginal hunting and fishing rights generally appear to be subject to state wildlife regulation,[25] the courts have insulated federally recognized hunting and fishing rights from state regulation unless such regulation meets carefully defined standards and is necessary to further an important state interest.[26] Thus, tribal struggles to obtain judicial confirmation of hunting and fishing rights rarely rest on the assertion that aboriginal hunting and fishing rights have survived without extinguishment; rather, the tribe typically will argue that those aboriginal rights were subsequently confirmed by the federal government, either expressly by treaty, or impliedly through its actions. If the tribe is successful in that crucial threshold issue, the disputed hunting and fishing rights then become subject to the same rules governing judicial analysis of other federally recognized Indian rights.

B. Federal Recognition of Indian Hunting and Fishing Rights

1. On-Reservation Hunting and Fishing

Creation of an Indian reservation, by treaty, statute, or executive order,[27] typically reserves to the Indian tribe the rights to hunt and fish on the reservation. Even when the treaty makes no mention of these on-reservation rights, a court is likely to find that the creation of the reservation itself guaranteed the tribe's rights to engage in hunting and fishing activities. Thus, because hunting and fishing are "normal incidents of Indian life," the Supreme Court has construed a treaty creating a reservation "for a home to be held as Indian lands are held" as reserving the rights to hunt and fish.[28] This conclusion follows logically from the fact that reservations were conceived so that the Indians could preserve their way of life. As the Supreme Court of Minnesota noted when analyzing a treaty that made no mention of the Indians' right to hunt and fish on the reservation: "Certainly it would be incongruous to construe the treaty as denying the Indians their very means of existence while purporting to grant them a home."[29]

---

553 (D. Ore. 1977); Whitefoot v. United States, 293 F.2d 658 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962).

25. *See* Organized Village of Kake v. Egan, 369 U.S. 60, 76 (1962).

26. *See infra* text accompanying notes 152-63.

27. *See* Blake v. Arnett, 663 F.2d 906, 909 (9th Cir. 1981); State v. Lowe, 109 Wis. 2d 663, 327 N.W.2d 166 (1982). Until 1871 federal-Indian affairs were conducted by treaty. The Appropriations Act of 1871, 16 Stat. 544, 566 (1871) (codified at 25 U.S.C. § 71 (1982)), prohibited further treaties, primarily because of congressional desire to exercise control over Indian affairs. This Act, though changing the form of Indian-U.S. relations, did not change the substance of those relations. *See* F. COHEN, *supra* note 4, at 127.

28. Menominee Tribe v. United States, 391 U.S. 404, 405-06 (1968).

29. State v. Clark, 282 N.W.2d 902, 909 (Minn. 1979). *See also* State v. Gurnoe, 53 Wis. 2d 390, 405, 192 N.W.2d 892, 899 (1972) (construing treaty language "to set apart and withhold from sale, for the use of the Chippewas" as including the right to hunt and fish).

The *Gurnoe* court limited the tribe's treaty right to those types and methods of fishing employed by the tribe at the time of the treaty and to those modern methods that are "reasonably consistent" with those traditional techniques. *Id.* at 411, 192 N.W.2d at 902. The concurring judges expressed some doubt about the need to deprive treaty fishermen of the advantages of

On-reservation hunting and fishing rights generally are exclusive to the Indian tribal members for whom the reservation was created, even if the exclusivity was not expressly stipulated in the treaty creating the reservation.[30] The exclusivity of the hunting and fishing rights derives in part from the tribe's power to exclude nonmembers from the reservation[31] and in part from the tribe's retained sovereignty over tribal territory.[32] Thus, the courts have upheld a tribe's right to regulate nonmember hunting and fishing on the reservation.[33] In addition, Indians exercising hunting and fishing rights on the reservation generally are beyond the jurisdiction of state laws.[34]

Although exclusive at the time the reservation was created, on-reservation hunting and fishing rights may be reduced by subsequent congressional action. If, for example, large amounts of reservation land were sold to non-Indian owners pursuant to the General Allotment Act,[35] a court likely would find that the hunting and fishing rights of the reservation Indians had lost their exclusive character and must be shared with non-Indians.[36] When non-Indian ownership on the reservation is minimal, however, the Supreme Court has indicated that tribes retain their powers to exclude nonmembers and to control on-reservation hunting and fishing activities.[37] The loss of exclusive tribal control of on-reservation activities alone does not subject tribal members on the reservation to state regulatory powers. Rather, the result is frequently an uneasy coexistence between the state and tribal sovereigns, with each responsible for various parts of the checkerboard territory.[38]

---

modern technology. *See also* United States v. Washington, 384 F. Supp. 312, 402 (W.D. Wash. 1974) (treaty interpreted as encompassing improvements developed in traditional fishing techniques); Comment, *State Power and the Indian Treaty Right to Fish*, 59 CALIF. L. REV. 485, 522 (1971).

30. *See* United States v. Washington, 384 F. Supp. 312, 332 n.12 (W.D. Wash. 1974); State v. Sanapaw, 21 Wis. 2d 377, 383, 124 N.W.2d 41, 44 (1963), *cited with approval in* Menominee Tribe of Indians v. United States, 391 U.S. 404, 406 n.2 (1968).

31. *See* Merrion v. Jicarilla Apache Tribe, 102 S. Ct. 894 (1982); Quechan Tribe of Indians v. Rowe, 531 F.2d 408, 410 (9th Cir. 1976) ("In the absence of treaty provisions or congressional pronouncements to the contrary, the tribe has the inherent power to exclude non-members from the reservation."); Ortiz-Barraza v. United States, 512 F.2d 1176, 1179-80 (9th Cir. 1975).

32. Merrion v. Jicarilla Apache Tribe, 102 S. Ct. 894, 901, 904 (1982); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 165-66 (1980); United States v. Mazurie, 419 U.S. 544, 557 (1975).

33. *See infra* text accompanying notes 120-47.

34. *See infra* text accompanying notes 177-85.

35. Indian General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-358 (1982)).

36. Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001, 1006 (D. Minn. 1971). The Supreme Court has agreed that subsequent alienation of reservation lands can destroy the once exclusive character of Indian hunting and fishing rights on the reservation. *See* Montana v. United States, 450 U.S. 544, 559-61 (1981) and *infra* text accompanying notes 127-47.

37. In New Mexico v. Mescalero Apache Tribe, 103 S. Ct. 2378 (1983), the Court confirmed that the sole power to regulate on-reservation hunting and fishing rested with the tribe. The Court noted that only 193 acres of the 460,000 acre Mescalero reservation had passed to non-Indian ownership, *id.* at 2381, while in Montana v. United States, 450 U.S. 544, 548 (1981), 28% of the reservation land was owned by non-Indians. Though the Mescalero tribe generally could exclude non-Indians from the reservation, it presumably must allow the non-Indian landowner access to his land. *See* F. COHEN, *supra* note 4, at 252 & n.86.

38. The result of the holding in Montana v. United States, 450 U.S. 554 (1981), has been the creation of a dual checkerboard pattern of hunting and fishing jurisdiction, requiring a plat book

2. Off-Reservation Hunting and Fishing—To What Does the Right Attach?

An assertion of off-reservation Indian hunting and fishing rights frequently involves a dispute with non-Indians over valuable commercial or recreational hunting and fishing that otherwise would be subject to the state's broad powers to control game and wildlife within its borders. The most fiercely contested claims of off-reservation hunting and fishing rights have focused on the treaties between the United States and various tribes of the Pacific Northwest. The tribes had reserved "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory . . . ."[39] In three early cases concerning disputed Indian claims of rights protected by that treaty language, the Supreme Court laid to rest the contention that the phrase limited Indian fishing rights to those enjoyed by any other inhabitant of the territory.

In *United States v. Winans*[40] the United States sought to enjoin landowners who were preventing treaty Indians from crossing their land to reach a "usual and accustomed" fishing site. Because the Indians' adversaries advanced a construction of the treaty that would have limited the Indians to the same rights they had without the treaty, the Court rejected the interpretation as rendering the treaty a nullity. Instead, the Court concluded that the treaty secured not only the right to fish, but also a right of access to all "usual and accustomed" sites.[41] Fourteen years later, in *Seufert Brothers Co. v. United States*,[42] the Court held that "usual and accustomed" must be construed broadly, to include both the natural meaning of the word and the Indians' probable understanding at the time of the treaty, as reflected in their actions after the treaty. Subsequently, in *Tulee v. Washington*,[43] the Court invalidated the state's attempt to impose a license fee on Indians fishing at one of the treaty-protected sites, concluding that such a fee "act[s] upon the Indians as a charge for exercising the very right their ancestors intended to reserve."[44] The Court thus established the framework of analysis for later battles over fishing rights in the Northwest; taken together, *Seufert*, *Winans*, and *Tulee* articulated the important rule that off-reservation treaty guarantees will be construed

---

to determine the owner of the land, and an identification of the person sought to be regulated before the proper regulatory power, tribal or state, can be identified. Tribal members are subject solely to tribal control anywhere within the reservation, whereas nonmembers are subject to state regulation on non-Indian lands and tribal regulation on all lands owned by the tribe, an Indian, or the United States. *See infra* text accompanying notes 127-47. The Court thus has exacerbated the "impractical pattern of checkerboard jurisdiction" it deplored in Seymour v. Superintendent of Wash., 368 U.S. 351, 358 (1962).

39. Treaty of Medicine Creek, Dec. 26, 1854, United States-Nisqually Tribe, 10 Stat. 1132. For a list of all treaties with tribes in the Pacific Northwest in which similar rights were reserved, see United States v. Washington, 384 F. Supp. 313, 349 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

40. 198 U.S. 371 (1905).

41. *Id.* at 384.

42. 249 U.S. 194, 198-99 (1919).

43. 315 U.S. 681 (1942).

44. *Id.* at 685.

broadly to effectuate the probable understanding of the signatory tribe and to provide protection from state regulation that impermissibly interferes with the exercise of treaty-protected rights.

In the late 1960s these off-reservation fishing rights formed the basis for a broad challenge to the states' ability to limit Indian fishing at the "usual and accustomed" sites. Beginning with *Puyallup Tribe v. Department of Game*, *(Puyallup I)*[45] and continuing to the present, courts have struggled to ensure ample protection of Indian treaty rights while recognizing legitimate state conservation interests. Though most of the cases in this series have focused on the state's ability to regulate Indians in the exercise of their treaty rights,[46] defining the off-reservation right was a necessary preliminary issue. In *United States v. Washington*[47] the federal district court construed the "in common with" language as guaranteeing the Indians the right to catch up to fifty percent of the "harvestable runs" of salmon and steelhead trout that passed through usual and accustomed fishing sites.[48] The Supreme Court subsequently found several justifications for construing the treaty language as establishing a division of harvestable fish into approximately equal treaty and nontreaty shares.[49] Starting with the established rules of *Seufert*, *Winans*, and *Tulee*, the Court reiterated that "[n]ontreaty fishermen may not rely on property law concepts, devices such as the fish wheel, license fees, or general regulations to deprive the Indians of a fair share of the . . . available fish."[50] Rather, in construing treaties that guarantee off-reservation hunting or fishing rights, a court must define those rights by considering the facts surrounding the treaty negotiations and the Indians' probable expectations at the time the treaty was signed, as gleaned from evidence of the tribe's way of life. Moreover, the Court emphasized, modern delineation of the treaty share must en-

45. 391 U.S. 392 (1968).

The controversy remains far from settled, notwithstanding three subsequent Supreme Court cases, Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973) (*Puyallup II*), Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165 (1977) (*Puyallup III*), and Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); two lengthy district court orders, United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), and United States v. Washington, 459 F. Supp. 1020 (W.D. Wash. 1978), and various state court and federal circuit court decisions. *See* Comment, *Indian Fishing Rights Return to Spawn: Toward Environmental Protection of Treaty Fisheries*, 61 OR. L. REV. 93 (1982); Note, *Treaties: Fishing Rights in the Pacific Northwest—The Supreme Court "Legislates" an Equitable Solution*, 8 AM. INDIAN L. REV. 117 (1980).

46. *See infra* text accompanying notes 153-75.

47. 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

48. Steelhead trout and salmon are anadromous fish, that is, they hatch in fresh water, migrate to the ocean, and return to their place of origin to spawn. Their "runs" are predictable; moreover, a certain "escapement" number of fish must be allowed to ensure perpetuation of the runs for future years. For each run of a particular fish, the available harvest can be calculated with reasonable certainty to allow sufficient escapement. Because fish constitute a valuable commercial resource, and because they may pass through several states, Indian reservations, off-reservation treaty fishing sites, and international waters, the jurisdictional problems are particularly complex. *See generally* United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974).

49. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 671 (1979).

50. *Id.* at 684-85.

sure adequate protection of the Indians' current "reasonable livelihood needs."[51] Because Indians constituted three-fourths of the population of the Pacific Northwest when the treaties were signed, and depended heavily on fishing for food and income, the Supreme Court found the logic of the district court's apportionment to be "manifest."[52]

In more recent litigation, parties have continued to dispute the proper means of calculating the number of fish to which the off-reservation treaty right attaches. The Ninth Circuit held that the nontreaty share of harvestable fish includes only fish to which nontreaty fishermen have access.[53] Thus, the court found that the district court properly rejected the state's argument that nontreaty fishermen were entitled to fifty percent of a run that had originated and remained on the reservation. Computation of the number of fish to which each group is entitled, then, excludes fish that never proceed upstream enough to leave the reservation. Several months later, the same court ruled that the state must include fish raised in hatcheries when defining the harvestable run to which the treaty fishermen's fifty percent right attaches.[54] The state argued that the tribes' treaty rights extended only to the natural fish run that passed the off-reservation fishing sites, and contended that it had no obligation to subsidize Indian treaty rights by guaranteeing tribal access to hatchery fish. The Ninth Circuit rejected these arguments primarily on the basis that the state can assert no ownership interest in the fish once they are released. In addition, the court noted the practical impossibilities of distinguishing natural fish from hatchery fish. Moreover, the court concluded, because the natural fishery was destroyed at least in part by non-Indian fishing and degradation of the environment, the state's hatchery fish constituted the modern substitute of the treaty right to natural fish.[55]

Other courts have been the forum for similar, though perhaps less spectacular, litigation requiring definition of the scope of off-reservation hunting and fishing rights guaranteed by treaty. In some cases, courts have defined the geographic area in which the reserved rights may be exercised;[56] in others, the dispute has centered on whether the treaty included an implied reservation of

---

51. *Id.* at 685.

52. *Id.* at 686 n.27. The Court also noted the compelling logic behind the district court's 50-50 apportionment: "For an equal division—especially between parties who presumptively treated with each other as equals—is suggested, if not necessarily dictated, by the word 'common' as it appears in the treaties. Since the days of Solomon, such a division has been accepted as a fair apportionment of a common asset . . . ." *Id.* The Court, however, did modify the manner in which the treaty share would be calculated, ruling that all fish caught by the Indians, regardless of where caught, would be included in the computation of the treaty share. *Id.* at 687. Thus, the Court reversed the district court's exclusion of fish caught on the reservation and fish caught for ceremonial purposes.

53. United States v. Washington, 694 F.2d 188, 190 (9th Cir. 1982) (Couby, J., concurring), *cert. denied*, 103 S. Ct. 3536 (1983).

54. United States v. Washington, 694 F.2d 1374 (9th Cir. 1982), *withdrawn for reh'g en banc*, 704 F.2d 1141 (9th Cir. 1983).

55. *Id.* at 1378. The state based its argument in part on Justice White's concurrence in Department of Game v. Puyallup Tribe, 414 U.S. 44, 49-50 (1973) (*Puyallup II*), in which Justice White stipulated that the treaty rights extended only to the natural fish run.

56. *See infra* notes 60-63 and accompanying text.

hunting and fishing rights;[57] in still others, courts have determined whether a particular group was entitled to the protection of off-reservation treaty rights.[58] All of these cases confirmed the well-established rule that the treaties constituted a grant from the tribe to the federal government and a reservation of all rights not ceded,[59] and thus must be construed broadly to reflect the intentions and understanding of the signatory tribe.

Several disputes have arisen over treaty language reserving to the tribe the rights to hunt and fish "on open and unclaimed land." Because the tribes could have reserved their aboriginal hunting and fishing rights only on lands on which they actually hunted and fished at the time of the treaty, the preliminary inquiry must determine whether the area allegedly protected by the treaty formed part of the tribe's aboriginal territory. The court then must determine how subsequent dispositions of the land have affected treaty rights; that is, it must decide if the challenged geographical area has remained "open and unclaimed." Indian off-reservation treaty rights continue unless the land has been settled by non-Indians or otherwise reduced to private ownership.[60]

A court could find that an express reservation of off-reservation rights was not limited to the territory specifically mentioned in the treaty. The Supreme Court of Michigan found that a treaty provision reserving Indian rights to hunt and fish on territory ceded to the United States guaranteed the right to fish in waters that were not part of the ceded territory. In *People v. Jondreau*[61] the state argued that the tribe's 1854 treaty retained no right to fish in navigable waters, because title to those waters previously had vested in the state when it entered the Union in 1837. Thus, the state contended that the treaty language reserving fishing rights in territory "hereby ceded" in 1854 did not protect the right to fish in state waters. Rejecting the state's argument and instead looking at the "substance of the right, without regard to technical rules,"[62] the court concluded that the right to fish on ceded territory must be extended to waters under state sovereignty at the time the treaty was signed: "Any other construction of the treaty would make the right granted by the treaty without substance."[63]

Even if the treaty contains no express stipulation for off-reservation hunting and fishing, a court nevertheless may imply a tribal reservation of those

57. *See infra* notes 64-70 and accompanying text.

58. *See infra* notes 71-75 and accompanying text.

59. United States v. Winans, 198 U.S. 371, 381 (1905).

60. Thus, treaty rights extend to national forests and all other lands still held by the federal government. State v. Arthur, 74 Idaho 251, 261 P.2d 135 (1953). *See also* State v. Tinno, 94 Idaho 759, 764, 497 P.2d 1386, 1391 (1972).

61. 384 Mich. 539, 185 N.W.2d 375 (1971).

62. *Id.* at 544, 185 N.W.2d at 377.

