Golden Gate University Law Review

Volume 10
Issue 1 *Ninth Circuit Survey*

Article 12

January 1980

Indian Law

Ben E. Fox

INDIAN LAW

I. INTRODUCTION

Treaties made between the United States and Indian tribes during the eighteenth and nineteenth centuries often provided that the tribes would retain the right to hunt and fish on the lands set aside as Indian reservations or in other designated areas "so long as game may be found . . . ."[1] Executive Orders or other documents which created or defined reservations often specified that the land was to be used for "Indian purposes."[2] The term "Indian purposes" has been judicially interpreted to include the guaranteed tribal right to hunt and fish on the indicated lands, free of state or federal control.[3]

However, the simple and explicit guarantees of the early treaties and Executive Orders have become confounded by the complexities of the twentieth century, and confused by social and political change. Congress, with its guardian-like powers over Indian tribes,[4] has vacillated between a policy of forced assimilation of Native Americans into the larger society, and efforts to preserve and protect Indian rights and cultural heritage.[5]

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1. Treaty with the Crow Indians of 1868, 15 Stat. 649, 650 (1868). For discussion of Indian treaty terminology and interpretation, *see* Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Upon The Earth"— How Long a Time Is That?*, 63 CAL. L. REV. 601 (1975).

2. *See* Exec. Order of January 9, 1884, establishing the Fort Yuma Indian Reservation "to be used for Indian purposes . . . ," *reprinted in 1* C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES 832 (1903).

3. *See* United States v. Sturgeon, 27 F. Cas. 1357 (D. Nev. 1879). Similar terminology such as "to be held as Indian lands are held" has also been interpreted to include the right to fish and hunt in Menominee Tribe of Indians v. United States, 391 U.S. 404, 405-06 (1968).

4. For a detailed review of federal guardianship theory, *see* Carter, *Race and Power Politics As Aspects of Federal Guardianship Over American Indians: Land Related Cases, 1887-1924*, 4 AM. INDIAN L. REV. 197 (1976).

5. For an overview of the history of federal Indian policy, *see* Washburn, *The Historical Context of American Indian Legal Problems*, 40 L. & CONTEMP. PROB. 12 (1976). The often contradictory federal policies have been conveniently related to time periods in D. GETCHES, D. ROSENFELT & C. WILKINSON, FEDERAL INDIAN LAW (1979) (hereinafter FEDERAL INDIAN LAW). The authors delineate the periods of: treaty making, 1776-1871; allotment and assimilation, 1871-1928; Indian reorganization, 1928-1945; tribal termination, 1945-1961; and Indian self-determination, 1961-present. *Id.*

The policy of allotment and assimilation was reflected by the General Allotment Act, 25 U.S.C. §§ 331-58 (1976) (commonly referred to as the Dawes Act of 1887) which divided Indian held lands on a per capita basis among tribe members, with individual

The often contradictory actions of Congress have resulted in a maze of federal, tribal and state jurisdiction over Indian matters.[6] Where federal or state actions limit or affect the exercise of Indian tribal rights, some tribes have responded by asserting their explicit or implied treaty rights or other guarantees. The courts are required to interpret the original treaties and agreements in conjunction with subsequent congressional enactments. Applying traditional canons of federal Indian law, the courts attempt to equitably balance guaranteed tribal rights and conflicting state or federal interests. Indian tribal hunting and fishing rights are primary areas of this conflict.[7]

States have rarely contested the rights of the Indians themselves to hunt and fish on their reservations, free of regulation.[8] But this question has arisen when an Indian

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Indians receiving a parcel of not more than 160 acres. The purpose of the policy was to assimilate Native Americans into the general society. To this end, the parcels assigned to individual Indians were to be held in trust by the United States for a period of 25 years, after which the Indian owners could sell the land to non-Indians if they chose. As a further inducement to enter the major society, Indians who assumed "the habits of civilized life" received United States citizenship. *See History of the Allotment Policy, Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess., pt. 9, at 428-89 (1934) (statement of D. S. Otis) *reprinted in* FEDERAL INDIAN LAW, *supra*, at 69.

The Indian Reorganization (Wheeler-Howard) Act of 1934, 25 U.S.C. §§ 461-79 (1974), ended the allotment policy, prohibited alienation of Indian land except among the tribes themselves and established a procedure for tribes to organize and adopt constitutions and by-laws, subject to approval by the Secretary of the Interior. *See* Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955 (1972). This reversal of the allotment and assimilation policy was itself reversed by the subsequent federal termination policy. *See* the Concurrent Resolution Expressing the Sense of Congress that Certain Tribes of Indians Should be Freed from Federal Supervision, H.R. Con. Res. 108, 83d Cong., 1st Sess. (1953), *amended*, H.R. 1063, 83d Cong., 1st Sess. (1953). H.R. 1063 was better known as Public Law 280, which expressly sought to remove all federal supervision and control from effected Indian tribes. *See* Herzberg, *The Menominee Indians: Termination to Restoration*, 6 AM. INDIAN L. REV. 143 (1978). The termination policy indicated Congress' return to a philosophy of assimilation of Indians "into the mass of the population." *See* COMM'N ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, INDIAN AFFAIRS: A REPORT TO CONGRESS (1949), *quoted in* FEDERAL INDIAN LAW, *supra*, at 86. In turn, the termination policy was replaced by the federal self-determination policy, reflected by a "significant movement" by the federal government toward "increased protection of Indian rights . . . ." Israel, *The Reemergence of Tribal Nationalism and Its Impact on Reservation Resource Development*, 47 U. COLO. L. REV. 617, 624 (1976).

6. For a review of the complicated nature of jurisdiction on reservations, see Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 KAN. L. REV. 387 (1974).

7. W. WASHBURN, RED MAN'S LAND—WHITE MAN'S LAW 196 (1971).

8. When the issue has been contested, courts have generally held that the states

reservation was terminated by Congress,[9] and former Indian land sold to non-Indians. At issue was whether treaty hunting and fishing rights were tied to the land and therefore extinguished by the transfer of the land from exclusive Indian control, or whether those rights were independent and survived alienation of the land.[10] Issues have also arisen as to who may exercise hunting and fishing rights,[11] and whether the rights extended to the descendants of Indians who elected to terminate their tribal membership and claims to tribal rights in return for monetary settlements.[12]

The recognition that wildlife is a valuable and exhaustible resource has resulted in competition between state and tribal governments for the economic benefits derived from fishing and hunting activities. As Indian tribes seek to develop and encourage non-Indian use of on-reservation wildlife resources to augment tribal income, states have attempted to impose licensing requirements and to apply their fish and game regulations to the non-Indian on-reservation activities. Conflict has also arisen when the tribes and the states have differing concepts of conservation and of the most effective methods of preventing over-exploitation of the resource. Finally, controversies have arisen concerning the extent to which the tribes and the states may regulate these non-Indian, on-reservation activities.

Various aspects of Indian hunting and fishing rights were brought before the Ninth Circuit in five cases in the last term. In three of these cases,[13] the court applied basic canons of federal

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have no regulatory power over Indian on-reservation fishing. *E.g.*, Moore v. United States, 157 F.2d 760 (9th Cir.), *cert. denied*, 330 U.S. 827 (1946); Pioneer Packing Co. v. Winslow, 159 Wash. 655, 294 P. 557 (1930); Arnett v. Five Gill Nets, 48 Cal. App. 3d 454, 121 Cal. Rptr. 906 (1975), *cert. denied*, 425 U.S. 907 (1976). *But see* Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165 (1977); Kimball v. Callahan, 590 F.2d 768 (9th Cir.), *cert. denied*, 100 S. Ct. 49 (1979) (under strict standards, states may regulate Indian on-reservation fishing for conservation purposes).

9. Kimball v. Callahan, 493 F.2d 564, 569 (9th Cir. 1974) (*Kimball I*); *see* notes 76-80 *infra* and accompanying text.

10. *Id.*

11. Kimball v. Callahan, 590 F.2d 768, 775 (9th Cir. 1979) (*Kimball II*); *see* notes 81-108 *infra* and accompanying text.

12. *Id.* at 775-76.

13. Kimball v. Callahan, 590 F.2d 768 (9th Cir. Jan., 1979) (per Jameson, D.J., sitting by designation; the other panel members were Goodwin and Anderson JJ.), *cert. denied*, 100 S. Ct. 49 (1979); California v. Quechan Tribe of Indians, 595 F.2d 1153 (9th

Indian law to the questions presented and generally supported the contentions of the Indian parties. In the other two cases, one marked by a dissent, the court emphasized the federal instrumentality theory.[14] The court held, in one case, that a state may regulate non-Indian, on-reservation hunting and fishing activities unless clearly and expressly preempted by Congress or the tribe.[15]

While the cases are significant in their own right, and have economic as well as cultural importance for the Indian litigants, the court's interpretation and application of traditional principles of federal Indian law in resolving the hunting and fishing rights issues may be of even greater significance to other areas of Indian law. This article will review the cases considered by the court and examine the Ninth Circuit's findings on the issues of tribal sovereignty, federal preemption and tribal immunity from suit.

II. BASIC PRINCIPLES OF FEDERAL INDIAN LAW

European colonists early recognized Indian property rights and made token affirmation of their validity to simplify the

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Cir. Apr., 1979) (per Anderson, J.; the other panel members were Takasugi, D.J., and Carter, J.); United States v. Jackson, 600 F.2d 1283 (9th Cir. July, 1979) (per Wright, J.; the other panel members were Tang, J., and Palmieri, D.J.).

14. United States v. Montana, 604 F.2d 1162 (9th Cir. Sept., 1979) (per Sneed, J.; the other panel members were Anderson, J., and Williams, D.J.) *petition for cert. filed*, 48 U.S.L.W. 3572 (U.S. Jan. 21, 1980) (No. 79-1128); Confederated Tribes of the Colville Indian Reservation v. Washington, 591 F.2d 89 (9th Cir. Feb., 1979) (per Choy, J.; Duniway, J., dissenting; the other panel member was Grant, D.J.). The term "federal instrumentality" refers to an agency or property of the federal government which is immune from state control or taxation due to its purpose as an instrument of federal policy. Waterbury Sav. Bank v. Danaher, 128 Conn. 78, 20 A.2d 455, 458 (1941). "Federal preemption" doctrine prevents state regulation or involvement in areas in which the federal government has indicated the intent to exclude state action, or where dual regulation would hamper or obstruct federal policy. South Carolina State Highway Dep't v. Barnwell, 303 U.S. 177 (1938). As applied to Indian tribes, federal instrumentality theory has shielded tribal on-reservation enterprises from state regulation, and similarly, prevented state taxation of salaries earned on a reservation by individual Indians. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973). In *Confederated Tribes*, the Ninth Circuit applied a hybrid of federal instrumentality theory and federal preemption doctrine, resulting in tribal immunity from state regulation only where the tribe or the federal government has explicitly and expressly indicated the intent to exclude a state government. Significantly, this novel theory removes from a state the burden of proving that state involvement would *not* hamper a federal policy, and requires instead that an Indian tribe show that the state action *will* materially interfere with a policy or goal of the tribe. *See* Kissel, note 207 *infra*.

15. 591 F.2d at 93.

occupation of Indian lands.[16] Indian rights are, therefore, among the oldest in our system of law and predate the United States Constitution. The United States continued to recognize Indian rights and to negotiate with the Indian tribes as sovereign nations[17] in order to minimize conflict and to provide a means of national expansion.[18]

The traditional means employed by the United States to gain concessions of land from the Indian tribes was the negotiation of treaties, often supported by a military presence.[19] Since the power to make treaties with Indian tribes is derived from the Constitution, treaties are considered the supreme law of the land and may not be contravened by state law.[20] Although the practice of entering into treaties with Indian tribes ended in 1871, treaties made prior to that date continue in effect unless superseded by subsequent congressional acts.[21]

Congress has plenary power over Indian tribes,[22] and may therefore enact legislation which contradicts or abrogates a prior treaty, but only if that intent is expressly stated in the subsequent act.[23] The termination of treaty rights requires either a clear statement or conclusive legislative history which reflects the intent to abrogate the rights.[24] That intent may not be merely implied or imputed to Congress.[25]

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16. Washburn, *The Historical Context of American Indian Legal Problems*, 40 L. & CONTEMP. PROB. 12, 14-15 (1976).

17. *Id.* at 16. *See also* W. WASHBURN, THE INDIAN IN AMERICA 210-14 (1975).

18. Wilkinson & Volkman, *supra* note 1, at 608-09.

19. *Id.* at 609-10. *Cf.* Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970) (the Court notes that treaty negotation was not at arm's length, but "[r]ather, treaties were imposed upon [the Indians] and they had no choice but to consent," *id.* at 630-31.).

20. U.S. CONST. art. I, § 8, cl. 3 provides Congress the power "[t]o regulate Commerce . . . with the Indian Tribes . . . ." U.S. CONST. art. II, § 2, cl. 2 grants to the President the power "by and with the Advice and Consent of the Senate, to make Treaties . . . ." *See* United States v. 43 Gallons of Whiskey, 93 U.S. 188, 196 (1876).

21. The Indian Appropriations Act of 1871, 25 U.S.C. § 71 (1976), provided that the United States would not form treaties with the Indian tribes after 1871, but no existing treaties would be affected or invalidated by the Act. *See* Antoine v. Washington, 420 U.S. 194, 201-02 (1975).

22. United States v. Mazurie, 419 U.S. 544 (1975); Lone Wolf v. Hitchcock, 187 U.S. 553, 565-66 (1903).

23. *E.g.*, United States v. Payne, 264 U.S. 446 (1924); United States v. White, 508 F.2d 453, 456-57 (8th Cir. 1974).

24. For a detailed analysis of the difference between clear or express statement and conclusive legislative history as bases for treaty right abrogation, see Wilkinson & Volkman, *supra* note 1, at 645-61.

25. Menominee Tribe v. United States, 391 U.S. 404, 412-13 (1968).

Traditionally, Indian treaties reserved certain lands for the exclusive use of the Indian tribes, and provided for the payment of cash and services to the tribes. In return, the tribes ceded to the United States other lands claimed by the Indians. Indian rights of hunting and fishing, have been considered exclusive for the tribes on retained reservation land. However, on the ceded land, these rights became non-exclusive[26] and are referred to as off-reservation rights.

The evolution of federal Indian law has resulted in the formulation of basic rules of treaty construction. Central to treaty interpretation is the theory of reserved rights, which holds that the powers of Indian tribes are not granted by Congress, but derive from tribal sovereignty based on the original possession of the land.[27] Treaties are therefore "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."[28]

In addition, courts require that ambiguous provisions of treaties be construed as the Indian signatories would have understood them.[29] The principle that treaties are to be interpreted liberally in favor of Indian tribes has not been consistently applied.[30] Nevertheless, many courts follow the "express statement rule," requiring, for effective abrogation, a subsequent Congressional act that *explicitly* abrogates treaty rights.[31]

The jurisdictional conflict arising from claims of federal and state governments and Indian tribes over on-reservation matters results from three contradictory theories. First, tribes claim the right of self-government based on the argument that at the time

26. Puyallup Tribe, Inc. v. Department of Game, 391 U.S. 392, 399 (1968) *(Puyallup I)*. Non-exclusive means that a right which formerly included the power to exclude non-tribe members from participation has been transformed to a right which is shared in common with non-tribe members.

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

28. *Id.* at 381.