63. *Id.* at 545, 185 N.W.2d at 378. Congress' power to give federal recognition to off-reservation treaty rights on state owned territory appears well established. Missouri v. Holland, 252 U.S. 416 (1920). But see Wisconsin v. Baker, 698 F.2d 1323, 1333-35 (7th Cir.), *cert. denied*, 103 S. Ct. 3537 (1983), in which the Seventh Circuit expressed doubt that Congress could limit state sovereignty in this way.

rights. In *United States v. Michigan*[64] the federal district court recognized tribal off-reservation fishing rights in treaties that ceded huge parcels of Indian aboriginal territory and established reservations for the displaced tribes, even though the treaty made no mention of off-reservation rights. The court found that the choice of the reservation's location, land near traditional fishing grounds, suggested that the Indians had intended to continue exercising their aboriginal fishing rights. In addition, the court drew a negative inference from the United States' failure to extract a release of fishing rights from the Indians.[65] Moreover, certain treaty provisions, especially one granting the Indians a yearly entitlement of salt barrels to promote the tribe's fish-preserving endeavors, confirmed that all parties to the treaties had expected the Indians to pursue their off-reservation fishing to the same extent as before the treaty. On balance, the court did not believe that the Indians had signed a treaty with the understanding that it would make their way of life impossible.[66]

Once a court determines that an Indian tribe has retained express or implied rights to hunt and fish at sites off the reservation, the protection of federal recognition attaches. The Indians acquire rights superior to non-Indian citizens, whose hunting and fishing rights may be conditioned and extensively regulated by the state.[67] Moreover, off-reservation hunting and fishing rights embody more than the right to dip a net or hook into the water; the state has an affirmative duty to ensure the availability of a fair share of game and wild-

64. 471 F. Supp. 192 (W.D. Mich. 1979), *vacated on other grounds*, 623 F.2d 448 (6th Cir. 1980).

65. The United States could have extracted a relinquishment of aboriginal hunting and fishing rights if it had intended to limit Indian fishing. *See, e.g.*, Treaty with the Winnebagoes, Sept. 15, 1832, United States-Winnebago Tribe, 7 Stat. 370, *cited in* United States v. Michigan, 471 F. Supp. at 234.

66. United States v. Michigan, 471 F. Supp. at 231. If the treaty had specifically ceded those rights, the court would have been powerless to rewrite the treaty. As the Supreme Court noted in Choctaw Nation v. United States, 318 U.S. 423, 432 (1943): "But even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties."

Other courts have found similar evidence of implied retention of off-reservation fishing rights. In State v. Gurnoe, 53 Wis. 2d 390, 192 N.W.2d 892 (1972), the court implied those rights on the basis of language creating a reservation "for the use" of the tribe, when the historical research revealed that the tribe had enjoyed an uninterrupted 300 years of fishing in the disputed waters and that this tradition had continued unmodified after the signing of the treaty. *See also* Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341 (7th Cir. 1983), in which the court reached the same conclusion as to reserved off-reservation fishing rights, but with a slightly different analysis. The issue before the court in *Lac Courte Oreilles* was whether the tribe had reserved fishing rights on huge tracts of land ceded pursuant to two predecessor treaties, signed in 1837 and 1842. Thus, the tribe's claims were much broader than those asserted in *Gurnoe*, in which the court was dealing with reserved fishing rights on smaller portions of land ceded in a later treaty. The *Lac Courte Oreilles* court concluded that express reservation of fishing rights in the 1837 and 1842 treaties had never been abrogated. *Id.* at 364-65. Similarly, in State v. Lowe, 109 Wis. 2d 633, 327 N.W.2d 166 (Ct. App. 1982), the court found adequate expression of intent to reserve off-reservation fishing rights in evidence that the tribe historically had fished in the waters and that the land was bought by the United States as a reservation precisely because of the importance of tribal fishing. *Id.* at 639, 327 N.W.2d at 169. Moreover, an express reservation of the right to hunt off the reservation has been construed as encompassing the right to fish as well.

67. United States v. Winans, 198 U.S. 371, 381 (1905).

life to treaty fishermen.[68] Recently, a tribe asserted that off-reservation rights protected by treaty embody an affirmative right to prevent the state from mismanaging its resources.[69] Although no court of appeals has yet confirmed this asserted environmental right, the Supreme Court's admonition that a state may not rely on its regulatory powers to defeat a tribe's treaty right[70] suggests that the tribe and the federal government have the power to prevent action that would dissipate the resource to which the treaty right attaches.

3. Parties Entitled to Exercise Treaty Rights

Judicial confirmation of treaty-protected hunting and fishing rights and the delineation of the territory or resources to which they apply may not put an end to litigation over the scope of the rights. In some cases, courts must determine if a particular claimant is entitled to exercise the treaty guarantee. Indians asserting claims to off-reservation treaty rights must establish that their group has preserved its tribal status. The group need not have acquired an organizational structure it did not have when the treaty was signed;[71] nor will a continual evolution of tribal policy and structure prove fatal to its claim. For treaty rights to endure, however, a "defining characteristic" of the original tribe must persist.[72]

Although federal recognition of the tribe is not a prerequisite to the continued vitality of treaty rights, a total lack of political and cultural cohesion will deprive the group of the ability to assert entitlement to the exercise of those rights. In *United States v. Washington*[73] the Ninth Circuit upheld the district court's finding that descendants of members of treaty-signatory tribes had not functioned since treaty times as " 'continuous[ly] separate, distinct and cohesive Indian cultural or political communit[ies].' "[74] The court held the groups ineligible for off-reservation treaty rights. Similarly, withdrawn mem-

68. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 678-79 (1979). On that basis the Ninth Circuit, in Washington State Charterboat Ass'n v. Baldridge, 702 F.2d 820 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 736 (1984), rejected the non-Indians' argument that the "run by run" approach used to allocate the salmon harvest should be substituted by an "aggregate" calculation, based on percentages of the entire available harvest. The non-Indians argued that the run by run approach forces an early halt to each year's ocean catch by nontreaty fishermen, at which point the runs are indistinguishable. Because the aggregate approach would not ensure that a tribe received its share of each particular run, but rather only would guarantee that 50% of the total available harvest was preserved for treaty fishermen, the court refused to modify the method of computation.

69. The Ninth Circuit orginally rejected that assertion in United States v. Washington, 694 F.2d 1374 (9th Cir. 1982). The opinion was withdrawn and the case accepted for rehearing en banc. 704 F.2d 1141 (9th Cir. 1983). *See generally* Comment, *supra* note 45; Note, United States v. Washington *(Phase II)*: *The Indian Fishing Conflict Moves Upstream*, 12 ENVTL. L. 469 (1982).

70. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 682 (1979).

71. White negotiators frequently imputed to the loose knit Indian groups a tribal structure they did not have. As the Ninth Circuit noted: "A structure that never existed cannot be 'maintained.' " United States v. Washington, 641 F.2d 1368, 1373 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

72. *Id.* at 1372.

73. *Id.* at 1368.

74. *Id.* at 1373 (citing United States v. Washington, 476 F. Supp. 1101, 1110 (W.D. Wash. 1979)).

bers of a tribe cannot claim an entitlement to treaty-protected hunting and fishing rights.[75]

4. Loss of Treaty Hunting and Fishing Rights

Congress has plenary power to unilaterally abrogate treaty rights,[76] subject to the constitutional limitation requiring just compensation for deprivation of property rights. Treaty hunting and fishing rights constitute property rights entitling the holders to just compensation when those rights are abolished by congressional action.[77] The courts, however, are reluctant to impute congressional intent to abrogate treaty rights in the absence of explicit statement. In *Menominee Tribe of Indians v. United States*[78] the Supreme Court refused to find that a federal statute terminating the Menominee Tribe[79] also destroyed the tribe's hunting and fishing rights. The Termination Act's primary purpose was to end federal supervision over the tribe's property and members. The Court found no expression of congressional intent to violate any treaty obligation of the United States to the tribe. Concluding that tribal hunting and fishing rights had survived the Termination Act, the Court cautioned against construing congressional action "as a backhanded way of abrogating [Indian] hunting and fishing rights . . . ."[80]

Following the *Menominee* Court's clear and emphatic language, a federal district court concluded that construction of a dam specifically authorized by Congress would impermissibly destroy treaty hunting and fishing rights without express congressional intent. Because Congress had authorized the project before the off-reservation treaty rights were established, the court refused to conclude that Congress had authorized the taking of treaty rights.[81] Thus, it held that construction of the dam could not proceed unless Congress manifested a clear intent to abrogate. The court correctly refused to infer congressional intent from a general project authorization, especially since the Act predated confirmation of the existence of the off-reservation fishing rights.

Abrogation of treaty-protected hunting and fishing rights, however, does

---

75. State v. Bojorcas, 14 Or. App. 538, 513 P.2d 813 (1973).

76. Lone Wolf v. Hitchcock, 187 U.S. 553, 564-67 (1903). Although judicial review of federal legislation passed pursuant to this plenary power traditionally has been very narrow, the Supreme Court has indicated that it is moving towards a more searching review. *See* Comment, *Federal Plenary Power in Indian Affairs After* Weeks *and* Sioux Nation, 131 U. PA. L. REV. 235 (1982).

77. Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968); Shoshone Tribe v. United States, 299 U.S. 476 (1937).

78. 391 U.S. 404 (1968).

79. Menominee Termination Act, Pub. L. No. 399-303, 68 Stat. 250 (1954) (repealed 1973). With the termination policy of the 1950s, congressional intent to abolish reservation life had resurfaced once more. *See* F. COHEN, *supra* note 4, at 152-80; Wilkinson & Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139 (1977).

80. *Menominee Tribe*, 391 U.S. at 412. At least one court has suggested that aboriginal title is more easily destroyed than federally recognized title. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341, 352-53 (7th Cir.), *cert. denied sub nom.* Besadny v. Lac Courte Oreilles Band of Lake Superior Chippewa Indians, 104 S. Ct. 53 (1983).

81. Confederated Tribes of the Umatilla Indian Reservation v. Alexander, 440 F. Supp. 553 (D. Or. 1977).

not always require express congressional language. An Indian agreement to "grant, cede, relinquish and convey to the United States all our right, title, and interest in land" was found to establish intent sufficient to infer that the tribe had relinquished its hunting and fishing rights.[82] Similarly, in *Blake v. Arnett*[83] the Ninth Circuit concluded that Congress had intended that land within the reservation borders conveyed to non-Indians pursuant to the Allotment Act would not be encumbered by any hunting and fishing rights that otherwise might be implied on reservation lands.[84] Distinguishing *United States v. Winans*,[85] in which the Supreme Court had found that the sale of the land to non-Indians had not extinguished off-reservation treaty rights, the Ninth Circuit emphasized that the fishing rights in *Winans* were protected expressly by treaty.[86] In *Blake*, however, the court found that congressional authorization of the sale of reservation lands to non-Indians constituted sufficient evidence of intent to extinguish Indian hunting and fishing rights.[87] In sum, although an explicit congressional statement is not necessary to a finding of abrogation, courts require convincing evidence that Congress considered and intended that its action would destroy rights guaranteed by treaty.

II. INDIAN REGULATION OF HUNTING AND FISHING

A. Tribal Sovereignty: Source of the Power to Regulate Hunting and Fishing

Tribal sovereignty in its pristine, prediscovery form encompassed the full panoply of powers held by all self-governing, sovereign, political communities.[88] Conquest and the subsequent incorporation of tribes into the territorial boundaries of the United States, however, subjected the tribal sovereigns to the plenary power of the conqueror. As of that moment, the tribes implicitly

82. United States v. Minnesota, 466 F. Supp. 1382 (D. Minn. 1979), *aff'd per curiam sub nom.* Red Lake Band of Chippewa Indians v. Minnesota, 614 F.2d 1161 (8th Cir.), *cert. denied*, 449 U.S. 905 (1980); *see also* State v. Hero, 282 N.W.2d 70 (S.D. 1979).

83. 663 F.2d 906 (9th Cir. 1981).

84. See *infra* text accompanying notes 126-47 for a discussion of the effect of non-Indian ownership within the reservation on tribal sovereignty over its territory.

85. 198 U.S. 371 (1905).

86. As the court itself recognized, however, the right to fish on the reservation probably was taken for granted by all at the time of the treaty, and it "did not occur to anyone" to mention fishing rights. Because rights reasonably implied from treaty language are entitled to the same protection as other treaty rights, *Menominee Tribe*, 391 U.S. 404, the absence of express mention of the right should not make abrogation easier to infer. Hobbs, *Indian Hunting and Fishing Rights II*, 37 GEO. WASH. L. REV. 1251, 1270 (1969).

87. In comparison, the off-reservation land in *Winans* appears never to have constituted part of a reservation. Thus, it is reasonable to infer that, at the time the treaty was signed, Congress intended that the off-reservation hunting and fishing sites would one day pass into private ownership.

The Supreme Court has not decided whether the sale of reservation lands to non-Indians extinguishes treaty hunting and fishing rights on those lands. It has indicated, though, that Indian claims of treaty rights on private land "would raise serious questions." Antoine v. Washington, 420 U.S. 194, 207 n.11 (1975); *compare id.* at 212 (Douglas, J., concurring). In addition, the Court has construed the allotment acts as generally divesting the tribe of its sovereignty over reservation lands conveyed to non-Indians. Montana v. United States, 450 U.S. 544, 559 n.9 (1981).

88. United States v. Wheeler, 435 U.S. 313, 323 (1978); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 173 (1973).

were divested, by virtue of their new dependent status, of any aspect of sovereignty that would conflict with the overriding sovereignty of the conquering nation.[89] Moreover, the federal government acquired the exclusive and absolute power to modify or abrogate any aspect of tribal sovereignty not implicitly divested.[90] Thus, retained tribal sovereignty continues to exist "at the sufferance of Congress, . . . subject to complete defeasance."[91]

Early federal Indian policy recognized a retained sovereignty in its "starkest territorial conception";[92] Indian affairs were contemplated as within the sole province of the federal government.[93] This "conceptual clarity"[94] diminished as contact between Indians and non-Indians increased and as congressional policy sought to accommodate legitimate state interests in certain aspects of reservation life.[95] Moreover, the scope of tribal sovereignty was modified further by frequent congressional fluctuations between affirmation of tribal self-government and avowed attempts to end tribal life by forced or encouraged assimilation into mainstream American culture.[96] However congressional policy may change, the judicial analysis remains constant: tribes retain all aspects of sovereignty not implicitly divested by their dependent status unless such sovereignty is surrendered by treaty or is inconsistent with congressional intent.[97]

Defining the contours of federally sanctioned tribal sovereignty, subject to

89. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823).

90. The Supreme Court has noted several sources of Congress's plenary control over tribal sovereignty, including the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, Williams v. Lee, 358 U.S. 217, 219 n.4 (1959); the political consensus that produced the federal government, which contemplated that one central body, as opposed to the individual states, would deal with the tribes, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 544 (1832); and the duty of protection that arose from the federal government's dealings with the tribes, United States v. Kagama, 118 U.S. 375, 383 (1886). Thus, although Congress is not the source of tribal sovereignty, United States v. Wheeler, 435 U.S. 313, 328 (1978), the continued existence of the tribal sovereignty depends purely on congressional policy. Treaties between the federal government and Indian tribes generally reflect congressional confirmation of retained tribal sovereignty, Williams v. Lee, 358 U.S. 217, 221 (1959). *See also* New Mexico v. Mescalero Apache Tribe, 103 S. Ct. 2378 (1983); Fisher v. District Court, 424 U.S. 382, 386-87 (1976). As the Supreme Court noted in United States v. Winans, 198 U.S. 371, 381 (1904), treaties represent only a limitation of aboriginal tribal sovereignty; all sovereign rights not ceded to the federal government are retained by implication.

91. United States v. Wheeler, 435 U.S. 313, 323 (1978).

92. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 165 n.1 (1980) (Brennan, J., dissenting in part).

93. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 514, 540-44 (1832).

94. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973).

95. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 171-72 (1973). See White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141-43 for a discussion of the evolution of the tribal sovereignty doctrine.

96. *See generally* F. COHEN, *supra* note 4, at 47-206; D. GETCHES, D. ROSENFELDT, & C. WILKINSON, CASES AND MATERIALS ON FEDERAL INDIAN LAW 29-119 (1979); M. PRICE & R. CLINTON, LAW AND THE AMERICAN INDIAN 68-91 (2d ed. 1983).

97. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153 (1980); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208-09 (1978); United States v. Wheeler, 435 U.S. 313, 328 (1978). Similarly, tribal sovereignty may be augmented by congressional action. Thus, although the tribe may have lost a particular sovereign power, either implicitly or by congressional action, congressional delegation of that power will authorize tribal assertion of a previously lost aspect of sovereignty. *Oliphant*, 435 U.S. at 212; United States v. Mazurie, 419 U.S. 544, 557 (1975).

Congress' ability to modify or abrogate at will, is necessarily a synchronic inquiry reflecting current congressional policy. In several important areas, though, the limits of tribal sovereignty are defined not by the extent to which the current Congress encourages tribal self government, but rather by the doctrine of implicit divestiture. That doctrine recognizes that some aspects of tribal sovereignty were necessarily lost when the tribe incorporated within a larger sovereign; an Indian tribe could not exercise power that would threaten the overriding sovereignty of the federal government.[98] Judicial decisions finding implicit divestiture have emphasized repeatedly the inconsistency between the asserted tribal power and the very concept of a federal sovereign. In *Johnson v. M'Intosh*,[99] for example, the Court found that incorporation into the United States had divested Indians of the power to convey their aboriginal title to land. This loss of sovereignty was necessitated by the principle "that discovery gave title to the . . . government by whose authority it was made."[100] *Worcester v. Georgia*[101] highlighted the tribes' loss of power to enter into foreign affairs and noted that the "irresistible power" of the conqueror "excluded [the tribes] from intercourse with any other European potentate."[102] More recently, the Court found implicit divestiture of the tribe's power to impose criminal sanctions on a nonmember, basing its holding in part on the shared assumption of all branches of government that tribes had no criminal jurisdiction over non-Indians and partly on the overriding federal interests in safeguarding the procedural rights of criminal defendants.[103] Thus, to determine whether a tribe has been implicitly divested of a sovereign power a court must determine whether the exercise of tribal sovereignty would be inconsistent with overriding federal interests.[104]

Loosely defined, and in the absence of implicit divestiture or congressional modification or abrogation, the tribes' retained powers of sovereignty include all instruments of self-government and territorial management avail-

98. Thus, barring express congressional delegation of power, a judicial finding of implied divestiture will not be reversed by subsequent changes in general congressional Indian policy. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978). To some extent, too, the doctrine of implicit divestiture is constitutionally required. Congressional delegation of power to Indian tribes must be within the parameters imposed by the delegation doctrine. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 284-91 (1978). The delegation doctrine may be acquiring renewed importance in constitutional law. *See* American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 543-48 (1981) (Rehnquist, J., dissenting); Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 676-88 (1980) (Rehnquist, J., concurring).

99. 21 U.S. (8 Wheat.) 543, 587 (1823).

100. *Id.* at 573; *see also id.* at 573, 578, 582.

101. 31 U.S. (6 Pet.) 515 (1831).

102. *Id.* at 542.

103. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

104. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153 (1980). The *Colville* Court stressed that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Id.* at 154. *See* Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479 (1979). In Montana v. United States, 450 U.S. 544 (1981), the Court appeared to expand the doctrine beyond its previously established limits. *See infra* text accompanying notes 132-33.

able to any sovereign.[105] Thus, tribal sovereignty encompasses tribal control over members and territory.[106] Since the continued legitimacy of any retained sovereign power depends on federal recognition, any assertion of tribal sovereignty requires careful analysis to determine consistency with congressional intent. Thus, for example, in *Kennerly v. District Court*[107] the Supreme Court examined federal legislation defining the procedure by which a tribe could consent to state jurisdiction and concluded that the statutorily defined procedure was intended to be exclusive. To that extent, then, tribal sovereignty had been limited by explicit congressional legislation. In most other disputes concerning the validity of tribal assertions of power, no federal statute is directly relevant. In those cases, the court starts with the premise of congressional confirmation of all aspects of sovereignty not otherwise released by treaty, implicitly divested, or abrogated by Congress. To determine whether the asserted tribal power fits within the limits of congressionally sanctioned tribal sovereignty, the court surveys general Indian legislation to see if the exercise of tribal sovereignty is consistent with federal policy. Since the 1960s, Congress steadfastly has encouraged tribal self-governance and self-sufficiency.[108] This congressional confirmation of retained tribal sovereignty provides an important gauge in judicial evaluations of the legitimacy of a tribe's asserted powers. On that basis the Supreme Court has upheld a tribe's asserted power to criminally prosecute its members,[109] to impose taxes on non-Indians who engage in on-reservation activities,[110] to determine tribal membership,[111] and to define the rules of property inheritance.[112] Thus, although federal Indian policy early abandoned the notion that tribes within the United States constituted semi-independent nations totally beyond the reach of state law, tribal sovereignty remains a vital aspect of Indian law: it is the yardstick by which to measure the validity of tribal assertions of control over its members and its territory.[113]

B. Tribal Sovereignty over Member Hunting and Fishing

Tribal power to regulate the on-reservation hunting and fishing activities of its members is undisputed;[114] the allocation of rights associated with on-reservation resources neatly fits within Congress' confirmation of retained tri-

105. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982); United States v. Mazurie, 419 U.S. 544, 557 (1975).

106. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152 (1980).

107. 400 U.S. 423 (1971).

108. *See infra* text accompanying notes 255-69.

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

110. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). *Cf.* Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 462 (1976) (state attempts to tax on-reservation Indians).

111. *See* The Cherokee Intermarriage Cases, 203 U.S. 76 (1906).

112. Jones v. Meehan, 175 U.S. 1 (1899).

113. Unfortunately, courts frequently have attributed to tribal sovereignty a much more expansive power. *See infra* text accompanying notes 245-50.

114. *See* New Mexico v. Mescalero Apache Tribe, 103 S. Ct. 2378, 2384 (1983).

bal power to regulate "internal [affairs] and social relations."[115] Pursuant to that authority, various tribes have adopted game and wildlife codes that control the time, place, and manner of member hunting and fishing. Violations of tribal codes may subject members to the criminal jurisdiction of tribal courts.[116]

Moreover, because the exercise of off-reservation treaty hunting and fishing rights implicates federally protected tribal rights specifically reserved by the tribe, tribal sovereignty over members is not limited to activity within the reservation borders. The locus of the act is not conclusive; rather, judicial inquiry focuses on whether the disputed assertion of tribal power would protect the tribe's legitimate interest in self-government.[117] Express treaty language guaranteeing off-reservation hunting or fishing rights confirms the tribe's reservation of the power to control the exercise of that right.[118] Reserved hunting and fishing rights are communal, tribal rights; thus, regulation of the exercise of those rights is an internal tribal matter reserved to the tribe as sovereign.[119]

C. *Tribal Sovereignty over Nonmembers Hunting and Fishing on the Reservation*

Because the territorial component is an important aspect of retained tribal

115. United States v. Kagama, 118 U.S. 375, 382 (1886). A finding that the tribe has the power to regulate does not in and of itself preclude state regulation. A state may regulate in those areas within the competence of tribal power, and thus derogate tribal sovereignty, if it can establish, among other things, a significant regulatory interest and a substantial off-reservation nexus with the object of regulation. *See infra* notes 152-76 and accompanying text.

116. *See* Puyallup Tribe v. Starr-Moses, 10 INDIAN L. REP. (AM. INDIAN LAW. TRAINING PROGRAM) 6028 (Puyallup Tribal Ct. 1983).

117. *See* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 687 (1979); Littell v. Nakai, 344 F.2d 486, 490 (9th Cir.), *cert. denied*, 382 U.S. 986 (1965).

118. Settler v. Lameer, 507 F.2d 231 (9th. Cir. 1974); United States v. Felter, 546 F. Supp. 1002, 1024 (D. Utah 1982).

119. As the Ninth Circuit noted in Settler v. Lameer, 507 F.2d 231, 236 (9th Cir. 1974): "It would be unreasonable to conclude that in reserving these vital [off-reservation] rights, the Indians intended to divest themselves of all control over the exercise of those rights." Thus, the court denied the tribal members' petition for habeas corpus and upheld the tribal court's imposition of fines and penalties for violations of the tribe's hunting and fishing code. Moreover, the court upheld defendant's arrest by tribal authorities, which had taken place off the reservation.

Even in the absence of a tribal enforcement mechanism, federal prosecution of an Indian for violation of his tribe's hunting and fishing code under federal law, 18 U.S.C. § 1165 (1982), was found invalid in United States v. Jackson, 600 F.2d 1283 (9th Cir. 1979). Finding no evidence of congressional intent to supplant the tribe's sovereign powers, the court denied federal jurisdiction over Indians violating a tribal ordinance on the reservation. Though the Lacey Act Amendments of 1981, 16 U.S.C. §§ 3371-3378 (1982), now make a violation of a tribal ordinance a federal crime, the question in future cases raising this issue still will be whether Congress intended to confer federal jurisdiction over tribal hunting and fishing. Although the legislative history is silent, *see* S. Rep. No. 123, 97th Cong., 1st Sess. 1-28, *reprinted in* 1981 U.S. CODE CONG. & AD. NEWS 1748; H.R. REP. No. 276, 97th Cong., 1st Sess. 1-42 (1981), express congressional intent to supplement state and tribal powers to achieve maximum enforcement of applicable fish and game conservation laws would appear to apply to any violator of a tribal hunting and fishing code. In that respect, the federal trespass statute is siginficantly different. As the *Jackson* court noted, Congress' main concern in passing that law was to provide a penalty to non-Indian violators of tribal hunting and fishing ordinances who otherwise were not subject to tribal law. 600 F.2d at 1287.

sovereignty,[120] a tribe may condition nonmembers' right to enter Indian lands on compliance with tribal hunting and fishing codes.[121] Although tribes cannot impose criminal sanctions on nonmembers,[122] violations of tribal ordinances are punishable by expulsion or exclusion from the reservation.[123] Moreover, a federal trespass statute[124] and the Lacey Act Amendments[125] make violations of a tribal conservation ordinance a violation of federal law.

Although it is firmly established that a tribe has authority to regulate nonmember hunting and fishing on land held in trust by the United States for Indians and on land owned in fee by a tribe or by an individual tribal member, recent cases have challenged the tribe's power to regulate non-Indian activities on land within the reservation borders owned in fee by a non-Indian.[126] In *Montana v. United States*[127] the Supreme Court held that Indian sovereignty over nonmembers generally is limited to the regulation of activities occurring on land owned by Indians or held by the United States for them; thus, the Court reversed the court of appeals' holding that the hunting and fishing ordinances of the Crow tribe applied to non-Indian activities on fee lands within the reservation.

The court of appeals had confirmed tribal sovereignty over fee land on two bases: that Congress had intended to extend tribal jurisdiction to fee lands within the reservation; and that the tribe had retained its inherent sovereign powers to regulate all hunting and fishing activities on the reservation, regardless of the ownership of that land.[128] With regard to the first prong of the Ninth Circuit's holding, the Court reviewed the possible sources of delegated power and found no congressional intent to confirm tribal power over non-Indian land. The Court agreed that an 1868 treaty with the Crow tribe, establishing a reservation for the "absolute and undisturbed use and occupation of the Indians," had "arguably conferred upon the Tribe the authority to control fishing and hunting on those lands."[129] Nevertheless, the Court concluded that, whatever the extent of tribal power reserved by the 1868 treaty, it did not

120. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137, 142 (1982).

121. *See* New Mexico v. Mescalero Apache Tribe, 103 S. Ct. 2378, 2385 (1983).

122. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

123. *See* New Mexico v. Mescalero Apache Tribe, 103 S. Ct 2378, 2391 n.27 (1983).

124. 18 U.S.C. § 1165 (1982).

125. 16 U.S.C. §§ 3371-3378 (1982).

126. *See, e.g.*, Mattz v. Arnett, 412 U.S. 481 (1973). In any case in which reservation land has been sold to non-Indians, the initial inquiry focuses on the termination issue; that is, whether the circumstances surrounding the sale of lands compel the conclusion that the reservation has been terminated. Reservation status may survive the sale of reservation lands; a court will not lightly conclude that an Indian reservation has been terminated. "[C]ongressional determination to terminate must be expressed on the face of the [legislation] or be clear from the surrounding circumstances and legislative history." *Id.* at 505. See Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), and De Coteau v. District County Court, 420 U.S. 425 (1975), for cases finding sufficient congressional intent to terminate or diminish an Indian reservation. All discussions in this Article assume continuing reservation status.

127. 450 U.S. 544 (1981).

128. United States v. Montana, 604 F.2d 1162 (9th Cir. 1979), *rev'd*, 450 U.S. 544 (1981).

129. 450 U.S. at 558-59 (citation omitted).

survive the passage of the General Allotment Act of 1887[130] and the Crow Allotment Act of 1920.[131]

Turning to the second basis for the holding below, the Court disagreed with the Ninth Circuit's holding that the tribe retained undivested sovereignty over non-Indian activity on fee lands. Rather, the Court concluded that the doctrine of implicit divestiture had operated to strip the tribe of this sovereign power. The Court did not, however, engage in a standard application of implicit divestiture to determine whether the assertion of tribal sovereignty would be inconsistent with an overriding federal sovereign interest. In a subtle but potentially significant modification of implicit divestiture, the Court stated that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relationships is inconsistent with the dependent status of tribes, and so cannot survive without express congressional delegation."[132] Nevertheless, the Court carefully limited the breadth of its new formulation of the implicit divestiture theory. The Court specified that a tribe may exercise its sovereignty over non-Indian lands within the reservation if activity on these lands "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[133]

The *Montana* Court's apparent expansion of the doctrine of implicit divestiture was unnecessary for its holding. As a preliminary matter, the court of appeals' opinion, though purporting to find two bases for upholding tribal assertion of jurisdiction on fee lands, merely had stated the same principle twice. The tribal hunting and fishing code could apply to all land within the reservation, the court had reasoned, because Congress had authorized this exercise of tribal sovereignty and, alternatively, because Congress had not divested the tribe's sovereignty in this area. Stated either way, the sole basis of

130. Ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-358 (1982)). The allotment system was a complete failure. *See* Comment, *Too Little Land, Too Many Heirs—The Indian Heirship Land Problem*, 46 WASH. L. REV. 709 (1971).

131. Ch. 224, 41 Stat. 751 (1920).

132. United States v. Montana, 450 U.S. at 564. The Ninth Circuit has recognized the Supreme Court's apparent modification of implicit divestiture. Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951, 963 (9th Cir.), *cert. denied*, 103 S. Ct. 314 (1982). Justices Rehnquist and White dissented from the denial of certiorari in this case partially because they believed the court of appeals had misapplied *Montana*. 103 S. Ct. at 314 (Rehnquist, J., dissenting). The *Montana* Court's definition of implicit divestiture may reflect the Court's decision that any asserted tribal power that does not affect the internal relationships of the tribe is inconsistent with federal sovereignty. But previous and subsequent Court opinions have recognized the tribe's ability, at least in certain instances, to regulate nonmembers. *See, e.g.*, New Mexico v. Mescalero Apache Tribe, 103 S. Ct. 2378 (1983); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). Moreover, the Court in *Merrion*, a post-*Montana* decision, returned to the narrower definition of implicit divestiture: "Only the Federal Government may limit a tribe's exercise of its sovereign authority." *Id.* at 147.

133. *Montana*, 450 U.S. at 566. The Court noted that the pleadings had not alleged any impairment of the tribe's reserved hunting and fishing rights. *Id.* at 558 n.6. Moreover, the Court found divestiture of tribal sovereignty was justified in this case because "nothing . . . suggests that such non-Indian hunting and fishing so threaten the Tribe's political or economic security as to justify tribal regulation. The complaint in the District Court did not allege that non-Indian hunting and fishing on fee lands imperil the subsistence or welfare of the Tribe." *Id.* at 566 (footnote omitted).

the Ninth Circuit's holding was that tribal sovereignty over fee lands was consistent with congressional intent.

Rather than increase the scope of the doctrine of implicit divestiture, the *Montana* Court could have based its holding squarely on congressional intent. The very existence of fee lands within the borders of Indian reservations is the result of drastic shifts in congressional Indian policy over short periods of time. The General Allotment Act of 1887[134] contemplated the ultimate disappearance of tribal life by allotting to individual Indians tracts of land that eventually could be alienated freely; moreover, unallotted tribal land was to be opened to non-Indian settlement. Congress firmly repudiated its allotment policy with the passage of the Indian Reorganization Act[135] in 1934. By that time, however, large amounts of tribal land had been transferred to private ownership.[136] Thus, the determination of congressional intent with regard to tribal sovereignty over non-Indian lands on the reservation is complicated by the incomplete realization and subsequent repudiation of the allotment policy. As an important preliminary matter, though, no federal legislation to date has repudiated Congress' original confirmation of retained undivested tribal sovereignty over tribal territory that is expressed in the numerous federal treaties establishing the reservation system itself.[137] This consistent congressional policy should inform any attempt to determine the effect of subsequent congressional action on retained tribal sovereignty.

In its discussion of legislative intent surrounding passage of the General Allotment Act, the *Montana* Court noted the following: "It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal juridiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government."[138] While legislative history of the allotment acts admittedly reveals ample evidence of intent to terminate reservation life, that policy was repudiated before completion. Because Congress premised its intent to terminate tribal sovereignty on the assumption that tribes themselves would cease to exist, it is difficult to project that intent onto the current checkerboard pattern of Indian reservations containing varying amounts of non-Indian land within their borders. The conclusion that Congress intended the General Allotment Act to work an automatic divestiture of sovereignty over fee lands is unwarranted.[139]

---

134. Ch. 119, 24 Stat. 388 (1887) (codified as amended at §§ 331-358 (1982)).

135. Ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (1982)).

136. Sale of land pursuant to the General Allotment Act reduced Indian holdings from 138,000,000 acres in 1887 to 48,000,000 acres in 1934. Nearly one half of those lands were desert or semi-desert lands. "Through the allotment system, more that 80 percent of the land value belonging to all Indians in 1887 has been taken away from them . . . ." *Readjustment of Indian Affairs: Hearings Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess. 17 (1934).

137. *See, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 538-39 (1832) (U.S. treaties with Cherokee tribe confer soveriegn power on Cherokee Nation).

138. 450 U.S. at 560 n.9.

139. The Supreme Court, discussing the effect of the General Allotment Act on continuing reservation status, an issue not before the *Montana* Court, stated in Mattz v. Arnett, 412 U.S. 481, 496 (1973) (footnotes omitted): "Its policy was not to continue the reservation system and the trust

The General Allotment Act's stated purpose was to "improve the condition of the Indians."[140] Later Congresses repudiated the means adopted by the allotment acts to achieve that purpose and declared a congressional policy to reaffirm tribal self-governance, again with the stated goals of protecting the best interests of the Indians.[141] Considered in light of subsequent legislation reaffirming tribal sovereignty[142] and construed to benefit its stated beneficiaries, the General Allotment Act should be interpreted as having limited the tribe's sovereignty over territory and members as little as possible. A logical conclusion, one actually suggested by the *Montana* Court's holding, is that alienation of reservation land pursuant to the General Allotment Act abrogated tribal sovereignty over that land only to the extent that such abrogation was consistent with retained tribal sovereignty over lands not sold to non-Indians. In actual effect, the applicable rule of law reached by evaluating congressional intent is nearly identical to the *Montana* holding, which admitted retained tribal sovereignty over fee lands if important tribal sovereign interests were implicated. The rationale suggested here, however, clarifies that the scope of retained tribal sovereignty is purely dependent on congressional intent. Moreover, it makes expansion of the doctrine of implicit divestiture unnecessary.[143]

---

status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all lands had been allotted and the trust expired, the reservation could be abolished." *See also* Cardin v. De La Cruz, 671 F.2d 363, 367 n.5 (9th Cir. 1982) (sovereign power continues despite allotment); Ute Indian Tribe v. Utah, 521 F. Supp. 1072, 1150-52 (D. Utah 1981) (legislative history of General Allotment Act inconclusive).

140. H.R. REP. No. 2247, 48th Cong., 2d Sess. 1 (1881).

141. H.R. REP. No. 1804, 73d Cong., 2d Sess. 1 (1934); S. REP. No. 1080, 73d Cong., 2d Sess. 1 (1934).

142. *See infra* notes 256-63 and accompanying text. Although the intent of the Congress that passed the General Allotment Act must take precedence over the intent of later Congresses, *see* International Brotherhood of Teamsters v. United States, 431 U.S. 324, 354 n.39 (1976), the legislative history of the General Allotment Act reveals that Congress contemplated eventual abolition of reservation life. Nothing in the legislative history indicates what the enacting Congress would have intended had it foreseen the checkerboard pattern of territory on Indian reservations that would result from congressional repudiation of the allotment policy before completion. In that regard, the Supreme Court's observation in Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596 (1980) (citations omitted), is helpful: "[W]hile the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, such views are entitled to significant weight, and particularly so when the precise intent of the enacting Congress is obscure." *Accord* Andrus v. Shell Oil Co., 446 U.S. 657, 666 n.8 (1980).

143. The mere fact of non-Indian ownership alone does not compel a finding that Congress intended to divest a tribe of sovereignty. In United States v. Winans, 198 U.S. 371 (1905), for example, the Supreme Court found that treaty hunting and fishing rights continued at off-reservation sites, unaffected by the fact of private ownership. The tribe also has retained sovereignty over the exercise of those rights. Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974). *See* Antoine v. Washington, 420 U.S. 194, 212 (1975).