29. McClanahan v. State Tax Comm'n, 411 U.S. 164 (1973); Choctaw Nation v. Oklahoma, 397 U.S. 620, 630-31 (1970); Menominee Tribe v. United States, 391 U.S. 404, 406 (1968); United States v. Winans, 198 U.S. 371, 380-81 (1905); Jones v. Meehan, 175 U.S. 1 (1899); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 551-53 (1832).

30. *E.g.*, 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. Walker River Irrigation Dist., 104 F.2d 334, 337 (9th Cir. 1939).

31. *E.g.*, United States v. White, 508 F.2d 453, 456-57 (8th Cir. 1974).

of the early treaties, tribes were considered sovereign nations.[32] Although some rights were relinquished by treaty, or were abrogated by Congress, those not expressly terminated continued as reserved rights and support tribal sovereignty and on-reservation self-government.[33] Second, federal claims to on-reservation jurisdiction derive from the United States Constitution[34] and from the judicially created theory that the federal government has assumed a guardian relationship in which the Indian tribes are viewed as wards requiring protection.[35] Finally, state claims to on-reservation jurisdiction reflect the doctrine that states possess original and complete sovereignty over their territory, except as limited by the Constitution or by conditions expressly imposed at the time of entry to the Union.[36] State claims are federally preempted in many areas. They may also be superceded by the principles that treaties are the supreme law of the land, and that Indian tribes possess a unique sovereignty somewhat similar to that of the United States.[37] Even when inherent on-reservation state jurisdiction is absent, however, Congress may delegate it to the states, as they did in Public Law 280,[38] which transferred federal jurisdiction to certain states[39] for civil and criminal matters arising on reservations.

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32. *E.g.*, K. KICKINGBIRD, L. KICKINGBIRD, C. CHIBITTY & C. BERKEY, INDIAN SOVEREIGNTY 6 (1977). This is a workbook of Indian law, developed by the Institute for the Development of Indian Law, Washington, D.C. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 532, 559 (1832).

33. FEDERAL INDIAN LAW, *supra* note 5, at xviii-xix.

34. The commerce clause provides Congress with the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. CONST. art. I, § 8 cl. 3. The commerce clause is usually combined with the supremacy clause, U.S. CONST. art. VI, § 3, cl. 2, to support federal on-reservation jurisdiction. The courts have refused to consider whether this jurisdictional claim is valid, stating that it is a "political question" left to the discretion of Congress. *See* United States v. Holliday, 70 U.S. (3 Wall.) 407 (1865).

35. United States v. Kagama, 118 U.S. 375 (1886); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). *See also* Carter, *supra* note 4.

36. U.S. CONST. art. IV, § 3 and amend.X.

37. This sovereignty, which includes immunity from suit, is possessed only by tribes, not by individual Indians. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978); Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165, 171-72 (1977) *(Puyallup III)*; California v. Quechan Tribe of Indians, 595 F.2d 1153, 1156 (9th Cir. 1979).

38. Act of August 15, 1953, ch. 505, 67 Stat. 588-90 (codified as amended in various sections of 18, 25 and 28 U.S.C.). *See* Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. REV. 535 (1975).

39. Originally Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin were granted civil and criminal jurisdiction, with some limitations. Jurisdiction could be assumed by other states without the requirement of Indian consent. In 1968, Congress enacted a provision requiring consent from effected Indians prior to the assumption of jurisdiction under Public Law 280. 25 U.S.C. § 1326 (Supp. 1976).

arising on reservations.

In considering on-reservation jurisdiction, all former reservation land, even if sold to non-Indians, remains legally defined as "Indian Country"[40] unless expressly severed by Congress.[41] The intent of Congress to sever former reservation land must be explicitly stated on the face of the act permitting alienation from Indian possession, or be clear from the surrounding circumstances and the legislative history.[42]

In reviewing the hunting and fishing rights cases before it this term, the Ninth Circuit has produced inconsistent results. In some cases, the court considered some of the principles of federal Indian law, applying and extending them; in other cases, however, the court used an interpretation of federal instrumentality doctrine which defines Indian tribes as a mere arm of the federal government.[43] The Ninth Circuit's use of instrumentality doctrine has been described both as "a substantial threat to tribal sovereignty,"[44] and as an effective negation of the "independent tribal authority to self-govern."[45] This view is borne out by the court's holding.

III. *KIMBALL V. CALLAHAN:* THE EFFECT OF TRIBAL TERMINATION ON TREATY RIGHTS

In *Kimball v. Callahan*[46] (*Kimball II*), the court reviewed the effect of tribal termination on tribal and individual treaty

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40. 18 U.S.C. § 1151 (1976) defines Indian Country as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-ways running through the same.

41. Mattz v. Arnett, 412 U.S. 481, 504 (1973).

42. DeCoteau v. District County Court, 420 U.S. 425, 444 (1975); Mattz v. Arnett, 412 U.S. 481, 505 (1973).

43. *See, e.g.*, Confederated Tribes of the Colville Indian Reservation v. Washington, 591 F.2d 89 (9th Cir. 1979).

44. Kissel, *The Ninth Circuit's Federal Instrumentality Doctrine—A Threat to Tribal Sovereignty*, 53 NOTRE DAME LAW. 358, 384 (1978).

45. *Id.* at 358.

46. 590 F.2d 768 (9th Cir.), *cert. denied*, 100 S. Ct. 49 (1979).

rights. The court affirmed the findings entered in a previous case by the same name,[47] and extended the holding to the descendants of tribe members who had terminated their tribal affiliation. A review of the history of the Klamath Reservation and of the legislative and judicial background which shaped the issues considered by the Ninth Circuit last term will be helpful for a clearer understanding of *Kimball II*.

A. BACKGROUND

In 1864, members of the Klamath and Modoc Indian Tribes and of the Yahuskin Band of Snake Indians[48] signed a treaty with representatives of the United States.[49] In return for cash payments and services from the federal government,[50] the Indian signatories ceded tribal land claims in southern Oregon and northern California to the United States. The treaty provided that certain land "within the country ceded by this treaty, shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians, [and be] held and regarded as an Indian Reservation . . . ."[51] A provision of the treaty guaranteed the Indians "the exclusive right of taking fish in the streams and lakes included in said reservation."[52] No mention was made in the treaty of hunting or trapping rights.[53]

47. 493 F.2d 564 (9th Cir. 1974) (*Kimball I*).

48. The Klamath and Modoc Tribes were related and originally referred to themselves as Maklaks. After the division of the Tribes, the Klamaths referred to themselves as Eukskni, and the Modocs apparently assumed their present name. The various bands referred to as the Yahuskin Snake group were also known as Paiutes, Shoshones or by the band names Yahuskin and Walpapi.

49. The 1864 treaty, referred to as the Council Grove Treaty of October 14, 1864, 16 Stat. 707 (1869), was actually the second treaty negotiated with the Klamath and Modoc Tribes. On February 14, 1864, the Tribes entered into a treaty by which they agreed to live in peace, subject themselves to the jursidiction of the United States, and permit travel by non-Indians through their land. In return the Tribes received two blankets and some food, and similar rights to travel through the non-Indian settlements if unarmed. The first treaty, which ceded no land, was rejected by the federal Indian Bureau as improper and void. The subsequent Council Grove Treaty resulted in the cession by the Tribes of approximately "twelve to fourteen million" acres of land claimed by the Indians, and was ratified by Congress in 1869. R. DILLON, BURNT-OUT FIRES 20 (1973). The treaty was objected to by some members of the Modoc Tribe, and resulted in the so-called Modoc War in 1873. For an historical perspective of the treaty negotiations, see *id.*

50. For a statement of the payments and services to be provided the Tribes, see Treaty of Oct. 14, 1864, 16 Stat. 707 (1869); R. DILLON, *supra* note 49, at 62; Pearson, *Hunting Rights: Retention of Treaty Rights After Termination*—Kimball v. Callahan, 4 AM. INDIAN L. REV. 121, 122 (1976).

51. Treaty of Oct. 14, 1864, 16 Stat. 707, 708 (1869).

52. *Id.*

53. *Id.*

In creating the reservation, Congress assumed civil and criminal jurisdiction over matters arising within reservation boundaries.[54] In 1953, Congress enacted Public Law 280,[55] which transferred this jurisdiction to Oregon, and represented the initiation of the federal termination policy.[56] Public Law 280 expressly exempted treaty fishing, hunting and trapping from state regulation.[57] To implement the termination policy, Congress passed the 1954 Klamath Termination Act[58] which established a tribal membership roll closed to additions after August, 1954.[59] This Act provided for termination of the reservation and sale of former reservation lands to both Indians and non-indians, to be final in 1961.[60] Tribe members could withdraw from the tribe and receive a monetary share of tribal holdings, or receive a parcel of the former reservation land and participate in an Indian-developed corporation intended to oversee the land remaining in Indian possession. Similar to the exemption provision of Public Law 280, the Klamath Termination Act provided that nothing in the Act would "abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty."[61] Unlike Public Law 280, however, the Klamath Termination Act included no statement concerning hunting or trapping rights.

The federal termination policy, and the combined effect of Public Law 280 and the Klamath Termination Act resulted in

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54. The federal assumption of on-reservation jurisdiction included in the Treaty of Oct. 14, 1864 was based on the supremacy clause, U.S. CONST. art. VI, § 3, cl. 2. *See* note 34 *supra*.

55. *See* notes 38-40 *supra*.

56. *See* note 5 *supra*.

57. 18 U.S.C. § 1162(b) (1976).

58. Act of August 13, 1954, ch. 732 § 1, 68 Stat. 718 (codified at 25 U.S.C. §§ 564-564x (1976)).

59. 25 U.S.C. § 564(b) (1976) states:

> At midnight of August 13, 1954, the roll of the tribe shall be closed and no child born thereafter shall be eligible for enrollment: *Provided*, That the tribe shall have a period of six months from August 13, 1954, in which to prepare and submit to the Secretary a proposed roll of the members of the tribe living on August 13, 1954, [the date of this Act] which shall be published in the Federal Register.

60. 25 U.S.C. § 564a(d) (1976) states: " 'Tribal property' means any real or personal property, including water rights, or any interest in real or personal property, that belongs to the tribe and either is held by the United States in trust for the tribe or is subject to a restriction against alienation imposed by the Unites States."

61. 25 U.S.C. § 564m(b) (1976).

litigation requiring nearly twenty-five years of treaty and statutory analysis by federal courts. These cases reflect an inconsistent application of federal Indian law principles, and included disapproval of a prior Ninth Circuit decision which the appellate court noted "could not stand"[62] in light of a United States Supreme Court case[63] which involved similar issues and affirmed traditional Indian law principles.

The cases preceding *Kimball II*[64] began in 1956, after the enactment of the Klamath Termination Act, but prior to the final termination of the Klamath Reservation in 1961. In *Klamath and Modoc Tribes v. Maison (Klamath I)*,[65] the tribes brought suit to enjoin Oregon from enforcing its game laws against tribe members hunting and trapping on the reservation. Applying the principle that Indian treaties must be interpreted as the Indian signatories would have understood them, the district court found that the guarantee of fishing rights in the Klamath Treaty impliedly included hunting and trapping rights.[66] These implied treaty rights were included in the express exemption from state regulation contained in Public Law 280. Therefore, Oregon was precluded from extending its game law enforcement to Indian on-reservation hunting and trapping.[67]

In 1964, three years after termination of the Klamath Reservation, tribe members who had elected to maintain tribal affiliation, contested Oregon's contention that the hunting, trapping and fishing rights established in *Klamath I* were extinguished by the termination of the reservation. In *Klamath and Modoc Tribes v. Maison (Klamath II)*, the Ninth Circuit failed to apply the federal Indian law principle that treaty rights may be abrogated only by an express indication of Congress' intent to do so.[68] The appellate court found that treaty rights were tied to the existence of the reservation, and were

62. 493 F.2d 564, 569 (9th Cir. 1974), referring to Klamath & Modoc Tribes v. Maison, 338 F.2d 620 (9th Cir. 1964), which held that treaty rights of the Tribes on the reservation were extinguished on all land transferred from Indian control to federal or private ownership as a result of the Klamath Termination Act. 338 F.2d at 623.

63. Menominee Tribe v. United States, 391 U.S. 404 (1968). *See* notes 77 to 79 *infra* and accompanying text.

64. 590 F.2d 768 (9th Cir. 1979).

65. 139 F. Supp. 634 (D. Or. 1956).

66. *Id.* at 637.

67. *Id.* at 636-37.

68. 338 F.2d 620, 623 (9th Cir. 1964); *see* note 23 *supra* and accompanying text.

extinguished unless expressly extended by the Klamath Termination Act, thereby permitting Oregon to apply state fish and game regulations to tribe members hunting or fishing on former reservation lands.

Four years later, in *Menominee Tribe v. United States*,[69] the Supreme Court considered the effect of the 1954 termination of the Menominee Tribe and reservation by Congress, rejecting the *Klamath II* reasoning. The Court found that the language of the Treaty of Wolf River of 1854,[70] setting aside the Wolf River reservation "for a home" for the Menominee Tribe, "to be held as Indian lands are held"[71] implied the tribal right to hunt and fish even if not specifically stated. The Supreme Court applied the *Winans*[72] doctrine which established that a treaty be construed as "the Indians . . . understood it, and as justice and reason demand . . . ."[73] The Court, observing that "the intention to abrogate or modify a treaty is not to be lightly imputed to Congress,"[74] found that the fishing and hunting rights of the Menominee Tribe had not been extinghished by the Menominee Termination Act.[75] The findings in *Menominee* had a signficant impact on the Ninth Circuit six years later when the effect of tribal and reservation termination were again brought before the appellate court in *Kimball I*.

The plaintiffs in *Kimball I* were Klamath Reservation Indians whose ancestors, or who themselves had elected to withdraw from the tribe, pursuant to the Klamath Termination Act. Their interest in tribal property had been converted to money and paid to them, and thus had been transferred to the United States or private ownership. Even so, the plaintiffs maintained 0that their individual treaty rights to fish, hunt and trap on the former reservation lands, free of state regulation, survived termination and withdrawal from the tribe. The Indians sought a declaration of their rights and an injunction to prevent Oregon from enforcing its game laws against tribe members on former reservation lands.

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69. 391 U.S. 404 (1968).

70. Treaty of Wolf River, 1854, 10 Stat. 1064, 1065, art. 2 (1854).

71. 391 U.S. at 406 (1968).

72. United States v. Winans, 198 U.S. 371 (1905); *see* text accompanying note 27 *supra*.

73. 198 U.S. at 380.

74. 391 U.S. at 413, *quoting* Pigeon River Co. v. Cox Co., 291 U.S. 138, 160 (1934).

75. *Id.* at 412-13.

After the district court dismissed the complaint for failure to state a claim upon which relief could be granted,[76] the plaintiffs appealed. The Ninth Circuit noted that its finding in *Klamath II*,[77] that treaty rights tied to the reservation did not survive termination, could not stand subsequent to *Menominee v. United States*. The *Kimball I* court held that Klamath Reservation Indians who withdrew from the tribe and received a monetary share of tribal holdings nevertheless retained treaty rights to hunt and fish on former reservation lands free of state regulation.[78] The court, compelled by *Menominee* to find for the Indian plaintiffs, stated that the Termination Act could not be construed as "a backhanded way of abrogating the hunting and fishing rights of these Indians."[79] The Ninth Circuit then remanded the case to the district court for further hearing on the issue of state regulation of Indian hunting and fishing on the former reservation lands for the purposes of conservation.