The argument that tribal sovereignty should remain coextensive with the reservation boundaries, notwithstanding the existence of non-Indian land, finds some support in the federal statute extending federal criminal jurisdiction to all land within the reservation borders, 18 U.S.C. § 1511 (1982). Although the statute is applicable on its face only to criminal jurisdiction, the Supreme Court has noted that the same general intent to bar state jurisdiction on Indian reservations extends to civil jurisdiction as well. De Coteau v. District County Court, 420 U.S. 425, 427 n.2 (1975). Congressional intent to extend federal jurisdiction to the exclusion of state jurisdiction, however, does not necessarily indicate congressional intent to confer tribal jurisdiction.

Moreover, whatever the general intent reflected in subsequent legislation, treaty guarantees of sovereignty, once divested, are not revived by general congressional enactments. *See* White Earth

In the wake of *Montana*, several lower federal courts have allowed tribal regulation of non-Indian activity on non-Indian lands within the reservation by finding that the activity sought to be regulated affected the tribe's economic security or political integrity. The Tenth Circuit, for example, upheld the applicability of the tribe's zoning ordinance to non-Indian lands within the reservation.[144] Similarly, the Ninth Circuit concluded that a tribe's building code applied to a non-Indian owner of a grocery store within the reservation.[145] Recently, the Ninth Circuit ruled that a tribal shoreline protection ordinance regulating riparian structures on Flathead Lake could apply to non-Indian owners within the reservation.[146] The court concluded that the challenged ordinance fell "squarely" within the *Montana* exception.[147] Because shoreline activities could pollute the lake water, upset the lake's ecological balance, and interfere with treaty fishing rights, the court concluded that the non-Indian conduct affected the tribe's health, welfare, and economic security. It appears, then, that although the *Montana* rule unnecessarily buttressed the doctrine of implicit divestiture, tribal sovereignty will extend to the borders of the reservation, regardless of the ownership of the land, whenever necessary to further important tribal interests.

Band of Chippewa Indians v. Alexander, 683 F.2d 1129, 1135-36 (8th Cir.), *cert. denied*, 103 S. Ct. 488 (1982). Thus, if the General Allotment Act extinguished certain aspects of tribal sovereignty, as this Article suggests, that sovereignty remains extinguished until redelegated by Congress. Regardless of the theoretical basis for finding that tribes have lost some sovereign powers over non-Indian land within their reservation, the *Montana* holding creates certain tension with other Court decisions reaffirming tribal sovereignty over the entire reservation. In New Mexico v. Mescalero Apache Tribe, 103 S. Ct. 2378 (1983), for example, the Court confirmed the tribe's exclusive sovereignty over all on-reservation hunting and fishing activities. In *Mescalero* only 193 acres of a 460,000 acre reservation were privately owned. In *Montana*, however, the tribe owned only 28% of the reservation land. It is not clear from the Court's opinions at what point non-Indian ownership will be great enough to require implicit divestiture of tribal sovereignty over alloted lands. The premises of the *Montana* holding, however, seem applicable to any situation in which the state seeks to regulate activities occurring on non-Indian land within the reservation. If the Allotment Act is interpreted along the lines suggested here, as divesting the tribes of only those sovereign powers over allotted lands that are unnecessary to protect the tribe's continued sovereignty over unallotted lands, the tension between *Montana* and *Mescalero* is reduced. If a large amount of reservation land has passed to private ownership, the tribe's retained sovereignty extends to a correspondingly diminished amount of land. Protection of that retained sovereignty is less likely to require extension of tribal powers over private lands than is the case when only a small amount of reservation land is privately owned. That is, to some extent the degree to which the reservation has been assimilated into non-Indian society will affect the legitimacy of the state's asserted power over the tribe. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 476 (1976) (citing the district court opinion in this case, 392 F. Supp. 1297, 1314, 1315 (D. Mont. 1975)).

144. Knight v. Shoshone & Arapahoe Indian Tribes, 670 F.2d 900 (10th Cir. 1982).

145. Cardin v. De La Cruz, 671 F.2d 363 (9th Cir.), *cert. denied*, 103 S. Ct. 293 (1982). *See also* Ashcroft v. United States Dep't of Interior, 679 F.2d 196 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1185 (1983).

146. Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir.), *cert. denied*, 103 S. Ct. 314 (1982).

147. *Id.* at 964. The court actually based its holding on the finding that the beds of the lake were owned by the United States in trust for the tribes; thus, tribal regulation of shoreline structures was an undisputed tribal sovereign power. In the alternative, though, the court concluded that even if title to those beds had passed to the state, tribal power over non-Indian land was permissible under the *Montana* exception.

D. *The Role of Tribal Sovereignty in Indian Regulation of Hunting and Fishing*

As a gauge for measuring the permissible limits of the tribe's authority over its members and its territory, established principles of tribal sovereignty are adequate to protect the tribe's interests in regulating its federally recognized hunting and fishing rights. The legitimacy of any asserted tribal sovereign power depends upon federal recognition. Such recognition may derive from explicit treaty language granting off- or on-reservation rights, from reasonable implications of the federal purpose revealed by the creation of the reservation itself,[148] or from general federal legislation.[149] Whatever the source, recognition confirms the federal government's commitment to protect the tribe's power to regulate in a manner coextensive with its federally recognized rights. Thus, tribal sovereignty extends beyond the borders of the reservation to allow regulation of treaty hunting and fishing rights. Likewise, protection of tribal sovereignty within the reservation frequently will authorize the assertion of tribal sovereignty over non-Indian land within the reservation. Under the *Montana* test, tribal control of hunting and fishing on non-Indian land within the reservation will be upheld if necessary to protect treaty rights, economic or political autonomy, or the general health and welfare of the tribe.

Recognition of broad tribal powers over hunting and fishing in no way implies an unlimited tribal right to disregard important state and federal interests in the preservation of game and wildlife. Congressional legislation may limit the tribe's sovereign powers;[150] moreover, concurrent state law may operate to the derogation of tribal sovereignty in compelling circumstances.[151] Nevertheless, confirmation of the tribe's powers over the hunting and fishing activities of its members and on its lands reflects clear congressional encouragement of tribal self sufficiency and ensures that sovereign powers will be limited only if overriding state or federal interests are established.

---

148. The federal government's treaties with Indian tribes recognize the tribes' rights of self-government, and thus confer federal protection on the tribe's sovereign powers. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 540 (1832).

149. To the extent that congressional policy confirms tribal self-governance, that too is a source of federal recognition and confirmation of tribal sovereignty. In fact, current federal statutes encourage tribal self-sufficiency and independence, *see* infra notes 256-63, and thus further confirm the legitimacy of retained, undivested tribal sovereignty.

150. Although federal power to regulate any aspect of Indian affairs is undisputed, a court will require a clear expression of congressional intent to apply a particular statute to areas otherwise within the retained sovereign power of the tribe. United States v. Jackson, 600 F.2d 1283 (9th Cir. 1979). *See also* United States v. White, 508 F.2d 453 (8th Cir. 1974) (Bald Eagle Protection Act, 16 U.S.C. § 668 (1982) inapplicable to treaty-protected hunting activities of tribal Indians on reservations); *contra* United States v. Fryberg, 622 F.2d 1010 (9th Cir.) (finding sufficient congressional intent to abrogate treaty rights), *cert. denied*, 449 U.S. 1004 (1980).

151. The analysis proposed in this Article suggests that a presumption of preemption arises whenever the state seeks to regulate in any area otherwise within the scope of federally recognized tribal sovereignty. *See infra* text accompanying notes 253-78.

III. STATE REGULATION OF HUNTING AND FISHING

A. State Regulation of Indian Off-Reservation Hunting and Fishing

Unless federal law provides otherwise, Indian off-reservation activity generally is subject to nondiscriminatory state laws.[152] Treaty guarantees of off-reservation hunting and fishing rights, however, are contained in federal laws promising protection against state interference. Thus, any state attempt to regulate Indian exercise of treaty rights will receive careful judicial scrutiny. In the long series of cases commencing with *Puyallup Tribe v. Department of Game*[153] (*Puyallup I*), the Supreme Court and the lower federal courts have attempted to fashion workable criteria with which to limit state incursions on off-reservation federal treaty rights.

Relevant language in a number of treaties between the United States and Indian tribes in the Pacific Northwest reserved to the tribes the right of fishing "at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory."[154] In *Puyallup I* the Court first defined the bounds of permissible state regulation of those treaty rights. Noting the nonexclusivity of the tribes' off-reservation right to fish, the Court determined that although the state could not "qualify" the right, it could regulate "in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians."[155] Since the courts below did not determine whether the challenged regulations were reasonable and necessary for conservation purposes, the Court remanded for further proceedings.

Five years later, the case was back before the Court. In *Puyallup II*[156] the Court reversed a state court decision upholding a Washington law that prohibited all net fishing of steelhead trout.[157] Because virtually all Indian fishing of steelhead was done by net, the Court found that the ban amounted to unlawful discrimination against the Indians' treaty right to engage in commercial fish-

152. Mescalero v. Jones, 411 U.S. 145, 148-49 (1973). *See also* Russ v. Wilkins, 624 F.2d 914 (9th Cir. 1980), *cert. denied*, 451 U.S. 908 (1981); United States v. Washington, 384 F. Supp. 312, 408 (W.D. Wash.), *aff'd*, 520 F.2d 676 (9th Cir. 1974), *cert. denied*, 423 U.S. 1086 (1976).

153. 391 U.S. 392 (1968). *See* Hobbs, *Indian Hunting and Fishing Rights II*, 37 GEO. WASH. L. REV. 1251 (1969). The litigation has continued to the present; major cases in the dispute include Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973); United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); Puyallup Tribe v. Department of Game, 433 U.S. 165 (1977); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979). The most recent cases involve disputes over whether the treaty share should extend to hatchery fish, United States v. Washington, 506 F. Supp. 187 (W.D. Wash. 1980), *modified*, 694 F.2d 1374 (9th Cir.), *withdrawn for rehearing en banc*, 704 F.2d 1141 (9th Cir. 1983), and whether nontreaty fishermen have a right to 50% of fish that never leave the reservation, United States v. Washington, 694 F.2d 188 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 3536 (1983). *See supra* text accompanying notes 44-45.

154. *E.g.*, Treaty of Medicine Creek, Dec. 26, 1854, United States-Nisqually Tribe, 10 Stat. 1132, 1133. For a complete list of the treaties reserving similar off-reservation fishing rights, see United States v. Washington, 384 F. Supp. 312, 349 (W.D. Wash. 1974).

155. *Puyallup I*, 391 U.S. at 398. For criticism and analysis of *Puyallup I*, see Johnson, *supra* note 2, at 207.

156. Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973).

157. The state allowed only sports hook and line fishing of steelhead trout because the sports catch alone was so large that it left no more than an adequate escapement number for preservation of the species. *Id.* at 46.

ing. The Court emphasized, however, that the state retained its power to regulate when necessary for conservation;[158] the ban on net fishing was invalid because it had failed to apportion fairly the available fish between treaty and nontreaty fishermen. Thus, the regulations were struck down, not because they furthered an impermissible goal, but because they rendered the tribal treaty rights meaningless. Once again the case was remanded to state court.

In the interim, however, the United States on its own behalf and as trustee for various Indian tribes had filed suit in federal district court seeking judicial delineation of the tribes' off-reservation fishing rights. In *United States v. Washington*[159] the district court both defined the tribes' treaty right and applied the *Puyallup* guidelines to determine the extent of permissible state regulation of the exercise of that right. Relying on the *Puyallup* rulings that the tribes were entitled to an apportioned share of the fish, the district court determined that the right to fish "in common with" other citizens entitled the treaty fishermen to take up to fifty percent of the harvestable fish.[160] The court then had to consider the permissible extent of state regulation of the exercise of treaty rights. Again applying *Puyallup* standards, the court concluded that any regulation of treaty fishing must be "reasonable and necessary to prevent demonstrable harm to actual conservation of fish."[161] Because the state had not sustained its burden of proving the necessity of applying numerous fishing regulations to treaty fishermen,[162] and because the existing state hunting and fishing code clearly prevented the tribes from exercising their treaty rights, the court invalidated those regulations and ordered the relevant state agencies to "make significant reductions in the non-Indian fishery" to provide a meaningful opportunity for the exercise of treaty rights.[163]

Notwithstanding the district court's opinion, subsequent state court proceedings soon enjoined the state from enforcing the new regulations it had issued in accordance with the district court order.[164] Another round of deci-

158. The Court concluded: "The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets." *Id.* at 49.

159. 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

160. *Washington*, 384 F. Supp. at 343. *See supra* notes 45-55 and accompanying text.

161. *Washington*, 384 F. Supp. at 342.

162. The district court suggested that the state would be unable to sustain this burden:

> With a single possible exception testified to by a highly interested witness . . . and not otherwise substantiated, notwithstanding three years of exhaustive trial preparation, neither Game nor Fisheries has discovered and produced any credible evidence showing any instance, remote or recent, when a definitely identified member of any plaintiff tribe exercised his off-reservation treaty rights by any conduct or means detrimental to the perpetuation of any species of anadromous fish.

Id. at 338 n.26.

163. *Id.* at 420. Because most of the non-Indian fishing takes place at river sites before the fish reach the upriver treaty fishing sites, regulation of non-Indian fishing was necessary to give the treaty fishermen an opportunity to exercise treaty rights. *See* Comment, *State Power and the Indian Treaty Right to Fish*, 59 CALIF. L. REV. 485, 501-03 (1971).

164. Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson, 89 Wash. 2d 276, 571 P.2d 1373 (1977); Puget Sound Gillnetters Ass'n v. Moos, 88 Wash. 2d 677, 565 P.2d 1151 (1977).

sions in federal district court and the Ninth Circuit, in which the state's attempts to circumvent the federal court orders were soundly condemned, finally reached the Supreme Court.[165] Consolidating review to consider both the state court injunctions and the federal court opinions, the Supreme Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*[166] (*Fishing Vessel*) approved the criteria used by the lower federal courts to evaluate state regulation of treaty fishing rights. The Court reaffirmed its earlier statements in the *Puyallup* series that state regulation must be limited to strict conservation needs: "Although nontreaty fishermen might be subjected to any reasonable state fishing regulation serving any legitimate purpose, treaty fishermen are immune from all regulations save that required for conservation."[167]

Although the exercise of treaty fishing rights in the Northwest seems destined to further prolonged litigation and federal involvement at all levels,[168] the cases to date establish rules and principles applicable to any case involving state attempts to regulate off-reservation treaty rights. The analysis involves two steps: initially, the court must define the treaty right; second, the court must ensure that state regulation is carefully tailored to fit within the narrow limits of permissible state incursion.[169] The Supreme Court has concluded that the state may regulate in the interest of conservation, provided that the regulation meets two standards: it must be a "reasonable and necessary conservation measure," and its application *to the Indians* must be "necessary in

165. United States v. Washington, 459 F. Supp. 1020 (W.D. Wash.), *aff'd*, 573 F.2d 1123 (9th Cir. 1978), *aff'd sub nom.* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, *modified*, 444 U.S. 816 (1979). The Ninth Circuit began its opinion by criticizing the state's reluctance to obey the district court's orders:

> The State's extraordinary machinations in resisting the decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases, the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century. The challenged orders in this appeal must be reviewed by this court in the context of events forced by litigants who offered the court no reasonable choice.

573 F.2d at 1126. State recalcitrance to provide ample protection of treaty rights has been noted in the literature. *See, e.g.*, Hobbs, *supra* note 153, at 1273.

166. 443 U.S. 658, *modified*, 444 U.S. 816 (1979).

167. *Id.* at 682.

168. The federal court's role as fishmaster should be reduced somewhat by its establishment of the Fisheries Advisory Board. *See* United States v. Washington, 459 F. Supp. 1020 (W.D. Wash. 1978). The Salmon and Steelhead Conservation and Enhancement Act of 1980, Pub. L. No. 96-561, 94 Stat. 3275 (1980) (codified in scattered sections of 15, 16, & 40 U.S.C.), was enacted in part to minimize the hardships suffered by nontreaty fishermen by reducing their fishing to protect treaty fishermen. Substantial amounts of federal money have implemented a buy back program in which nontreaty fishermen can sell their equipment to the states at an attractive price. *See* United States v. Washington, 645 F.2d 749 (9th Cir. 1981).

169. As a practical matter, the two-step analysis is necessary only if the available supply of the resource is insufficient to allow unlimited tribal exercise of treaty rights. If the resource is plentiful or if tribal exploitation does not threaten the resource, state regulation could never be found "necessary for conservation purposes." In those instances, a determination that the treaty either expressly or impliedly reserves off-reservation hunting and fishing rights typically will free the tribal member from state regulation. *See, e.g.*, State v. Tinno, 94 Idaho 759, 497 P.2d 1386 (1972); State v. Stasso, 172 Mont. 242, 563 P.2d 562 (1977).

the interests of conservation."[170] Lower court application of those two related criteria has ensured meaningful protection of tribal treaty rights.

Although the state normally enjoys great latitude in regulating the management of game and wildlife, its police power is reduced significantly when treaty rights are implicated. To fulfill the Supreme Court's first requirement that state regulation of treaty rights be a reasonable and necessary conservation measure, the state must do more than establish that its hunting and fishing codes are sound programs of resource allocation and management: the state must show that its regulation is necessary to ensure the continued existence of the resource.[171] As defined by the Sixth Circuit, the state can regulate treaty fishing rights if that regulation is "necessary to preserve fish from extinction or prevent irreparable damage to fish supplies or destruction of fisheries."[172] As a result, if a tribe can show that it adequately is regulating its members to ensure perpetuation of the resource, state regulation will not be deemed necessary.[173] Moreover, under this analysis, the absence of tribal self-regulation will not automatically justify the imposition of state law to fill any perceived enforcement vacuum; the state still must establish that its regulations are necessary to preserve the resource. In general, then, if the tribal members' actions do not threaten the resource, the state has no power to regulate the manner in which the tribe exercises its treaty rights, even if the tribe has chosen not to assert its undisputed sovereignty over the exercise of its treaty rights.

The Supreme Court's second criterion, that a state's reasonable and necessary conservation law will apply to treaty rights only to the extent necessary, has been interpreted as imposing a least restrictive alternative requirement on the regulation of treaty rights. That is, the state first must exercise its police power over nontreaty citizens to achieve its conservation goal. If that regulation will ensure preservation of the regulated resource, treaty rights must remain free from state interference.[174] Taken together, the two criteria impose stringent limits on the state's power to regulate off-reservation treaty hunting

170. Antoine v. Washington, 420 U.S. 194, 207 (1975).

171. This requirement reflects Justice Douglas' observation that "it would indeed be unusual for a state to have the power to tax the exercise of a 'federal right.'" *Puyallup I*, 391 U.S. at 401-02 n.14. Thus, he continued, state regulation of a treaty right is subject to a different standard than the constitutional standard defining the bounds of permissible state power. *Id.* The standard may be similar to the "middle tier" analysis suggested in some equal protection cases. *See infra* note 274.