On remand, the district court held that hunting, fishing and trapping based on treaty rights were exempt from state regulation and that these rights also extended to the descendants of all Indians included on the tribal roll at the date of termination.[80] Oregon appealed, and last term the case again came before the Ninth Circuit Court of Appeals.

B. *Kimball v. Callahan (Kimball II)*

Oregon's appeal from the district court decision presented the Ninth Circuit the opportunity to review and clarify its findings in *Kimball I*. In *Kimball II*, the appellate court affirmed the district court's findings and considered the additional issue of whether the state could regulate Indian fishing and hunting on former reservation lands for the purpose of conservation.[81]

In its argument, Oregon maintained that the appellate court should reconsider the state contentions that: (1) only those Indians on the final tribal roll could exercise tribal rights; (2) that persons born after the closing of the tribal roll on August 13,

76. Kimball v. Callahan, 493 F.2d at 565.
77. 338 F.2d 620 (9th Cir. 1964).
78. 493 F.2d at 569-70.
79. *Id.* at 568, *citing* Menominee Tribe v. United States, 391 U.S. at 412.
80. Kimball v. Callahan 590 F.2d 768, 770 (9th Cir. 1979).
81. *Id.* at 775-77.

1954, were not entitled to exercise treaty rights; (3) that treaty rights could not be exercised on land disposed of to the federal government or to private purchasers; and (4) that the state could regulate the exercise of treaty rights to hunt and fish on former reservation lands by members of the tribes for conservation purposes. The state argued that these issues extended beyond those in *Kimball I*, that the findings in *Kimball I* were inconsistent with subsequent cases[82] and that new evidence of the legislative history of the Klamath Termination Act would dictate a different result.

In dismissing the state's contentions, the appellate court reviewed each case cited by Oregon as inconsistent with *Kimball I*. The court first considered its own holding in *United States v. Washington*[83] and a court of claims decision in *Whitefoot v. United States*,[84] and distinguished *Kimball I*, noting that neither *Washington* nor *Whitefoot* dealt with the rights of individual Indians after the termination of a tribe. The panel observed that the *Kimball I* decision was not based on retained treaty rights flowing from tribal property rights; rather, since the *Kimball I* plaintiffs had elected withdrawal the decision was expressly based on individual treaty rights unconnected with land possession.

In further analyzing *Washington* and *Whitefoot*, the court discussed individual user rights to the tribal property. Klamath Reservation Indians had individual user rights to the tribal treaty rights of hunting, fishing, and trapping on their reservation prior to the Klamath Termination Act. *Kimball I* found that the Termination Act did not extinguish those tribal rights. Consequently, the individual Indians did not suffer the

82. Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165 (1977) *(Puyallup III)*; United States v. Washington, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); Whitefoot v. United States, 293 F.2d 658 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962).

83. 520 F.2d 676 (9th Cir. 1975), *cert denied*, 423 U.S. 1086 (1976). In *Washington*, the Ninth Circuit affirmed the district court decision of Senior District Judge Boldt that various treaties guaranteed 14 tribes the opportunity to take "up to 50% of the harvestable number of fish that may be taken by all fisherman . . . ." 384 F. Supp. 312 (W.D. Wash. 1974). The so-called "Boldt Decision" and its progeny have caused considerable controversy. *See* note 209 *infra* and accompanying text.

84. 293 F.2d 658 (Ct. Cl. 1961). In *Whitefoot*, the court of claims held that the inundation of tribal fishing areas by a dam had been compensated by payment to the tribe, and that no separate compensation was owing to individual Indians. *Id.* at 675.

loss of their user rights. Thus, the court concluded that nothing in *Washington* or *Whitefoot* was contrary to this aspect of *Kimball I*.[85]

The appellate court next turned to the state's argument that *Kimball I* was inconsistent with the Supreme Court's decision in *Puyallup Tribe v. Department of Game (Puyallup III)*.[86] The Ninth Circuit again distinguished *Kimball I*, observing that unlike the Indians in *Puyallup III*, the Klamath Reservation Indians were not seeking *exclusive* rights to hunt and fish on the former reservation lands. The court held that although the transfer or modification of reservation lands may affect treaty rights by converting them from exclusive to non-exclusive, the non-exclusive rights to fish, hunt and trap on former reservation lands were protected by the Klamath Treaty provision[87] guaranteeing the "exclusive right of taking fish."[88] That right, and the judicially implied rights to hunt and trap survived termination, but were rendered non-exclusive by the alienation of the land from Indian ownership.

Having dismissed the argument that *Washington*, *Whitefoot* and *Puyallup III* were inconsistent with *Kimball I*, the court considered the state's second major contention: that the legislative history not considered by the first *Kimball* court required a contrary result. This legislative history, which the *Kimball I* panel had specifically found lacking, reflected the intent of Congress to extinguish the treaty rights to hunt, fish and trap on former reservation lands according to Oregon. The state presented evidence of the legislative history of the 1958 amendments[89] to the Klamath Termination Act, contending they reflected the intent of Congress to terminate treaty rights of Indians who elected to withdraw. The *Kimball II* court found nothing in the new material that indicated an intent by Congress to abrogate the Klamath Reservation Indians' treaty rights.[90]

Finding nothing in the state's contentions that supported

85. 590 F.2d at 773.
86. 433 U.S. 165 (1977).
87. 590 F.2d at 774.
88. 493 F.2d at 566.
89. Act of August 23, 1958, Pub. L. No. 85-731, § 1, 72 Stat. 816 (codified at 25 U.S.C. § 564w-1 (1976)).
90. 590 F.2d at 775.

reconsideration on issues decided in the first appeal, the court concluded that the *Kimball I* decision that "withdrawn tribal members retained their treaty rights to hunt, fish, and trap on the lands constituting their ancestral Klamath Indian Reservation, including land constituting United States forest lands and privately owned land on which hunting, fishing and trapping is permitted," was the law of the case.[91] Thus, the court rejected the state's challenges to *Kimball I*, and in so doing supported and clarified that case.

The court next considered the extension of treaty rights to tribal roll member descendants who were born subsequent to the closing of the roll. This question had not arisen in *Kimball I*. To support its contendion that individuals born after the tribal roll was closed enjoyed no treaty rights, the state argued that the Klamath Termination Act expressly provided that individuals born after the 1954 closing date could not subsequently be enrolled. The state maintained that an individual must have had tribal membership status and been enrolled to share in tribal property or rights. Rejecting this argument, the court observed that although the Klamath Termination Act was final in terminating federal services to the Indians and federal supervision of reservations, the Act clearly contemplated the continuing existence of tribal organizations. The power of the tribe to act under a tribal constitution and by-laws consistent with the Termination Act was unaffected.[92]

The court noted that the Klamath Tribe maintained a tribal government and that the tribal constitution established criteria for membership in the tribe.[93] The tribal roll was created only to determine who should share in the distribution of tribal property disposed of pursuant to the Klamath Termination Act. Reasoning that since the tribe retained the power to establish membership criteria and to permit eligible individuals to join, and since *Kimball I* decided that the Act did not extinguish tribal treaty rights to hunt, trap and fish, the court found these rights were bestowed on all descendants of persons on the final roll.[94] The appellate court therefore upheld the district court

91. *Id.*
92. *Id.* at 776.
93. *Id.*
94. *Id.*

finding that the Termination Act did not limit treaty hunting, fishing and trapping rights to persons on the final tribal roll of 1954, and that those rights were extended to eligible descendents of individuals listed on the final roll.[95] The Ninth Circuit also affirmed the lower court finding that the Termination Act did not affect the tribe's authority to regulate the exercise of these rights by individual Indians.