172. United States v. Michigan, 623 F.2d 448, 449 (6th Cir. 1980) (per curiam), *cert. denied*, 454 U.S. 1124 (1982). Similarly, other courts have concluded that state regulation must be necessary for conservation purposes, Sohappy v. Smith, 302 F. Supp. 899, 908 (D. Or. 1969); or "indispensable," Maison v. Confederated Tribes of Umatilla Indian Reservation, 314 F.2d 169, 173 (9th Cir. 1963). *See also Puyallup I*, 391 U.S. at 401-02 n.14.

173. United States v. Washington, 384 F. Supp. 312, 340 (W.D. Wash. 1974). Adequate tribal self-regulation would consist of, for example, a detailed code regulating the time, place, and manner of the exercise of the treaty right; granting permission to the state to monitor the treaty protected activities; giving the state accurate information about the amount of the resource used; and providing treaty fishermen with means of identification. Depletion of the resource will be prevented without subjecting the tribe to state rules, thus preserving tribal sovereignty. *Id.* at 341.

174. United States v. Michigan, 653 F.2d 277, 279 (6th Cir. 1981); United States v. Washington, 384 F. Supp. 312, 409 (W.D. Wash. 1974); Sohappy v. Smith, 302 F. Supp. 899, 907 (D. Or. 1969); People v. LeBlanc, 399 Mich. 31, 63, 248 N.W.2d 199, 214-215 (1976).

and fishing rights. First, the validity of the police power is measured by a stringent standard when the target of the police power is a treaty right. In addition, the regulation can limit treaty hunting and fishing only after the state has unsuccessfully sought to reach its conservation goal by regulating non-treaty citizens.

The principles just described allow meaningful state regulation of federally protected tribal rights to conserve a valuable resource. On that basis, the Supreme Court of Washington properly upheld state prosecution and conviction of a treaty fisherman who had violated the state's temporary, emergency ban on coho salmon fishing. Because the regulation had been adopted according to proper procedures, and because the state had met its burden of establishing that the temporary ban was necessary to ensure reproduction of the species in future years, regulation of treaty rights was permissible.[175]

In some instances, state regulation of off-reservation treaty rights would appear to further legitimate police power objectives other than conservation, such as public health and safety. For instance, state law may require the marking of fish nets to protect the public from the safety risks posed by unmarked nets in waters frequented by fishermen and those using the waters for recreation. In that regard, the Supreme Court's warning that the state cannot "qualify" the treaty right again becomes relevant: the state cannot subordinate the tribe's rights to some other legitimate state objective or policy without satisfying the same stringent standards imposed on its ability to regulate treaty rights for conservation purposes. Thus, the validity of the state police power again will require a heightened state interest. If, for example, the state can show that unmarked fish nets pose a real safety risk, and if tribal self-regulation has not eliminated the hazards, the relevant state regulation would apply to tribal members to ensure that exercise of treaty rights will not endanger the public safety.[176]

B. State Regulation of Indian Hunting and Fishing on the Reservation

Prior to the Supreme Court's *Puyallup* decisions, the law appeared settled that states had no power to regulate on-reservation hunting and fishing by tribal members. State attempts to prosecute Indians hunting and fishing on their reservation in violation of state law had failed uniformly, as the courts

175. State v. Reed, 92 Wash. 2d 271, 276, 595 P.2d 916, 919 (1979).

176. The *Fishing Vessel* Court appeared to allow state regulation of treaty fishing rights only when necessary for conservation: "Although nontreaty fishermen might be subjected to any reasonable state fishing regulation serving any legitimate purpose, treaty fishermen are immune from all regulation save that required for conservation." 443 U.S. at 682. That statement is unnecessarily broad. Other state regulations enacted pursuant to different police powers also should be applicable to treaty rights if the state can meet the same heightened standards. The suggestion in State v. Gurnoe, 53 Wis. 2d 390, 410, 192 N.W.2d 892, 902 (1972), that state regulation of treaty fishing rights is permissible if necessary in the exercise of other valid police powers, ignores the Supreme Court's insistence that state regulation of treaty rights is subject to a higher standard than the constitutional limits on the exercise of state police power generally. Similarly, the court in State v. Whitebird, 110 Wis. 2d 250, 251-52, 329 N.W.2d 218, 218-19 (Ct. App. 1982), erroneously refused to impose that heightened standard on state attempts to regulate Indian treaty rights in the furtherance of public safety.

held that Indian hunting and fishing on the reservation was beyond the power of state regulation.[177] This insulation from state regulation appeared coextensive with reservation boundaries; thus, courts rejected state attempts to regulate tribal hunting and fishing activities on land allotted to non-Indians within the reservation[178] and on public roads going through the reservation.[179] Actually, in more recent cases, the states frequently conceded their lack of power to regulate Indian activity on the reservation.[180]

Two Supreme Court decisions in the trout and salmon disputes, however, clearly had allowed state regulation to apply to on-reservation activity. In *Puyallup III*[181] the Court rejected the argument that it should modify its earlier holdings to exclude from state regulation Indian fishing done on land that had been found to constitute a reservation only after the initial *Puyallup* decisions. Reiterating its insistence that the fish be "fairly apportioned" between treaty and nontreaty fishermen, the Court equated the tribe's asserted right to exclusive on-reservation fishing with the power to defeat the nontreaty fishermen's rights to a share of the resource. The Court unequivocally rejected the tribe's claim to an exclusive right to all fish passing through its reservation.[182]

---

177. Moore v. United States, 157 F.2d 760 (9th Cir. 1946); *In re* Blackbird, 109 F. Supp. 139 (W.D. Wis. 1901); State v. Clar, 282 N.W.2d 902 (Minn. 1979); State v. Jackson, 218 Minn. 429, 16 N.W.2d 752 (1944); State v. Cloud, 179 Minn. 180, 228 N.W. 611 (1930).

178. State v. Clark, 282 N.W.2d 902 (Minn. 1979); Arnett v. 5 Gill Nets, 48 Cal. App. 3d 454, 121 Cal. Rptr. 906 (1975).

179. State v. Lemieux, 110 Wis. 2d 158, 327 N.W.2d 669 (1983); *but see* Lower Brule Sioux Tribe v. South Dakota, 540 F. Supp. 276 (D.S.D. 1982), *rev'd on other grounds*, 711 F.2d 809 (8th Cir. 1983), in which the court found that state hunting and fishing laws were applicable to Indians on land within the reservation borders that had been condemned by Congress for construction of a dam.

180. *E.g.*, New Mexico v. Mescalero Apache Tribe, 103 S. Ct. 2378 (1983); White Mountain Apache Tribe v. Arizona, 649 F.2d 1274, 1277 (9th Cir. 1981); Confederated Tribes of the Colville Indian Reservation v. Washington, 591 F.2d 89, 92 (9th Cir. 1979); Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Comm'n, 588 F.2d 75, 77 (4th Cir. 1978), *cert. dismissed*, 446 U.S. 960 (1979).

181. Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165, 173-177 (1977). At the outset, the *Puyallup I* Court expressly refused to consider whether the reservation had been extinguished. 391 U.S. at 394 n.1. After *Puyallup II*, 414 U.S. 44, the Ninth Circuit held that the reservation still existed. United States v. Washington, 496 F.2d 620 (9th Cir.), *cert. denied*, 419 U.S. 1032 (1974). Thus, some of the "usual and accustomed" fishing grounds and stations now were located within reservation borders. In *Puyallup III*, 433 U.S. at 173 n.11, the Court again refused to rule on the continued existence of the Puyallup reservation.

182. *Puyallup III*, 433 U.S. at 173-77. In dissent, Justice Brennan, joined by Justice Marshall, criticized the majority for denigrating the Court of Appeals' holding that the reservation continued to exist. *Id.* at 179-85 (Brennan, J., dissenting). In addition, the dissenters argued that because the treaties' "in common with" language expressly applied only to off-reservation fishing, it was inappropriate to allow state regulation of on-reservation fishing, which was governed by Article II of the treaty. Because Article II of the treaty provided that the reservation was to be "set apart . . . for their exclusive use" and that no white man would be permitted on the reservation without the tribe's approval, Justice Brennan concluded that the treaty clearly had reserved exclusive on-reservation fishing rights. Justice Brennan concluded the majority holding was based only on the Court's desire to bring this case to an end, suggesting that "the result would not be the same were the case here for the first time instead of the third." *Id.* at 185 (Brennan, J., dissenting). The Court appears to have adopted the Ninth Circuit's finding that the reservation exists. New Mexico v. Mescalero Apache Tribe, 103 S. Ct. 2378, 2385 n.15 (1983).

Although the on-reservation right to fish may well be exclusive, in the sense that the tribe may refuse to grant access to nonmembers, exclusivity does not encompass the right to destroy the

The *Fishing Vessel* Court repeated that principle two years later when it modified parts of the district court's holding that had excluded from calculation of the treaty share fish caught on the reservation, as well as fish caught for ceremonial and subsistence purposes. The Court found that the place where fish are taken was irrelevant to the apportionment of fish between treaty and nontreaty fishermen; it concluded that the tribes' total catch would be used to measure its share.[183] Some commentators and lower federal courts have criticized the Court's holdings that subject on-reservation activities to state regulation. They have suggested limiting the holdings to their peculiar facts and have urged against construing the decisions to allow state regulation of tribal hunting and fishing on the reservation.[184]

On a theoretical level, though, it is not immediately apparent that treaty rights exercised on the reservation are any more or any less immune from state regulation than off-reservation treaty rights. Both derive, either expressly or by implication, from federal laws; both reflect congressional intent to guarantee to tribal members rights not held by other citizens; and both guarantee federal protection to the holder. The locus of the exercise should not be dispositive; rather, when confronted with a state attempt to regulate any treaty-protected right, whether exercised off or on the reservation, the court's analysis should evaluate the importance of the state interest to be furthered and whether state regulation is necessary to the protection of that interest. Both on-reservation and off-reservation rights, and the federal protection they bestow on the holder, should admit the same narrow exceptions to the general rule that treaty rights are not subject to state regulation.[185]

C. State Regulation of Non-Indian Hunting and Fishing

1. Off the Reservation

State regulation of hunting and fishing generally promotes a valid police power objective. Although the state has no ownership interest in the fish and game within its borders, the Supreme Court repeatedly has recognized legitimate state interests in the conservation and protection of wildlife.[186] More-

resource. Thus, the *Puyallup III* Court's conclusion that state regulation applied with equal force to all treaty rights was consistent with its earlier insistence that "the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets." *Puyallup II*, 414 U.S. at 49.

183. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 687-88 (1979).

184. *E.g.*, United States v. Michigan, 471 F. Supp. 192, 265-70 (W.D. Mich. 1979); United States v. Washington, 384 F. Supp. 312, 336-339 (W.D. Wash. 1974); Johnson, *supra* note 155; Comment, *Empty Victories: Indian Treaty Fishing Rights in the Pacific Northwest*, 10 ENVTL. L. REP. (ENVTL. L. INST.) 437 (1980). State regulation of other on-reservation activity, however, has been upheld with a much lesser showing of necessity than that required by *Puyallup* and *Fishing Vessel*. *See infra* text accompanying notes 192-232. To incorporate the Court's strict standards into judicial evaluation of other areas in which tribal sovereign rights are implicated would seem to offer increased, rather than diminished, protection of treaty rights.

185. *See infra* text accompanying notes 253-78.

186. "Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture." Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 284 (1977). *See also* Hughes v. Oklahoma, 441 U.S. 322,

over, the Court has recognized that states have great latitude in determining appropriate regulations.[187] Thus, a state may specify the time, manner, and extent of hunting and fishing, adopt licensing programs, and impose criminal penalties on violators of its codes. Because many species of game and wildlife are migratory, a state also may deem it advantageous to enter into interstate agreements for joint regulation of commercial and sport hunting and fishing activities of particular species or in a particular area.[188]

Although the Supreme Court upheld a state hunting code that favored state residents and made hunting by nonresidents more expensive and more difficult,[189] the state does not have the same broad discretionary powers when Indian hunting and fishing rights are affected. The state's affirmative duty to guarantee full exercise of treaty rights[190] may require modification of non-Indian hunting and fishing activities. For example, a state cannot allow non-Indian hunting and fishing to deplete the supply available to treaty fishermen. Indirectly, then, the states' broad powers to regulate non-Indian hunting and fishing are limited by its obligation to protect treaty rights. State regulation that allows non-Indian hunting and fishing to derogate treaty guarantees by making exercise of hunting and fishing rights impossible, though otherwise unobjectionable, constitutes an invalid infringement on a federal right.[191]

2. On the Reservation

The "hybrid mixture of Indian jurisdictional and proprietary interests"[192] embodied in Indian hunting and fishing rights frequently conflicts with similar state sovereignty interests. Those conflicts are perhaps the sharpest when the dispute involves state regulation of non-Indian activities on the reservation. On the one hand, the state asserts its interests as a sovereign to control and conserve wildlife resources within its borders; in addition, it claims that its power to regulate the conduct of non-Indians in no way infringes on tribal sovereignty. The tribe, on the other hand, can assert the same conservation interest in resources within its territory. Moreover, the tribe contends that, in the absence of federal enactment to the contrary, sovereignty over tribal terri-

334-35 (1979); Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 386 (1978); LaCoste v. Department of Conservation, 263 U.S. 545, 549, 552 (1924).

187. *See* LaCoste v. Department of Conservation, 263 U.S. 545, 552 (1924).

188. *See, e.g.*, the interstate compact among Idaho, Oregon, and Washington discussed in Idaho *ex rel* Evans v. Oregon, 103 S. Ct. 2817 (1983).

189. Baldwin v. Fish & Game Comm'n, 436 U.S. 371 (1978). In *Baldwin* nonresident elk license fees cost between 7½ times and 25 times the amount paid by residents. Moreover, it appears that the state's special interest in wildlife protection justifies a total ban on nonresident hunting or fishing. *See* State v. Kemp, 73 S.D. 458, 44 N.W.2d 214 (1950), *appeal dismissed*, 340 U.S. 923 (1951) (lack of substantial federal question).

190. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 684-85 (1979); Antoine v. Washington, 420 U.S. 194, 207 (1975).

191. United States v. Washington, 384 F. Supp. 312, 411 (W.D. Wash. 1974). *See also* United States v. Washington, 694 F.2d 1374, 1380-82 (9th Cir. 1982); Sohappy v. Smith, 302 F. Supp. 899, 911 (D. Or. 1969).

192. Ute Indian Tribe v. Utah, 521 F. Supp. 1072, 1145 (D. Utah 1981).

tory vests exclusive regulatory powers over Indians and non-Indians alike in their on-reservation activities.

Early cases challenging the applicability of state hunting and fishing laws to non-Indians on the reservation arose in the context of a criminal prosecution of a nonmember for violating state laws on the reservation. In *United States v. Sanford*[193] and *State v. Danielson*[194] the courts upheld the applicability of state law against the contention that the defendants' on-reservation activities were beyond the jurisdiction of the state. Both courts based their holdings on findings that federal law had not preempted state law and that application of state law would not infringe on tribal sovereignty.[195] Although these cases involved criminal prosecutions of non-Indians, and although the tribal interest in self-government was asserted only by the non-Indian seeking to avoid state prosecution, subsequent court opinions relied on these cases to uphold the applicability of state law to on-reservation activity by non-Indians, notwithstanding the tribe's assertion of infringement on its sovereign powers.[196]

A number of tribes have adopted increasingly sophisticated game management plans in efforts to attract non-Indian sportsmen to the reservation; these revenue raising efforts are in part the product of congressional encouragement of tribal self-sufficiency and independence. As the tribes promulgated detailed codes purporting to regulate the on-reservation activities of nonmembers and sometimes asserting the inapplicability of state conservation codes, tribal-state litigation was inevitable. Applying the Supreme Court's frequently repeated two-pronged test that state laws will not apply to on-reservation activity if they are preempted by federal law or if they infringe on the tribe's right of self-government,[197] several federal circuit panels upheld the jurisdiction of the state to regulate hunting and fishing by non-Indians on the reservation.

---

193. 547 F.2d 1085 (9th Cir. 1976). The federal prosecution in *Sanford* was brought under the Lacey Act, 18 U.S.C. § 43 (1982), which prohibits the interstate transportation of wildlife killed in violation of state laws. Thus, the court first had to determine whether state laws applied to the reservation before it could find the basis of a Lacey Act offense. The court held state law applicable, *Sanford*, 547 F.2d at 1089. The Act was recently amended to provide that violation of a tribal hunting and fishing ordinance could subject the violator to a Lacey Act prosecution. 16 U.S.C. §§ 3371-3378 (1982).

194. 427 P.2d 689 (Mont. 1967).

195. The courts found that a federal statute punishing on-reservation hunting and fishing unauthorized by the tribe did not show congressional intent to occupy the field of fish and game management. *Danielson*, 427 P.2d at 692; *Sanford*, 547 F.2d at 1089. In addition, both courts rather summarily concluded that application of state law would not interfere with tribal self-governance. *Danielson*, 427 P.2d at 693; *Sanford*, 547 F.2d at 1089. Since the respective tribes were not in any way involved in the case, it is not surprising that the courts found that tribal sovereign interests were not affected.

196. *E.g.*, White Mountain Apache Tribe v. Arizona, 649 F.2d 1274, 1285 (9th Cir. 1981); United States v. Washington, 604 F.2d 1162, 1170 (9th Cir. 1979), *rev'd on other grounds*, 450 U.S. 544 (1981).

197. New Mexico v. Mescalero Apache Tribe, 103 S. Ct. 2378, 2386 n.16 (1983); Ramah Navajo School Bd. v. Bureau of Revenue, 102 S. Ct. 3394, 3398 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 158 (1980); Fisher v. District Court, 424 U.S. 382, 386 (1976).

Any preemption analysis of tribal-state disputes over the ability to regulate on-reservation activity must start with the Supreme Court's decision in *White Mountain Apache Tribe v. Bracker*,[198] in which the Court found traditional preemption analysis[199] inapplicable to Indian affairs. Noting firm federal encouragement of tribal independence and repeating that ambiguities in federal law must be construed generously in favor of the Indians, the Court rejected the idea that preemption of state law required express congressional intent. Rather, the Court stated, the preemption analysis involves "a particularized inquiry into the nature of the state, federal and tribal interests at stake, an inquiry designed to determine whether in the specific context, the exercise of state authority would violate federal law."[200] In *White Mountain Apache Tribe v. Arizona*[201] the Ninth Circuit applied the *Bracker* analysis and concluded that the state could impose its hunting and fishing laws on non-Indians on the reservation if the state could show a substantial conservation interest. The *White Mountain* court analyzed *Bracker* and found three possible bases for concluding that state law was preempted: comprehensive federal regulation, federal policy favoring self-management, and lack of legitimate state interest in regulating the on-reservation activity. The court found none of these factors present in the case before it.[202]

According to the *White Mountain* court, federal statutes relating to hunting and fishing, and general federal statutes encouraging tribal self-determination, did not constitute comprehensive federal regulation that would preclude the application of state law.[203] The court next examined federal policies en-

198. 448 U.S. 136 (1980).

199. In other areas of the law, the courts are more hesitant to find that state law has been preempted: " 'It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.' " New York Dep't of Social Serv. v. Dublino, 413 U.S. 405, 413 (1973) (quoting Schwartz v. Texas, 344 U.S. 199, 202-03 (1952)).

200. *Bracker*, 448 U.S. at 145. In *Bracker* the Court struck down Arizona's attempt to impose a motor vehicle license and use fuel taxes on on-reservation logging operations conducted by a non-Indian corporation pursuant to a contract with the tribe.

201. 649 F.2d 1274 (9th Cir. 1981) [hereinafter referred to as *White Mountain*].

202. *Id.* at 1278-84.

203. *Id.* at 1279. The Court noted that Congress had consistently preserved state fish and game regulations in areas under potentially exclusive control and cited statutory provisions concerning national forests (16 U.S.C. § 528 (1982)), National Wildlife Refuge Systems (16 U.S.C. §§ 670h(b), 670h(C)(4), 670i(b)(4), 670k(6) (1982)). In addition, it concluded that the federal trespass statute, 18 U.S.C. § 1165 (1982), did not reflect congressional intent to enter the arena of fish and game regulations. *Id.*

As a matter of fact, however, rather than "preserve" state law, the statutory provision for National Wildlife Refuge Systems provides that regulations shall be consistent with state laws to the extent possible. 16 U.S.C. § 670 (1982). Moreover, the public lands sections expressly state that the Act has no effect on Indian hunting and fishing rights. 16 U.S.C § 670m (1982). Although the court referred to these statutes as showing lack of congressional intent to preempt, they seem to illustrate just the contrary: Congress made state hunting and fishing laws applicable on federal lands when it saw fit; its failure to extend the grant to Indian reservations, coupled with its express disclaimer in § 670m, indicates that Congress assumes that states lack power to apply their laws to the reservation.

Moreover, with regard to the federal trespass statute, the Supreme Court has recently found § 1165 to be a basis for imposing criminal penalties on violators of tribal hunting and fishing codes. *Mescalero*, 103 S. Ct. at 2391 n.27.

couraging tribal self-determination as reflected in treaties, statutes and administrative practice. Finding that the only tribal self-government interest at stake was a potential loss of revenues, the court concluded the tribal sovereignty interest was not "overly weighty."[204] Turning to the third relevant factor in *Bracker*, the court in *White Mountain* found an important state interest in regulating hunting and fishing for the purpose of conservation and fish management.[205] On that basis, the court concluded that state law was not preempted. Other courts, though engaging in less detailed preemption analyses, likewise concluded that state hunting and fishing codes, as applied to non-Indians on the reservation, were not preempted by federal law.[206]

Concluding that state law was not preempted, however, does not end the inquiry. In a long line of cases beginning with *Williams v. Lee*,[207] the Supreme Court has repeated that a state law will not apply to on-reservation activity if it would infringe on tribal sovereignty. While recognizing that the preemption analysis is the most frequent basis of decision, the Court continues to characterize the infringement test as an independent bar to state law. Thus, when evaluating state attempts to apply hunting and fishing codes to non-Indians on the reservation, lower courts have evaluated the potential impact on tribal sovereignty. By defining the right of tribal self-government as extending "only to intratribal relations and to concurrent civil authority over visitors to reservations,"[208] the *White Mountain* court could have concluded that no tribal sovereignty interest was implicated by the application of state hunting and fishing laws to non-Indians. Other courts, less willing to define tribal sovereignty in such a narrow way, agreed that state law would infringe on tribal sovereignty, but nevertheless concluded that the infringement was permissible. Thus, in *White Earth Band of Chippewa Indians v. Alexander*[209] a federal district court found that because many non-Indians are likely to buy tribal permits to protect themselves from inadvertently hunting and fishing on tribal lands without a permit, and because many non-Indians who hunt and fish on Indian land already have a state license, no tribal economic interests were threatened by requiring non-Indians hunting on the reservation to

204. *White Mountain*, 649 F.2d at 1283.

205. *Id.*

206. Because Confederated Tribes of the Colville Indian Reservation v. Washington, 591 F.2d 89 (9th Cir. 1979), and United States v. Montana, 604 F.2d 1162 (9th Cir. 1979), *rev'd in part*, 450 U.S. 544 (1981), were decided before *Bracker*, their traditional preemption analyses are not based on correct principles of Indian law. The Supreme Court's *Montana* decision, however, left untouched that part of the Ninth Circuit's holding that state law applied to non-Indian activity on land within the reservation owned by non-Indians. The Eighth Circuit in White Earth Band of Chippewa Indians v. Alexander, 683 F.2d 1130 (8th Cir. 1982), upheld the applicability of state law despite the district court's failure to follow a careful weighing of interests as required by *Bracker*. The court found remand unnecessary because the tribe had not shown that the state's hunting and fishing laws were beyond the scope of its police power. The court incorrectly equated legitimacy of police power with the state's ability to regulate treaty rights. *See supra* text accompanying notes 170-73.

207. 358 U.S. 217 (1959).

208. *White Mountain*, 649 F.2d at 1284.

209. 518 F. Supp. 527, 537 (D. Minn. 1981), *aff'd*, 683 F.2d 1129 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 489 (1983).

purchase a state license. The court did not discuss whether application of state law would derogate the tribe's traditionally respected sovereignty over its territory.[210]

Central to every holding that state law was applicable to non-Indian hunting and fishing on the reservation was judicial recognition that state regulation of hunting and fishing effectuates an important state interest in conservation and wildlife management.[211] If, however, the tribes have a federally protected right to condition and even prohibit the hunting and fishing activities of non-Indians on the reservation, as the state in each case conceded,[212] the analysis should depend not on whether the state law advances a legitimate police power objective, but on whether state regulation of a federally protected right is permissible. As Justice Douglas noted in *Puyallup I*, the tests are different: "The measure of the legal propriety of . . . conservation measures [regulating federally protected treaty rights] is therefore distinct from the federal constitutional standard concerning the scope of the police power of a State."[213] The point is an important one: the validity of the police power asserted should be a necessary but not sufficient prerequisite to finding state law applicable to non-Indians on the reservation, just as in disputes over state regulation of Indian off-reservation rights. Both types of disputes involve state attempts to regulate a right guaranteed by treaty, and both should be subject to the same analysis. Federal recognition of the tribe's right to control its territory to the extent of excluding nonmembers raises barriers to the operation of state law that should be relaxed only upon a showing, in the *Puyallup* Court's

210. The Ninth Circuit in Confederated Tribes of the Colville Indian Reservation v. Washington, 591 F.2d 89 (9th Cir. 1979), made no reference to tribal sovereignty as an independent bar to state law, basing its holding that state law applied to non-Indian hunting and fishing on the reservation solely on its conclusion that state law had not been preempted. Subsequently, in United States v. Montana, 604 F.2d 1162 (9th Cir. 1979), *rev'd in part*, 450 U.S. 544 (1981), the Ninth Circuit concluded that tribal sovereignty would not be infringed as long as Montana did not apply its regulations to Indian hunting and fishing and provided its regulation of non-Indians on the reservation did not discriminate against the tribe. *Id.* at 1172.

In a rare case finding state law inapplicable to the on-reservation fishing activities of nonmembers, the Fourth Circuit, in Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Comm'n, 588 F.2d 75 (4th Cir. 1978), found state law preempted and also concluded that imposition of state law would frustrate tribal sovereignty. In *Eastern Band* the tribe had developed an extensive program to attract non-Indian trout fishermen to the reservation. With federal funds and personnel assistance, the tribe's streams were stocked with fish raised by the Department of the Interior. The state sought to impose its license fee on non-Indians fishing on the reservation; the court, on the basis of strong congressional support of the fishing program, found federal intent to prempt state law. Moreover, the court noted, the state could assert no legitimate regulatory interest in nonmigratory wildlife resources developed solely with federal funds and assistance. While basing its holding on preemption grounds, the court also found that the state law would frustrate "one major goal of tribal self-government, financial self-sufficiency." *Id.* at 78.

211. United States v. Montana, 686 F.2d 766, 769 (9th Cir. 1982); White Earth Band of Chippewa Indians v. Alexander, 683 F.2d 1129, 1137 (8th Cir. 1982); White Mountain Apache Tribe v. Arizona, 649 F.2d 1274, 1283 (9th Cir. 1981).

212. White Mountain Apache Tribe v. Arizona, 649 F.2d 1274, 1277 (9th Cir. 1981); Confederated Tribe of the Colville Indian Reservation v. Washington, 591 F.2d 89, 92 (9th Cir. 1979); United States v. Montana, 604 F.2d 1162, 1169 (9th Cir. 1972), *rev'd in part*, 450 U.S. 544 (1981); White Earth Band of Chippewa Indians v. Alexander, 518 F. Supp. 527, 534-35 (D. Minn. 1981), *aff'd*, 683 F.2d 1129 (8th Cir. 1982).

213. Puyallup Tribe v. Department of Game, 391 U.S. 392, 401 n.14 (1968).

words, that application of the law is "necessary" to protect a heightened state interest.[214]

The Supreme Court's decision in *Montana v. United States*[215] seemed to leave the Court's imprimatur on lower court holdings that state law is generally applicable to the on-reservation hunting and fishing activity of non-Indians. While reversing the Ninth Circuit's opinion that the tribe could exercise concurrent jurisdiction with the state over non-Indian activities on fee lands within the borders of the reservation, the *Montana* Court left intact that part of the opinion finding Montana law applicable to all non-Indian hunting and fishing on any land within the borders of the reservation. In *New Mexico v. Mescalero Apache Tribe*,[216] however, the Supreme Court unanimously concluded that federal law had preempted New Mexico's hunting and fishing laws to the extent it was purported to apply to the reservation.

The Mescalero Apache Tribe, working closely with the United States Fish and Wildlife Service, the National Park Service, and the Secretary of the Interior, undertook substantial development of the reservation's hunting and fishing resources. In an effort to generate tribal revenues, to provide employment to tribal members, and generally to further tribal self-sufficiency, the development program included construction of a resort complex, creation of eight artificial lakes stocked by an on-reservation fish hatchery, and adoption of a range management program designed to increase the elk, antelope, bear, and deer herds on the reservation. Management of the wildlife resources rests with the tribal council, which, pursuant to its constitution[217] and an agreement with the federal government, enacts ordinances every year to regulate all on-reservation hunting and fishing activities. The ordinances, which are subject to federal approval, reflect the recommendations and yearly projections of wildlife supply of the reservation's range conservation staff and impose licensing and time, place, and manner restrictions on hunting and fishing.[218]

In 1969 the tribe asserted the right to exclude state game and fish officers without tribal authorization. The state honored the tribe's request, but continued to arrest nonmembers of the tribe for illegal possession of game and fish as they left the reservation.[219] Because of numerous conflicts between tribal ordinances and state hunting and fishing laws, the tribe filed suit in 1977 to prevent state regulation of on-reservation hunting and fishing activities. The

214. *Id.*

215. 450 U.S. 544 (1981).

216. 103 S. Ct. 2378 (1983).

217. The tribe is organized under the Indian Reorganization Act of 1934, 25 U.S.C. § 461 (1982) which authorizes all reservation tribes to enact a constitution and bylaws, subject to approval by the Secretary of the Interior.

218. The state conceded that tribal management of the reservation wildlife had been "exemplary and in conformance with accepted wildlife management procedures." *Mescalero*, 630 F.2d 724, 726 (10th Cir. 1980), *vacated and remanded*, 450 U.S. 544 (1981). The state also recognized it could show no conservation need to regulate the reservation wildlife but argued that wildlife management efficiency concerns required application of state law. *Id.*

219. *Id.* at 729 n.10; *Mescalero*, 103 S. Ct. at 2383.

district court ruled in favor of the tribe, and the Tenth Circuit affirmed.[220] The Supreme Court vacated and remanded the decision for reconsideration after its decision in *Montana v. United States*.[221] On remand, the Tenth Circuit reiterated its earlier decision,[222] and the Supreme Court affirmed.

Repeating its earlier formulation of the preemption analysis applicable to Indian affairs, the Court stated that "state jurisdiction is preempted by the operation of federal law if it interferes with or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."[223] The Court also articulated several guidelines for assessing the relevant "federal and tribal interests." First, traditional notions of tribal sovereignty provide a "crucial backdrop;"[224] moreover, general federal Indian legislation reflects staunch federal commitment to tribal self-government.[225] In addition, the Court emphasized its frequent reaffirmation of tribal power "to manage the use of its territory and its resources by both members and non-members."[226] And finally, the Court noted, the correct preemption analysis recognizes and evaluates the importance of the state's asserted regulatory interest.

Applying those principles to the case before it, the Court found strong federal and tribal interests in favor of preemption. As an initial matter the Court noted the tribe's undisputed control over its lands and resources, as evidenced by the treaty between the tribe and the United States and by federal statutes confirming this power.[227] The Court then considered the impact of

220. 630 F.2d 724 (10th Cir. 1980).

221. 450 U.S. 544 (1981).

222. 677 F.2d 55 (1982).

223. *Mescalero*, 103 S. Ct. at 2386. This language comes close to establishing a presumption against the applicability of state law. *See infra* text accompanying notes 252-77.

224. *Mescalero*, 103 S. Ct. at 2378. In *Bracker* the Court had stated that tribal sovereignty formed an "important" backdrop. 448 U.S. at 143. In turn, the *Bracker* Court strengthened its earlier declaration that tribal sovereignty "provides a backdrop against which the applicable treaties and federal statutes must be read." McClanahan v. State Tax Comm'n, 411 U.S. 164, 172 (1973).

225. *E.g.*, Indian Financing Act of 1974, 25 U.S.C. § 1451 (1982); Indian Self-Determination and Educational Assistance Act of 1975, 25 U.S.C. § 450 (1982); Indian Reorganization Act of 1934, 25 U.S.C. § 461 (1982); Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 (1982); *see also Mescalero*, 103 S. Ct. at 2386 n.17.

226. *Mescalero*, 103 S. Ct. at 2387.

227. *E.g.*, Treaty with the Apaches, July 1, 1852, United States-Apache Tribe, 10 Stat. 890. The court of appeals found and the Supreme Court agreed that the treaty contained an implied reservation of tribal sovereignty over the resources within the tribe's resources. 630 F.2d at 728-29, 731; 103 S. Ct. at 2387-88. Moreover, in addition to general federal statutes encouraging tribal self-sufficiency, the Court discussed various federal statutes confirming the right of tribal sovereignty over hunting and fishing resources. Public Law 280, under which the states may assume criminal and civil jurisdiction over tribes, specifically reserves the tribes's power to regulate hunting and fishing on the reservation. 25 U.S.C. § 1321(b) (1982); 18 U.S.C. § 1162(b) (1982).

Because Indian hunting and fishing rights are specifically excluded, the difficult jurisdictional questions created when states assume Public Law 280 jurisdiction over Indian reservations are beyond the scope of this Article. *See generally* Bryan v. Itasca County, 426 U.S. 373 (1976); Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. REV. 535 (1975).

A federal criminal trespass law, 18 U.S.C. § 1165 (1982), and the Lacey Act Amendments of 1981, 16 U.S.C. § 3371 (1982), provide for federal prosecution of hunting and fishing in violation of Indian tribal law. Also, the Indian Reorganization Act, 25 U.S.C. § 476 (1982), generally con-

state regulatory powers on these reservation activities and concluded it would "disturb and disarrange" a comprehensive federal scheme and threaten Congress' overriding goal of encouraging tribal self-governance.[228] Finally, in its evaluation of the state's regulatory interest, the Court found no state contribution to these on-reservation activities, and no off-reservation effects that otherwise might justify the assertion of state power. Because the balancing of interests revealed no significant state interest[229] in the face of substantial federal and tribal interests, the court concluded that state law could not apply to any on-reservation hunting and fishing activities.[230]

Taken in conjunction, the Court's opinions in *Montana v. United States*[231] and *Mescalero* articulated several important, if not entirely consistent, principles applicable to disputes over state regulation of on-reservation activities. First, *Montana* suggests that state law generally applies to non-Indian fee land within the reservation, unless the tribe can show that state regulation would have a substantial, adverse effect on tribal survival. Tribal sovereignty, in light of *Montana*, is not necessarily co-extensive with the reservation borders. Any assertion of tribal authority over non-Indian lands requires a showing that serious tribal concerns are implicated. *Mescalero*, however, greatly limits the state's ability to regulate on-reservation activities (presumably only on those reservations where non-Indian ownership is minimal)[232] to those cases in which the state can show a substantial need or interest in regulating. The analysis to be applied, then, hinges on the amount of non-Indian ownership within the borders of the reservation.

D. Enforcement of Permissible State Regulation

A court determination that a state can regulate a particular aspect of Indian hunting and fishing does not necessarily resolve the dispute. Difficult en-

---

firms "all powers vested in any Indian tribe . . . by existing law." *Mescalero*, 103 S. Ct. at 2388 nn.20 & 21. Thus, the *Mescalero* Court found that tribal sovereignty over on-reservation wildlife resources was a federally protected right.

228. 103 S. Ct. at 2388 (citing Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 691 (1965)).

229. The only state interests asserted were the state's interest in promoting efficiency in wildlife management, 630 F.2d at 726, and the state's loss of revenues from the sale of state licenses plus some federal matching funds calculated with reference to the total number of state licenses sold. 103 S. Ct. at 2391 n.28. The state interest was further diminished because the state played no role in the development of the resources it sought to regulate; moreover, the wildlife that the state sought to regulate was nonmigratory. In these respects the *Puyallup* litigation is significantly different. There, the trout and salmon displayed intricate migratory patterns frequently passing through treaty fishing sites on their way to and from the ocean. Moreover, state funds played a substantial role in increasing these fish populations. United States v. Washington, 694 F.2d at 1380.

230. Applying the *Mescalero* rationale, the district court ruled that Arizona's hunting and fishing regulations are inapplicable on the Fort Apache reservation. White Mountain Apache Tribe v. Arizona, 11 INDIAN L. REP. 3002 (D. Ariz. Oct. 24, 1983).

231. 450 U.S. 544 (1981). *See supra* text accompanying notes 127-47.