The *Kimball II* court next turned to the question of state regulation of Indian hunting and fishing on former reservation lands for the purpose of conservation. The court noted a series of cases which established state power to regulate, while not prohibiting treaty-protected fishing, in the interest of conservation so long as the regulations met appropriate standards and did not discriminate against Indians.[96] These cass held that a state must demonstrate that both the imposed fishing and hunting regulations and their application to Indians are reasonable and necessary to conservation.[97] Observing that the Klamath Indians were not seeking exclusive rights to hunt, fish and trap on the former reservation lands, and further that the General Council of the Klamath Tribe had adopted a comprehensive scheme of joint hunting regulation with the state, the court noted the tribe's recognition of state authority to reasonably regulate Indian hunting, fishing and trapping for conservation purposes.[98] In dispute, however, was the extent of the state's authority.

The Klamaths maintained that the Ninth Circuit should decide the appropriate extent of state regulation for conservation, while Oregon argued that the issue should be decided by the federal district court. The appellate court ruled that the matter should be remanded to the lower court for the "development of a factual record which would serve as a basis for establishing regulations within the scope of the state's right to regulate the Indians' treaty rights."[99] Also, the district court

95. *Id.*

96. *Id., citing* Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165, 177 (1977) *(Puyallup III)*; Antoine v. Washington, 420 U.S. 194 (1975); Puyallup Tribe, Inc. v. Department of Game (*Puyallup I*), 391 U.S. 392, 398 (1968); United States v. Washington, 520 F.2d 676 (9th Cir. 1975); Sohappy v. Smith, 302 F. Supp. 899 (D. Or. 1969).

97. 590 F.2d at 776-77.

98. *Id.* at 777.

99. *Id.*

should formulate standards based on the evidence presented, and in keeping with the applicable guidelines of *Puyallup I, II*[100] and *III*[101]. If the parties proved unable to agree upon the appropriate scope of the state's authority, the district court was to do so.[102] Having established a procedure to resolve future disputes between the litigants, the Ninth Circuit remanded the case to the district court for implementation.

C. SIGNIFICANCE

The Ninth Circuit's decision in *Kimball II* reaffirmed and extended the court's earlier holding in *Kimball I* that Indian treaty rights are not dependent on the continued possession of reservation lands. This case is of particular significance to tribes whose reservations and tribal status were terminated as a result of Congress' termination policy. The decision in *Kimball II* is equally important to tribes and individual Indians who are permitted by Congress to sell their reservation lands to non-Indians. This alienation of Indian land to non-Indians, while altering hunting, fishing and other treaty rights from exclusive to non-exclusive, will no longer be a complete and conclusive surrender of these rights. Where the former reservation land is transferred to the federal government, or where the private purchaser allows hunting, fishing and trapping of the land, the treaty rights may be exercised by Indians, free of state regulations except those that are reasonable and necessary for conservation purposes.

Of overriding importance, however, is the Ninth Circuit's affirmation of the principle that the intent to abrogate or modify Indian treaty rights must be expressly stated, and may not be

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100. *See* note 96 *supra* and accompanying text.

101. 590 F.2d at 768, 777, *citing* Puyallup Tribe v. Department of Game, 433 U.S. 165 (1977) *(Puyallup III)*; Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973) *(Puyallup II)*; Puyallup Tribe, Inc. v. Department of Game, 391 U.S. 392 (1968) *(Puyallup I)*. The *Puyallup* cases arose in Washington over state efforts to regulate Indian off-reservation treaty fishing. In *Puyallup I*, the first case to permit state regulation of a treaty right, the Court affirmed Washington's power to regulate off-reservation treaty fishing for conservation purposes. The standard established in *Puyallup I* was that state regulation of Indian treaty fishing had to be "necessary for the conservation of fish . . . ." 391 U.S. at 399. The regulation could not discriminate against Indians. *Id.* at 398. In *Puyallup II*, a state regulation prohibiting the use of gill nets was invalidated because it discriminated against Indians. 414 U.S. at 48. In *Puyallup III*, the power of the state to regulate treaty fishing was extended to on-reservation Indian fishing, under the standards previously established. 433 U.S. at 175-77.

102. 590 F.2d 768, 777.

lightly imputed to Congress. The earlier Ninth Circuit finding in *Klamath II*[103] that treaty rights were, by implication, altered to mere statutory grants by the Klamath Termination Act, represented what the Supreme Court termed a "backhanded" abrogation of treaty rights.[104] In applying the strictest test for abrogation of treaty rights, the Ninth Circuit provided a significant safeguard to the continued exercise of Indian treaty rights.

Although *Kimball II* affirmed and extended *Kimball I*, there was a distinct difference in the tenor of the two decisions. In *Kimbal I*,[105] the Ninth Circuit showed a subtle antagonism at being "compelled"[106] by the Supreme Court decision in *Menominee*. Although the Ninth Circuit panel found that its earlier holding in *Klamath II* could no longer stand following *Menominee*, the appellate court seemed reluctant to adopt the *Menominee* reasoning as its own.[107] In *Kimball II* this apparent reluctance was absent. The court appeared more certain and consistent in its application of traditional federal Indian law principles. If the Ninth Circuit has adopted the traditional canons of treaty and federal Indian law interpretation, future court decisions will reflect more consistency and predictability. Unfortunately, the Ninth Circuit's application of the federal instrumentality theory in *Confederated Tribes of the Colville Indian Reservation v. State of Washington*,[108] indicates that such optimism about the Ninth Circuit's adoption of traditional standards should be guarded.

IV. *CALIFORNIA V. QUECHAN TRIBE OF INDIANS:* A TEST OF TRIBAL IMMUNITY FROM SUIT

In a second case regarding tribal hunting and fishing rights, *California v. Quechan Tribe of Indians*,[109] the Ninth Circuit considered the issues of tribal sovereignty and tribal sovereign immunity from suit. The case arose when California sought a declaration of the state's right to send state game wardens onto

103. 338 F.2d 620 (9th Cir. 1964).

104. Menominee Tribe v. United States, 391 U.S. at 412.

105. 493 F.2d 564 (9th Cir. 1974). *See also* text accompanyingnotes 70-79 *supra*.

106. 493 F.2d at 567.

107. *Id.* at 568.

108. 591 F.2d 89 (1979). *See* text accompanying notes 190-203 *infra*.

109. 595 F.2d 1153 (9th Cir. Apr., 1979) (per Anderson, J.; the other panel members were Carter, J., and Takasugi, D.J.).

the Fort Yuma Indian Reservation to enforce state game laws on non-Indians hunting and fishing on the reservation with tribal permission.[110] The Quechan Tribe challenged the power of the state to bring the suit. The appellate court reviewed the principle of tribal immunity from suit, and considered whether the fact that the suit was brought by a state government negated the tribe's immunity.

A. Background

The Quechan Tribe of Indians was organized pursuant to the Wheeler-Howard Indian Reorganization Act of 1934.[111] The tribe resides on the Fort Yuma Indian Reservation located in southern California and Arizona, along the Colorado River. The reservation land was transferred to the Department of the Interior in 1884, to be used for "Indian purposes."[112] The Quechan Tribe adopted a constitution and bylaws which became effective in 1936, and has exercised powers of self-government since that date. Article XI of the tribal bylaws states "the [Quechan Tribal] Council shall pass ordinances for the control of hunting and fishing upon the reservation consistent with Federal laws and applicable game preservation practices."[113] The council adopted various ordinances under Article XI requiring non-Indians who hunt or fish on reservation lands to possess a tribal trespass permit, or be subject to arrest by tribal game wardens for criminal trespass.[114] Non-Indian trespassers are transferred to federal authorities to be prosecuted for unauthorized entry onto an Indian reservation for the purpose of hunting or fishing, which is a federal crime.[115]

As originally enacted, the tribal ordinances required non-Indians to possess a valid California hunting or fishing license if engaging in those activities, and to observe state game laws

110. *Id.* at 1154.

111. 25 U.S.C. §§ 461-79 (1974). *See* note 5 *supra.*

112. Executive Order of January 9, 1884, *reprinted in* 1 C. Kappler, *supra* note 2, at 832, *cited in* California v. Quechan Tribe of Indians, 424 F. Supp. 969, 970 (S.D. Cal. 1977), *vacated*, 595 F.2d 1153.

113. 424 F. Supp. at 971.

114. *Id.*

115. 18 U.S.C. § 1165 (1976) makes it a crime for anyone "without lawful authority or permission, willfully and knowingly [to go] upon any land that belongs to any Indian or Indian tribe, band, or group . . . for the purpose of hunting, trapping or fishing . . . ."

while on the reservation.[116] In 1975, however, the tribal council enacted Tribal Ordinance QT-1-75, which deleted the provisions requiring compliance with California game laws while on the reservation and established that a California license was not required of non-Indians if a tribal permit to hunt and fish on the reservation was obtained.[117] Tribal game wardens, commissioned as Deputy Special Officers of the Bureau of Indian Affairs, were empowered to cite non-Indian trespassers, and procedures for the disposition of the charges were established. The tribe imposed neither hunting seasons nor limits on the quantity of fish or game that could be taken on the reservation by non-Indians.[118]

Prior to the adoption of Ordinance QT-1-75, the California Department of Fish and Game regularly sent game wardens onto the reservation lands to enforce state game laws[119] on non-Indian hunting and fishing. In July, 1975, the tribal council informed the Department that the regulation of hunting and fishing on the reservation was the exclusive right of the council, and that non-Indians would no longer be required to possess California game licenses. The council indicated that California game wardens attempting to enforce state game laws on the reservation would be arrested by tribal authorities for trespass. The state then sought a declaratory judgment of its authority to apply state game laws to non-Indians hunting or fishing on the reservation, and to have state game wardens enter the reservation to enforce the state regulations.

The federal district court held that California game wardens could, in a prohibitory manner only,[120] apply state fish and game regulations to non-Indians hunting or fishing on reservation lands.[121] The court also found, however, that having failed to demonstrate a compelling interest, state game wardens were

116. 424 F. Supp. at 971.

117. *Id.*

118. *Id.*

119. License requirements are provided for at CAL. FISH & GAME CODE §§ 1050-1110 (West Supp. 1979). Indian tribe members are generally exempt. CAL. FISH & GAME CODE § 12300 (West Supp. 1979).

120. The phrase "prohibitory manner only" indicates that the state may, under the standards and conditions imposed by the court, prohibit through regulation certain on-reservation acts by non-Indians which may be permitted by the tribe. The state may not, however, permit non-Indian on-reservation acts not allowed by the tribe, *i.e.*, enforcing open seasons when the tribe chooses to observe a closed season. 424 F. Supp. at 975.

121. *Id.* at 977.

prohibited from entering the reservation without the express permission of the Quechan Tribe.[122] Both sides appealed to the Ninth Circuit.

B. Ninth Circuit Opinion

On appeal, California argued that the enforcement of state fish and game laws against non-Indians on the reservation did not infringe on the Quechan Tribe's right of self-government. California maintained that state regulation of non-Indian on-reservation hunting and fishing was not preempted by federal statute or by specific tribal regulations. Thus, the state contended that it had the right to enter the reservation to enforce state fish and game laws against non-Indians.[123] The Quechan Tribe, on the other hand, contended that the state's fish and game laws were preempted on the reservation by the tribe's regulations, and by the intent of Congress that the tribe, not the state, regulate on-reservation hunting and fishing.[124] The tribe argued that the case should be remanded to the district court for consideration of newly adopted tribal fish and game ordinances. In a decisive argument not presented to the district court, the tribe contended that sovereign immunity protected it from suit if California brought the action without the express consent of Congress.

Since the tribe's claim of sovereign immunity represented a challenge to the court's jurisdiction, that question was considered first. The court noted that the application of sovereign immunity is not a discretionary remedy, but instead represents a right which courts must recognize.[125] The appellate courts compared tribal sovereign immunity to that of the United States, noting that "neither can be sued without the consent of Congress."[126] The panel concluded that sovereign immunity barred this suit.

The court rejected California's arguments that the facts were sufficiently unique for the court to refuse to apply the doctrine of

122. *Id.*
123. 595 F.2d at 1154.
124. *Id.*
125. *Id.* at 1155.
126. *Id.*

sovereign immunity, and that Public Law 280[127] represented an implied waiver of sovereign immunity by Congress. Even where Congress consents to a suit, the court observed, the abrogation of the immunity is limited by any conditions that Congress imposes.[128] A waiver of sovereign immunity by Congress may not be implied, but must be "unequivocally expressed."[129] The court found that the significance of a suit being initiated by a state rather than by a non-government plaintiff was transcended by the tribal right to immunity. Although sympathizing with the state's need to establish the extent of its authority, the court noted that "the desirability for complete settlement of all issues . . . must . . . yield to the principle of immunity.[130] Finally, the Ninth Circuit rejected the state's contention that unless Public Law 280 were interpreted as a congressional waiver of the tribal sovereign immunity, the question of whether Public Law 280 provided the state authority to regulate non-Indian on-reservation hunting and fishing would be permanently precluded from judicial resolution. The panel found nothing in the language or legislative history of Public Law 280 indicating the intent of Congress to waive tribal sovereign immunity. The court observed that tribal immunity only bars judicial determination where suit is brought against only the tribe itself.[131]

Since the finding of sovereign immunity precluded consideration of any other issues on appeal, the Ninth Circuit vacated the district court judgment, and remanded the case to the lower court for dismissal.[132]

C. SIGNIFICANCE

In *Quechan*, the Ninth Circuit applied the traditional federal Indian law doctrine that as a quasi-sovereign entity, an Indian tribe possesses an immunity from suit similar to that of the United States. Although Congress may abrogate the tribal immunity and consent to a suit against a tribe, the abrogation is

127. 18 U.S.C. § 1162 (1964). *See* note 5 *supra*.

128. *Id.*

129. *Id.*

130. *Id.*, *quoting* United States v. United States Fidelity & Guar. Co., 309 U.S. 506 (1940).

131. 595 F.2d at 1156.

132. *Id.* United States v. Montana, 604 F.2d 1162, 1165 n.5 (9th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3572 (U.S. Jan. 21, 1980) (No. 79-1128).

limited by any congressionally imposed conditions. The waiver of tribal sovereign immunity may not be implied, but must be unequivocally expressed.

The finding by the Ninth Circuit that in considering sovereign immunity it is irrelevant that the action was initiated by a state government is significant to the continuing interaction of state and tribal governments. Equally important is the appellate court's recognition that sovereign immunity from suit is a right, not a discretionary remedy. The affirmation of this principle provides a valuable guarantee that an Indian tribe's economic resources will not be consumed in defending legal actions testing tribal rights, whether brought by individuals or by state governments.

V. *UNITED STATES V. JACKSON:* TRIBAL REGULATION OF MEMBER ON-RESERVATION ACTIVITIES

In *United States v. Jackson*[133] the Ninth Circuit considered the effect of an Indian tribe's failure to exercise a reserved right. The appellate court reviewed the doctrine of tribal sovereignty, and considered whether the failure to exercise a tribal right results in its termination, or permits its assumption by the United States, even in the absence of an express intent by Congress to do so.

A. BACKGROUND

The defendant, Donald Jackson, was an enrolled member of the Confederated Tribes of the Umatilla Reservation. Being of less than one-fourth tribal blood, he was enrolled in a tribal membership classification which did not entitle him to participate in any rights arising out of tribal treaties, including hunting. Jackson was arrested for hunting on the reservation without tribal permission, and was prosecuted and convicted in federal district court under 18 U.S.C. section 1165.[134] He did not deny hunting on the reservation without tribal permission, but appealed on the ground that article IV[135] of the tribal constitution,

133. 600 F.2d 1283 (9th Cir. July, 1979) (per Wright, J.; other panel members were Tang, J., and Palmieri, D.J.).