232. In *Mescalero* only 193 acres on the 460,000 acre reservation were owned by non-Indians. 103 S. Ct. at 2381. The reservations in *Puyallup* and *Montana* showed significantly larger non-Indian ownership. Only 22 acres of the 18,000 acre Puyallup reservation were owned by Indians, Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165, 174 (1977); 28% of the Crow reservation involved in *Montana* had passed to private ownership, 450 U.S. at 548.

forcement problems may persist, particularly if the approved regulation applies to on-reservation activity.[233] Because the tribes have retained their sovereign power to exclude nonmembers from the reservation, a holding that state law applies to on-reservation activities may be meaningless if state enforcement officials are barred from the reservation. At least one federal district court, while holding California game laws applicable to non-Indians on the reservation, denied state game wardens the authority to enter the reservation without tribal permission.[234] Arizona state officials in a Ninth Circuit case conceded their lack of power to enter the reservation, but contended that state game law could be enforced as non-Indian violators left the reservation with their illegal catch.[235] The Supreme Court, in cases holding state law applicable to on-reservation activities, has failed to reach the enforcement issue.[236]

It appears that state officials can arrest Indians on public roads within the reservation.[237] In that situation, although the arrest would be valid, the success of a prosecution would depend on whether state law applied to the particular activity. Thus, on-reservation enforcement problems arise whether the violator is Indian or non-Indian. In many instances, state enforcement will be effective at the entrance to the reservation. If, however, the state can demonstrate a substantial need to enforce state law on the reservation, that authority follows logically from a decision that state law applies on the reservation.[238]

State enforcement at treaty sites off the reservation may be equally problematic. If state law is inapplicable to off-reservation sites because the tribes are self-regulating, and the state discovers inadequate tribal enforcement of its own regulations, the state has limited recourses. Under the *United States v.*

---

233. Law enforcement on Indian reservations may involve city, county, or state police officers, tribal enforcement authorities, the Bureau of Indian Affairs, or the F.B.I., depending on the locus of the act and the identity of the parties involved. Cross-deputization is a cooperative effort between state, tribal, and federal authorities that grants enforcement powers to officials who otherwise would be limited in their abilities to arrest certain individuals or to arrest on certain lands. The cross-deputization process has had mixed results. *See* Wall, 16 AM. INDIAN L. NEWSLETTER 34 (1983).

234. California v. Quechan Tribe, 424 F. Supp. 969 (S.D. Cal. 1977), *vacated on other grounds*, 595 F.2d 1153 (9th Cir. 1979).

235. White Mountain Apache Tribe v. Arizona, 649 F.2d 1274 (9th Cir. 1981). *White Mountain* consolidated two similar cases, one involving the Arizona White Mountain Apaches, and the other involving the Washington Colvilles. Washington asserted the right of its officials to enter the reservation. *Id.* at 1277.

236. *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 154-58 (1980); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 468 n.6 (1976).

237. *See* State v. Lemieux, 110 Wis. 2d 158, 327 N.W.2d 669 (1983). *See also* State v. Folstrom, 331 N.W.2d 231 (Minn. 1983).

238. In California v. Quechan Tribe, 424 F. Supp. 969 (S.D. Cal. 1977), *vacated on other grounds*, 595 F.2d 1153 (9th Cir. 1979), the court decided that the state would be granted the power to enter the reservation to enforce applicable laws only if a compelling need were established. *Id.* at 976.

Granting state authority to enter in carefully limited instances does not open the door to widespread state interference with Indian affairs on the reservation. First, the hurdles to making the initial finding that state law is applicable are substantial. Second, the state then would have to establish a compelling need to enter the reservation to enforce the applicable law. Thus, a showing that off-reservation enforcement was adequate, or a showing that tribal self-regulation ensured enforcement of applicable state law, would preclude entry by state officials.

Washington[239] plan approved by the Supreme Court,[240] state officials can monitor compliance at the off-reservation sites. In addition, they can report violations to the tribe and ultimately seek judicial relief if all other avenues of encouraging adequate tribal self-regulation prove unsuccessful.[241] The Oregon court of appeals, however, has held that an Indian fishing at a usual and accustomed fishing ground in violation of both state and tribal regulations is not immune from state prosecution.[242] This holding, though facially responsive to the state's legitimate interest in preserving wildlife, does not necessarily survive the Supreme Court's decision in *Fishing Vessel*. Prosecution of an Indian exercising treaty rights requires a specific showing that application of state law is necessary to the preservation of the resource.[243] Once a state enacts a necessary conservation measure, carefully tailored to minimize infringement on tribal sovereignty according to the *Puyallup* standards, Indian self-regulation becomes irrelevant. An Indian violating such a state regulation is subject to state prosecution.[244]

IV. EVALUATING STATE INCURSIONS ON TRIBAL SOVEREIGNTY

A. The Demise of Tribal Sovereignty as an Independent Bar to State Law

Although the Supreme Court abandoned its earlier "platonic" notions of tribal sovereignty,[245] it continues to repeat its dictum in *Williams v. Lee*[246] that tribal sovereignty can constitute an independent bar to the application of state law: "[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[247] Actually, however, every Supreme Court decision finding state law inapplicable to Indian-related activities rested

239. 459 F. Supp. 1020 (W.D. Wash. 1978); 384 F. Supp. 312 (W.D. Wash. 1974).

240. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

241. United States v. Washington, 384 F. Supp. at 408-10.

242. State v. Gowdy, 1 Or. App. 424, 462 P.2d 461 (1969).

243. Of course, it is possible that tribal regulation would be found co-extensive with the treaty right. In that case, the Indian would not be immune from state law, *not* because he was violating tribal law, but because he was not acting within his treaty rights and thus generally subject to state law. *See* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973).

244. *See* State v. Reed, 92 Wash. 2d 271, 595 P.2d 916 (en banc), *cert. denied*, 444 U.S. 930 (1979). A showing that the defendant was acting in adherence to tribal law would have no bearing on his guilt or innocence. In *Reed* the Court upheld an Indian's conviction for net fishing coho salmon in violation of an emergency ban on all coho salmon fishing submitted to and approved by the district court.

245. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973). *See also* Bryan v. Itasca County, 426 U.S. 373, 376 n.2 (1976); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973).

246. 358 U.S. 217 (1959).

247. *Id.* at 220. The Supreme Court reconfirmed the vitality of the tribal sovereignty bar, or "infringement test," in its most recent case involving state assertions of regulatory power over reservation activities. *Mescalero*, 103 S. Ct. at 2386 n.16. *See also* Ramah Navajo School Bd. v. Bureau of Revenue, 102 S. Ct. 3394, 3398 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 158 (1980); Fisher v. District Court, 424 U.S. 382, 386 (1976).

its holding on a preemption analysis.[248] That is, the Supreme Court weighed relevant state and federal interests, measured against the "crucial" backdrop of tribal sovereignty and determined whether federal law leaves room for the application of state law.[249] The suggestion that tribal sovereignty cannot of its own force preclude state regulation, despite repeated Court dicta to the contrary, is consistent with established principles of Indian law. Because congressional control over the contours and very existence of tribal sovereign powers is absolute,[250] to refer to tribal sovereignty as a bar to state law is merely to articulate the preemption analysis in a slightly different form. That is, state law may be inapplicable to an Indian-related activity because Congress has confirmed the tribe's exclusive power to regulate such activity. Delineation of

248. Some cases expressly hold state law inapplicable on preemption grounds. *E.g.*, Ramah Navajo School Bd. v. Bureau of Revenue, 102 S. Ct. 3394, 3402-03 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 138 (1980); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 158 (1973); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 165 (1973); Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 691 (1965).

The Court's holding in Williams v. Lee, 358 U.S. 217 (1959), the source of the language establishing the infringement test, is easily explained on a straight preemption rationale. In *Williams* the Court denied the state jurisdiction over a suit brought by a non-Indian against an Indian to collect for goods sold to the Indian on the reservation. Noting that congressional recognition of tribal self-government was reflected in the treaty with the tribe and in the Navajo Hopi Rehabilitation Act, 25 U.S.C. §§ 631-640 (1982), the Court concluded that if this federally recognized Indian sovereignty over the reservation is to be abrogated, "it is for Congress to do it." 358 U.S. at 223. Moreover, the Court found significance in the negative inference to be drawn from a federal statute authorizing a state to assume civil or criminal jurisdiction over an Indian reservation: "[W]hen Congress has wished the States to exercise this power [over the reservation] it has expressly granted them the jurisdiction which *Worcester v. State of Georgia* had denied." *Id.* at 221. State law was inapplicable, then, because it had been preempted by clear congressional protection of tribal sovereignty.

Similarly, Fisher v. District Court, 424 U.S. 382 (1976), in which the Court denied the state jurisdiction over an Indian adoption proceeding, rests on preemption grounds. Because the Indian Reorganization Act, 25 U.S.C. § 476 (1982), "specifically intended to encourage Indian tribes to revitalize their self-government," *id.* at 387, and because the tribe's right to "govern itself independently of state law has been consistently protected by federal statute," *id.* at 386, the Court concluded that the tribe's adoption ordinance "implements an overriding federal policy which is clearly adequate to defeat state jurisdiction." *Id.* at 390. State jurisdiction "defeated" by an "overriding federal policy" has been preempted.

Even Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), and its famous statement that "[t]he Cherokee nation, then, is a distinct community, occupying its own territory . . . in which the laws of Georgia can have no force," *id.* at 561, based its conclusion on a finding that current congressional policy admitted no state interference with tribal affairs. The Court defined that policy, as expressed in federal statutes, as one which "manifestly consider[s] the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive." *Id.* at 557. *See also id.* at 554, 556. State law was invalidated because it "interfer[ed] forcibly with the relations established between the United States and the Cherokee nation." *Id.* at 561. Again, this is a preemption analysis.

Thus, tribal sovereignty stands as a bar to state law only to the extent that tribal sovereignty is confirmed by Congress. The infringment theory does no more than recast the preemption analysis in slightly different form. *See also* Indian Civil Rights Task Force, *Development of Tripartite Jurisdiction in Indian Country*, 22 U. KAN. L. REV. 351, 380-85 (1974); Lynaugh, *Developing Theories of State Jurisdiction over Indians: The Dominance of the Preemption Analysis*, 38 MONT. L. REV. 63 (1977); Mettler, *A Unified Theory of Indian Tribal Sovereignty*, 30 HASTINGS L.J. 89 (1978).

249. *See, e.g.*, New Mexico v. Mescalero Apache Tribe, 103 S. Ct. 2378 (1983). *See also supra* text accompanying notes 198-200. See Clinton, *State Power over Indian Reservations: A Critical Comment on Burger Court Doctrine*, 26 S.D.L. REV. 434 (1981), for criticism of the extent to which the current Court has allowed state law to apply in derogation of tribal sovereignty.

250. *Bracker*, 448 U.S. at 143; United States v. Wheeler, 435 U.S. 313, 319 (1978); Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903).

the bounds of permissible state power over Indian affairs is understood better as a pure preemption analysis. To accurately reflect Congress' steadfast support of tribal self-development, however, courts should adopt a presumption that state law is inapplicable to any activity, whether on or off the reservation, if the federal government has recognized tribal sovereignty over that activity.[251] A presumption of preemption would reflect not only the clear congressional intent that Indian tribes achieve a maximum amount of self-government and self-sufficiency, but also would recognize that tribal sovereignty depends solely on congressional confirmation. Moreover, because the state would be able to overcome the presumption only upon a clear showing of a well-defined need, the analysis would limit instances of state incursion on tribal affairs while recognizing that tribes are no longer independent sovereigns but have assumed the peculiar role of a "dependent domestic nation."[252]

B. The Presumption of Preemption

1. Source of the Presumption

A presumption of preemption finds ample support in federal statutes and in well-established rules of construction developed by the Supreme Court in a long series of Indian cases. Treaties establishing reservations in exchange for tribal cession of aboriginal territory (typically setting aside the land "for the use of" or "for the exclusive use of" the particular tribe) raise barriers to state authority.[253] Similarly, numerous state enabling act disclaimers embody the same determination to limit state jurisdiction over Indian affairs.[254] Thus, treaties and disclaimers of jurisdiction over Indians contained in many state enabling acts reflect early federal intent that Indians would remain separate from the rest of the population, with full control over their own affairs. The Indian Reorganization Act (IRA)[255] is perhaps the first major modern congressional reaffirmation of tribal self-governance and economic self-sufficiency. Among the Act's stated purposes was the intent to extend to the tribes "the fundamental rights of political liberty and local self-governance."[256] After Congress' "brief though disastrous experiment with the termination policy

---

251. Thus, the preliminary inquiry would focus on whether the asserted tribal power has been implicitly divested, *see supra* text accompanying notes 97-106.

252. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

253. *See, e.g.*, *Mescalero*, 103 S. Ct. at 2387-88; Williams v. Lee, 358 U.S. 217, 221-22 (1959); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 575-76 (1832) (McClean J., concurring).

254. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 175-76 (1973); *Mescalero*, 630 F.2d at 731. See F. COHEN, *supra* note 4, at 268-69 for a discussion of the effect of enabling act disclaimers.

255. 25 U.S.C. § 461 (1982).

256. S. REP. No. 1080, 73d Cong., 2d. Sess. 3-4 (1934) (letter from President Roosevelt). *See also* H.R. REP. No. 1804, 73d Cong., 2d Sess. 1, 6 (1934). Tribal ordinances enacted pursuant to power confirmed by the IRA provide additional evidence of congressional intent to preempt. *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 156 (1980); Fisher v. District Court, 424 U.S. 382, 390 (1976); *Mescalero*, 630 F.2d at 732. Although this policy was repudiated during a brief period when Congress sought to terminate all Indian reservations, congressional policy has once again shifted to a firm commitment to tribal self-governance. *See Oversight of Economic Development on Indian Reservations, Hearing Before the Select Comm. on Indian Affairs*, 97th Cong., 2d. Sess. 1-2 (1982); F. COHEN, *supra* note 4, at 152-206.

of the 1950's,"[257] and because the IRA had failed to provide sufficient opportunities for tribal involvement with policy and decisionmaking functions,[258] the Indian Financing Act of 1974[259] and the Indian Self Determination and Educational Assistance Act[260] established clear congressional commitment to the enhancement of tribal self-governing power.[261] In a similar vein, congressional enactment of the Indian Civil Rights Act of 1968[262] acknowledged the existence of tribal self-governing power under the plenary power of Congress by establishing procedures for its exercise.[263] Other congressional statutes, covering a wide variety of areas, repeatedly reaffirmed congressional encouragement of the full development of tribal sovereignty.[264]

Of equal importance, perhaps, are the negative inferences to be drawn from several statutes specifically authorizing the assertion of state power over Indian affairs; the conferral of state power in specific instances implies that Congress intended not to confer that power in other instances.[265] In what is commonly referred to as Public Law 280, for example, Congress provided means by which states could assume civil and criminal jurisdiction over reser-

257. H.R. REP. No. 1600, 93d Cong., 2d. Sess. 20 (1974).

258. *Id.*

259. 25 U.S.C. § 1451 (1982).

260. *Id.* § 450.

261. Congressional declaration of policy in the Indian Financing Act of 1974 is stated as the development of Indian resources "to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources." *Id.* § 1451. Legislative history similarly emphasizes congressional intent to implement the "long sought after goal of Indian self-sufficiency." H.R. REP. No. 907, 93d Cong., 2d Sess. 7 (1974). *See also* S. REP. No. 348, 93d Cong., 1st Sess. 1 (1973); *Indian Financing Act of 1973, Hearings Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess. 124 (1974); *Financing the Economic Development of Indians and Indian Organizations, Hearings Before the Subcomm. on Indian Affairs of the Sen. Comm. on Interior and Insular Affairs*, 93d Cong.; 1st Sess. 1, 45, 120 (1973).

The Indian Self-Determination and Education Assistance Act reflects identical congressional concern with the erosion of tribal sovereignty and declares its intent "to promote maximum Indian participation in the government and education of the Indian people." H.R. REP. No. 1600, 93d Cong., 2d Sess. 1 (1974). *See also* S. Rep. No. 682, 93d Cong., 2d Sess. 1 (1974); *Indian Self-Determination and Education Program, Hearings Before the Subcomm. on Indian Affairs of the Sen. Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess. 62 (1973). The statute itself recognizes the government's obligation "to respond to the strong expression of the Indian people for self-determination." 25 U.S.C. § 450a (1982).

262. 25 U.S.C. §§ 1301-1303 (1982).

263. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62 (1978); *see also* Morton v. Mancari, 417 U.S. 535, 551-53 (1974); S. REP. No. 762, 93d Cong., 2d Sess. 13 (1974).

264. For example, as Justice Brennan noted in Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 167 n.2 (1980) (Brennan, J., concurring in part and dissenting in part), the Clean Air Act Amendments of 1977, 91 Stat. 735 (1977) (codified at 42 U.S.C. § 7401 (Supp. V 1981)), confer on tribal governing bodies the exclusive power to redesignate lands for air quality purposes, and the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 455, 523 (1977) (codified at 30 U.S.C. § 1201 (Supp. V 1981)), voices similar concerns.

The Indian Tribal Governmental Tax Status Act of 1982, Pub. L. No. 97-473, 97th Cong., 96 Stat. 2607 (1982) (codified at 26 U.S.C. § 1 (1982)), which treats tribal governments as states for purposes of obtaining favorable tax treatment, was passed to facilitate the tribal efforts to "assist their people by stimulating tribal economies and providing governmental services." S. REP. No. 646, 97th Cong., 2d Sess. 11 (1982). *See also* H. REP. No. 984, 97th Cong., 2d Sess. 15 (1982).

265. The "express inclusion, implied exclusion" rule of statutory construction (*expressio unius est inclusio alterius*) is well established. *See* 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 47.23 (1973 & 1983 Cum. Supp.).

vations.[266] Even those states that assume jurisdiction pursuant to those procedures are required by statute to disclaim any power to regulate treaty hunting and fishing rights.[267] Similarly, in several conservation statutes, Congress provided for operation of state law on certain federal lands but never extended that grant of state power to Indian reservations.[268] Congressional grants of jurisdiction reveal congressional intent to grant the states powers otherwise denied to them.[269] Thus, these statutes provide additional evidence of congressional intent to minimize assertions of state power over those areas in which tribal sovereignty has received congressional approval.

Judicially developed rules of construction also support the adoption of a presumption of preemption. The Supreme Court frequently has stated that statutes and treaties are to be construed liberally to further Indian interests;[270] doubtful expressions are to be resolved in favor of the Indians.[271] In addition, a court must interpret treaty provisions to reflect what the Indians are likely to have understood at the time they signed them.[272] Both rules suggest that a court should be slow to validate state attempts to regulate Indian affairs, at least in the absence of a carefully articulated need. In sum, a presumption of preemption would reflect accurately congressional commitment to tribal development and the Supreme Court's repeated insistence that the statutes embodying this clear commitment be construed liberally to protect Indian interests in tribal sovereignty.

2. Application of the Presumption

The presumption of preemption as proposed in this Article would arise any time a state attempts to regulate in an area otherwise left to the tribes in

266. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588-90 (1953) (codified as amended in scattered sections of 18 & 28 U.S.C.).

267. "Nothing in this section . . . shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof." 18 U.S.C. § 1162(b) (1982).

268. *E.g.*, 16 U.S.C. § 528 (1982) (national forests); *id.* § 668dd(c) (National Wildlife Refuge System; federal regulation shall be consistent with state laws to the extent possible); *id.* §§ 670h(b) & (c)(4) (other public lands); *id.* § 670i(b)(4) (same); *id.* § 670k(6) (same); *see also id.* § 670m (expressly stipulating that no provision of the act is intended to affect Indian hunting and fishing rights). The Ninth Circuit has found that these statutes demonstrate a lack of congressional intent to preempt state law. White Mountain Apache Tribe v. Arizona, 649 F.2d 1274, 1279 (9th Cir. 1981). A more compelling conclusion, however, is that by specifically granting jurisdiction in some instances, Congress intended to retain control in those areas not granted. Williams v. Lee, 358 U.S. 217, 220-21 (1959).

269. Williams v. Lee, 358 U.S. 217, 221 (1959).

270. *E.g.*, Bryan v. Itasca County, 426 U.S. 373, 392 (1976); Tulee v. Washington, 315 U.S. 681, 684 (1942); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832) (McClean, J., concurring).

271. *See* DeCoteau v. District Court, 420 U.S. 425, 444 (1975); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973); Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); Squire v. Capoeman, 351 U.S. 1, 6-7 (1956); Carpenter v. Shaw, 280 U.S. 363, 367 (1930); Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89 (1918); Winters v. United States, 207 U.S. 564, 576 (1908); United States v. Winans, 198 U.S. 371, 380-81 (1905).

272. *See* Choctaw Nation v. United States, 318 U.S. 423, 431-32 (1943); Tulee v. Washington, 315 U.S. 681, 684-85 (1942); United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938); Jones v. Meehan, 175 U.S. 1, 10-11 (1899).

the proper exercise of their sovereignty. In a very important sense, then, tribal sovereignty is crucial to the preemption analysis. Because tribal sovereignty exists subject to the plenary power of Congress, and because Congress, pursuant to that plenary power, currently expresses firm commitment to the fullest possible exercise of tribal sovereign powers, the exercise of tribal sovereignty is an exercise of a right protected by the federal government. Whenever the state seeks to regulate any activity within the competence of federally protected tribal sovereignty, whether the activity occurs on or off the reservation, the court should presume that state law is inapplicable.

Because tribes on the reservation no longer are isolated and totally separate entities, and because in some instances state regulation of Indian activity may be necessary to protect important state interests unrelated to Indian affairs, the courts have allowed state regulation when the state could assert a well-defined need for jurisdiciton. Thus, in the *Puyallup* cases the Supreme Court permitted state regulation of off-reservation hunting and fishing rights if the state could show that regulation was necessary to ensure preservation of the resource and if the state could satisfy the court that its regulation of treaty rights would be minimally intrusive on tribal sovereignty.[273] In general, though, the Court has not been as protective of tribal sovereignty in disputes arising over state attempts to regulate on-reservation activity.[274] The Court's preemption analysis, unlike the *Puyallup* restrictions on state regulation of off-reservation treaty rights, does not require the state to adopt the least restrictive regulation possible, nor does it require the state to show that on-reservation state regulation is necessary to further an important state interest. Since tribal sovereignty over on-reservation activity, just as tribal sovereignty over the exercise of off-reservation treaty rights, is a federal right, state incursions on either should admit of the same limited exceptions. It is difficult to understand why the Supreme Court has been careful to ensure maximum protection of tribal sovereignty over off-reservation treaty rights, while allowing state regulation over on-reservation activity without the same high barriers against state intrusion. A presumption of preemption would ensure that any state regulation of treaty rights is subject to the same stringent analysis.

Once the presumption of preemption is triggered, the analysis suggested here would allow state regulation if the state could overcome the presumption with a specific showing that the activity is one requiring limited incursion into tribal sovereignty. Specifically, the state would have to establish: (1) that it has a heightened regulatory interest in the activity it seeks to regulate; (2) that the regulation is aimed at activity with a substantial off-reservation nexus; (3) that the regulation would not interfere with a comprehensive federal plan; and (4) that the state regulation is necessary to the furtherance of the objective.

The first requirement does no more than restate the Court's recognition

273. Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973); Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968).

274. The *Puyallup* analysis eventually was applied to limit state regulation on the reservation, but only because some of the lands had been found to constitute a reservation after the original decisions.

that the state's ability to regulate treaty rights is narrower than its general police power.[275] The other three, already recognized by the Court as important factors in determining the legitimacy of state power over Indian affairs,[276] would ensure that the state articulate a well-defined need to implement an important regulatory policy in the most limited way possible.

The Supreme Court has recognized the uniqueness of the preemption analysis in Indian affairs. No clear expression of congressional intent is needed; rather, the Court has been willing to find preemption of a particular state activity that would interfere with the realization of Congress' attempt to allow full exercise of tribal self-governance.[277] Adoption of a presumption of

275. Puyallup Tribe v. Department of Game, 391 U.S. 392, 401-02 n.14 (1973). In the hunting and fishing context, the Court already has decided that state regulation of treaty rights is possible only if the state can show that its regulations are necessary to preserve the species. Thus, the state's general powers of game and wildlife management are reduced when treaty rights are the target of state regulation. State regulation of other areas of reserved tribal sovereignty should be similarly limited. In the taxing area, for instance, the state's legitimate interest in raising revenues could satisfy the heightened standard if the state were seeking to impose the tax in exchange for supplying valuable services, or if failure to tax could threaten the state's tax base. *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 173 (1980) (Brennan, J., concurring in part and dissenting in part). The *Puyallup* Court's limits on state police power suggest a standard similar to the "middle tier" standard of equal protection most forcefully suggested by Justice Marshall. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting). Under that analysis, the challenged state action must serve important governmental objectives. *See* Craig v. Boren, 429 U.S. 190, 197 (1976). *See generally* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 670-76 (10th ed. 1979).

276. The off-reservation nexus requirement finds support in Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980), in which the Court found state taxes applicable to on-reservation activity in part because "the value . . . is not generated on the reservation by activities in which the Tribes have a significant interest." *Id.* at 155. That same rationale was relevant to the Court's recent holding that state hunting and fishing laws were inapplicable to on-reservation activities, when the state had contributed nothing to the development of the fish and wildlife resources. *Mescalero*, 103 S. Ct. at 2388.

The third criterion would invalidate state law interference with a comprehensive federal plan, regardless of the legitimacy of state interest. Thus, if state jurisdiction would "disturb and disarrange" a comprehensive federal regulatory scheme, Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 691 (1965), the state will be unable to overcome the presumption. *See also Mescalero*, 103 S. Ct. at 2387; *Bracker*, 448 U.S. at 148-49.

Finally, the requirement that state regulation be necessary to the furtherance of its objective has been carefully developed in court cases limiting state regulations of off-reservation treaty rights. *See, e.g.*, Antoine v. Washington, 420 U.S. 194 (1975); Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973); Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968). This requirement seems equally applicable to on-reservation disputes, in which the state is seeking to regulate a different aspect of federally recognized tribal sovereignty.

277. The Court has expressly declined to adopt the Solicitor General's proposal that the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, should control adoption of a presumption of preemption. Ramah Navajo School Bd. v. Bureau of Revenue, 102 S. Ct. 3394, 3403 (1982). *See* Brief for United States as Amicus Curiae at 17-24, *Ramah*. The Court had previously emphasized that "automatic exemptions" from state regulation, as a matter of constitutional law, are rare. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980) (quoting Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 481 n.17 (1976)).

The Court's unwillingness to adopt the Solicitor General's theory may rest on its sensitivity to Congress' plenary control over Indian affairs. Were the Court to find a constitutionally mandated presumption against State interference, changing congressional policy would not alter the presumption. A statutorily based presumption, however, depends on continued congressional endorsement of tribal self-development. Thus, the presumption could be modified in scope or abandoned to adapt to a new congressional approach to tribal sovereignty.

The Solicitor General argued that its constitutionally based presumption could be responsive to congressional changes in policy. *See* Supplemental Brief for the United States as Amicus Cu-

preemption would provide much-needed guidance to lower courts and to state officials and would reduce the need for case by case Supreme Court review.[278] Moreover, incorporating federal recognition of tribal sovereignty into the preemption analysis by adopting a presumption against the application of state law would make the judicial inquiry a more honest one. It denies meaning to the concept of tribal sovereignty to conclude, as the Court did in *Washington v. Confederated Tribes of the Colville Indian Reservation*,[279] that state taxation of on-reservation cigarette sales to non-Indians did not infringe on tribal sovereignty, when the tribe had already enacted a comprehensive scheme for taxing those same items and obtained enormous amounts of revenue from the on-reservation sales.[280] Instead, the Court should have recognized a presumption of preemption, because the tribe had retained undisputed tribal sovereignty to tax the on-reservation sale of cigarettes. The analysis then would have proceeded to consider the necessity and permissible extent of the infringement on tribal sovereignty.

A strict preemption analysis along the lines suggested here, applied to the *Colville* cigarette case, would have forced the state to articulate more clearly the factors justifying infringement on tribal sovereignty. Although state taxation of cigarette sales within the state is normally a valid exercise of police power, derogation of federally protected sovereign rights would require the state to advance a particularly important or heightened interest in levying the tax in question. If, for instance, the state could show that the taxpayers were recipients of state services, or if the state could show serious potential damage to its tax base, a sufficent state interest would have been established.[281] Next, the Court would have applied the off-reservation nexus requirement and would have found that the tax was directed at items whose value was generated off the reservation. Thus, the second criterion would have been fulfilled. Turning to the third criterion, the Court would have evaluated relevant federal regulation. In this case, approval of the tribal taxing plan by the Secretary of

---

riae at 4, Ramah Navajo School Bd. v. Bureau of Revenue, 102 S. Ct. 3394 (1982). Nevertheless, a statutorily based presumption is better able to incorporate legitimate state concerns into the analysis and is more clearly dependent on continued congressional approval.

278. *See, e.g.*, Ramah Navajo School Bd. v. Bureau of Revenue, 102 S. Ct. 3394, 3403 (1982). The Court has indicated its weariness at repeated disputes over conflicts between state and tribal law: "The general question presented by this case has occupied the Court many times in the recent past, and seems destined to demand its attention over and over again until the Court sees fit to articulate, and follow, a consistent and predictable rule of law." *Id.* at 3404 (Rehnquist, J., dissenting). *See also* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 137 (1980); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 176 (1980) (Rehnquist, J., concurring).

279. 447 U.S. 134 (1980).

280. The majority, while confirming the tribe's sovereign power to impose its own taxes on on-reservation cigarette sales, concluded that the additional imposition of state taxes would not interfere with the exercise of that sovereign power. *Id.* at 158-59. That conclusion is, at best, disingenuous. As the dissent pointed out, imposition of the state tax would place the tribes at a tremendous competitive disadvantage, because its cigarettes would have to bear two tax burdens. *Id.* at 170 (Brennan, J., dissenting).

281. One or both of those heightened state interests may have been present, *id.* at 156; however, the Court never required the state to substantiate its predicted "parade of horribles." *Id.* at 173 (Brennan, J., dissenting).

the Interior was the government's only involvement. In the absence of express congressional delegation of power[282] or statutory provisions regulating the target activity,[283] the state could have satisfied the Court that its regulation would not interfere with a comprehensive federal plan. With regard to the last criterion, the *Colville* Court did not consider whether the burdens imposed on the tribe were necessary to further the state's assumedly important interest in taxing off-reservation value on the reservation. Had the Court applied the proposed analysis, it would have insisted, for example, that the state demonstrate that its enforcement mechanisms intruded on tribal sovereignty no more than necessary.[284] Because the *Colville* Court failed to require the state to establish that imposition of the cigarette tax was justified by an important state need that could not be protected in a manner less intrusive on tribal affairs, the Court's decision failed to adhere to the Court's own standards for evaluating state incursion on a federally protected right.[285]

C. *The Presumption in Hunting and Fishing*

Although the preemption analysis outlined above could have broad application to all state attempts to regulate any conduct otherwise reserved to tribal regulation,[286] the approach is particularly applicable to hunting and fishing rights, because it recognizes the extensive traditional relationship between the tribe and its land.[287] Moreover, Congress has repeatedly emphasized its intent not to disturb tribal sovereignty over hunting and fishing[288] and has provided explicit enforcement mechanisms for tribal hunting and fishing codes. A federal trespass statute makes it a crime to hunt and fish on Indian lands without

---

282. The Court in United States v. Mazurie, 419 U.S. 544 (1975), took for granted that state law may be preempted by tribal ordinances enacted pursuant to specific federal statutory authorization.

283. *E.g.*, Ramah Navajo School Bd. v. Bureau of Revenue, 102 S. Ct. 3394 (1982); Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965).

284. *Compare Washington*, 447 U.S. at 159-60 (tribes bear burden of showing record keeping requirements invalid).

285. For general discussion and criticism of *Colville*, see Clinton, *State Power over Indian Reservations: A Critical Comment on Burger Court Doctrine*, 26 S.D.L. REV. 434, 440-43 (1981); Comment, *What About* Colville*?*, 8 AM. INDIAN L.J. 161 (1980); Note, *The Limits of Indian Sovereignty: The Tribe Confronts the State in On-Reservation Taxation of Non-Indians*, 18 HOUS. L. REV. 563 (1981); Note, *Tribal Taxation Does Not Preclude State's Authority to Impose an Otherwise Valid State Tax*, 57 N.D.L. REV. 241 (1981).

286. For example, the applicability of state environmental laws to tribal lands is an area currently in dispute. *See generally*, Comment, *The Developing Test for State Regulatory Jurisdiction in Indian Country: Application in the Context of Environmental Law*, 61 OR. L. REV. 561 (1982) and sources cited *id.*, at 563 n.17.

287. *Mescalero*, 630 F.2d at 728; *see also* United States v. Winans, 198 U.S. 371, 381 (1905) (access to and control of wildlife was "not much less necessary to the existence of the Indian than the atmosphere they breathed").

288. *E.g.*, Congressional proposals to abrogate Indian hunting and fishing rights have all died in committee. H.R.J. Res. 246, 96th Cong., 1st Sess. (1979); H.R. 2738, 96th Cong., 1st Sess. (1979); S.J. Res. 170, 171, 88th Cong., 2d Sess. (1964); *Indian Fishing Rights—Fishery Management, Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 96th Cong., 2d. Sess. (1980). *See also* S.J. Res. 48, 88th Cong., 1st Sess. (1963); H.R.J. Res. 698, 87th Cong., 2d Ses. (1962). *Indian Fishing Rights, Hearings Before the Subcomm. on Indian Affairs of the Sen. Comm. on Internal & Insular Affairs*, 88th Cong., 2d. Sess. (1964)

tribal permission;[289] in addition, the Lacey Act Amendments of 1981[290] prohibit interstate transportation of any fish or game acquired in violation of a tribal ordinance.

As applied to Indian hunting and fishing rights, the preemption analysis offered here would recognize the tribe's retained sovereignty to control hunting and fishing, both on the reservation and at off-reservation sites where hunting and fishing rights have received either express or implied federal recognition. Thus, the distinction between between off- and on-reservation rights would lose its significance; the inquiry would focus on whether the activity was protected by federal law. The role of tribal sovereignty in such an inquiry would be two-fold: first, it would define the limits to which tribes can assert authority, invalidating any tribal attempt to exercise power in areas over which its sovereignty has been divested. Second, it would define those areas in which the presumption of preemption will be triggered. Any state attempt to regulate matters over which the tribe has retained sovereignty, whether it has exercised that sovereignty or not, would have to overcome the presumption against state regulation by satisfying the test outlined above. In effect, this analysis extends the *Puyallup* Court's narrowly defined limits of state power over off-reservation Indian hunting and fishing to all aspects of Indian hunting and fishing. To overcome the presumption, the state would be required to establish a heightened regulatory need such as preserving resources or eliminating safety hazards. Second, to establish an off-reservation nexus, the state could show, for instance, that the resource was a migratory species, frequently crossing reservation boundaries; or that state funds significantly contributed to the development of the resource. Moreover, the state would have to demonstrate that its regulation would not interfere with extensive federal regulation of the development and exploitation of the resource. And finally, the state would have to prove that the regulation was necessary to further its heightened interest. Thus, adequate tribal self-regualtion would render state hunting and fishing codes inapplicable.

To adopt the presumption of preemption would not be a drastic step for the Court. Language in *New Mexico v. Mescalero Apache Tribe*,[291] its most recent evaluation of state regualtion of on-reservation activities, comes close to establishing such a presumption. In addition, the Tenth Circuit's holding in *Mescalero* expressly found a presumption applicable.[292] Most importantly, a presumption of preemption would ensure that Congress' firm commitment to and encouragement of tribal self-determination finds adequate protection

289. 18 U.S.C. § 1165 (1982).

290. 16 U.S.C. § 3372 (1982).

291. *See supra* note 224 and accompanying text. Moreover, the Court noted that the state has been permitted to assert its authority over nonmembers on the reservation in "certain" circumstances and over tribal members on the reservation in "exceptional" circumstances. *Mescalero*, 103 S. Ct. at 2384-85. Because the state is more likely to be able to overcome the presumption of preemption when it seeks to regulate nonmembers, the preemption analysis correctly predicts this difference in state power.

292. *See Mescalero*, 630 F.2d at 730, 732.

against unwarranted state intrusion.[293]

V. CONCLUSION

Tribal sovereignty retains an important role in Indian hunting and fishing rights. It establishes the limits to which tribes may exercise control over their members and their territory. The validity of any tribal attempt to regulate hunting and fishing depends on a finding that the tribe operates within the bounds of undivested, federally confirmed tribal sovereignty. State attempts to regulate areas in which the tribe's sovereign powers have been confirmed raise difficult questions regarding the state's ability to regulate a federally protected right. Because the Supreme Court has long recognized that the tribes are not totally insulated from state control, a proper analysis must give sufficent protection to legitimate state interests while narrowly defining the instances of state incursions on tribal sovereign powers. A statutorily based presumption of preemption strikes the proper balance between state and tribal interests. Reflecting firm congressional commitment to maximum tribal self-development, the presumption of preemption requires the state to demonstrate a well-defined regulatory need and ensures that the state regulation imposed will be carefully tailored to advance that need in the manner least intrusive on tribal sovereign powers.

293. As the Tenth Circuit said in *Mescalero*, "The federally declared policy of self-determination becomes a mockery if it is subject to defeasance by the state." *Id.* at 734.