134. For the relevant language of § 1165, see note 115 *supra*.

135. Article IV of the Tribe's constitution states:

> The membership of the Confederated Tribes shall consist, as follows, of: (a) All persons of Indian blood whose names appear

which divides tribe members into three classifications, violated his right to equal protection under the Indian Civil Rights Act of 1968.[136]

B. Ninth Circuit Opinion

On appeal, the Ninth Circuit first considered whether 18 U.S.C. section 1165 provides federal courts with jurisdiction over acts committed by an Indian on an Indian reservation against the property of another Indian. Concluding that Congress did not intend the statute to be an exception to the exclusive jurisdiction of tribes over their members, the appellate court reversed the district court conviction without considering the defendant's equal protection claim.[137]

The Ninth Circuit panel observed that although Indian tribes have inherent sovereignty over internal affairs, it "is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers."[138] The power to enact and enforce tribal laws over tribe

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> on the official census roll of the Confederated Tribes as of July 1, 1949; provided that corrections may be made in said roll by the General Council within five (5) years from the adoption and approval of this Constitution and By-Laws, subject to the approval of the Secretary of the Interior or his authorized representative. (b) All children born to enrollees of the Confederated Tribes, who are at least one-fourth (¼) degree of blood of the Confederated Tribes. Where only one parent of such children is an enrollee of the Confederated Tribes, the children may become members only upon application accepted by the General Council. (c) Any other person of blood of the Confederated Tribes may, upon application, be admitted by a majority vote of the General Council to participate in tribal government and to vote and to hold office. It is expressly understood, however, that such persons shall not participate in any right or claim arising out of treaties to which the Confederated Tribes are a party.

600 F.2d 1283, 1284 n.1.

136. Act of April 11, 1968, 25 U.S.C. §§ 1301-03 (1970). Also referred to as the Indian Bill of Rights, this statute was enacted as part of the Civil Rights Act of 1968. The Indian Civil Rights Act was intended to afford individual Indians protection from deprivation of their rights by Indian tribes. *See* Burnett, *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 Harv. J. Legis. 557 (1972). The "due process" and "equal protection" clause of the Act, 25 U.S.C. § 1302(8), has been controversial, and court interpretations have varied. *See* Note, *Indian Law Overview, Ninth Circuit Survey*, 7 Golden Gate U. L. Rev. 313, 313-21 (1976).

137. 600 F.2d at 1285-86.

138. *Id.*

members is part of the tribe's inherent sovereignty. While Congress placed certain serious offenses under the exclusive jurisdiction of the federal courts when it enacted the Major Crimes Act,[139] hunting on a reservation without a tribe's permission was not among the offenses included. The court observed that the Act, in extending "the general laws of the United States as to the punishment of offenses . . . to the Indian Country"[140] contains exceptions, including one for "offenses committed by one Indian against the person or property of another Indian."[141] "[E]xcept for the offenses enumerated in [section 1153], all crimes committed by enrolled Indians against other Indians within Indian Country are subject to the jurisdiction of tribal courts."[142] Under this interpretation, Jackson would be subject to the exclusive jurisdiction of the tribal court for hunting on the reservation without tribal permission. Thus, the federal district court was without jurisdiction to hear the case.[143]

The United States argued that the language of section 1165 appeared to apply to both Indians and non-Indians, therefore including Indians within the jurisdiction transferred from Indian tribes to the federal government.[144] To support this interpretation, the United States cited the statute which section 1165 replaced:

> [I]f any person, other than an Indian, shall, within the limits of any tribe with whom the United States shall have existing treaties, hunt, or trap, or take and destroy, any peltries or game, except for subsistence in the Indian Country, such person shall forfeit the sum of five hundred dollars, and forfeit all the traps, guns and

139. 18 U.S.C. § 1153 (1976). The Major Crimes Act represented Congress' reaction to the Supreme Court decision in Ex Parte Crow Dog, 109 U.S. 556 (1883), that federal courts had no jurisdiction over the on-reservation murder of an Indian by another Indian. *See* FEDERAL INDIAN LAW, *supra* note 5, at 363. The Major Crimes Act of 1885 gave the United States jurisdiction on Indian reservations for certain enumerated serious offenses. Offenses which are committed by one Indian against another Indian, and which are *not* listed in the Act are "subject to the jurisdiction of tribal courts." United States v. Antelope, 430 U.S. 641, 643 n.2 (1977). *But see* Keeble v. United States, 412 U.S. 205 (1973), *cited with explanation*, 600 F.2d 1286 n.8.

140. 600 F.2d at 1286.

141. *Id.*

142. *Id., quoting* United States v. Antelope, 430 U.S. 641, 643 n.2 (1977).

143. 600 F.2d at 1287, 1288.

144. *Id.* at 1286.

> ammunition in his possession, used or procured to be used for that purpose, and peltries so taken.[145]

The United States argued that the deletion of the phrase "other than an Indian" from section 1165 reflected the intent of Congress to apply the section to Indians on reservations.[146] In rejecting this argument, the appellate court, relying on legislative history, noted that other changes included in section 1165 indicated that Congress intended to include under federal jurisdiction only non-Indian hunting and fishing, which would not be subject to tribal jurisdiction or authority.[147]

The United States, in an argument rejected by the court, maintained that in the absence of a tribal procedure to respond to hunting violations by Group C tribal members, like the defendant Jackson, the group came under federal jurisdiction, as did non-Indians who were outside the tribe's jurisdiction.[148] This contention "confuse[d] jurisdiction with enforcement procedures."[149] The lack of an established system of punishment did not indicate the absence of power, but rather, showed merely that the tribe had failed to exercise the jurisdiction it held.[150]

Finding that the defendant's offense was within the exclusive jurisdiction of the tribal court, the Ninth Circuit held that the district court lacked subject matter jurisdiction, and remanded the case to the lower court to be dismissed.[151]

C. SIGNIFICANCE

In *United States v. Jackson*, the Ninth Circuit again reviewed the concept of limited tribal sovereignty. The importance of the case rests in the court's application of the principle of reserved rights and its refusal to allow federal jurisdiction to automatically fill a perceived vacuum. The court reaffirmed the *Winans* doctrine of reserved rights[152] which states that, whether exercised or not, unless a tribal right is relinquished by the tribe, or extinguished by

145. Ch. 161, § 8, 4 Stat. 730 (1834) (codified at 25 U.S.C. § 216 (repealed 1960)).
146. 600 F.2d at 1287.
147. *Id.*
148. *Id.*
149. *Id.* at 1288.
150. *Id.*
151. *Id.*
152. United States v. Winans, 198 U.S. 371 (1905); *see* text accompanying notes 27 & 28 *supra*.

Congress, it continues.

Tribes seeking to implement procedures for on-reservation autonomy and tribal self-determination will find the Ninth Circuit decision in this case noteworthy: a tribe's failure to exercise its jurisdictional power as a quasi-sovereign does not, in itself, result in the loss of that power, or its transfer to federal or state government. Those tribal rights and powers not relinquished by the tribe, or specifically terminated by Congress are retained, and merely require exercise by the tribe to become effective.

VI. *UNITED STATES V. MONTANA:* TRIBAL SOVEREIGNTY — THE POWER TO EXCLUDE

In *United States v. Montana*,[153] the Ninth Circuit considered a direct conflict between a claim of inherent state sovereignty over territory within state boundaries, and federal and Indian tribal sovereignty over the same land.[154] The court noted that the issue was "close,"[155] and in reaching its decision reviewed the principles of treaty interpretation, federal preemption, tribal and state sovereignty and the effect of alienation of on-reservation land to non-tribal members.

In an effort to reach an equitable resolution of the conflicting claims, the Ninth Circuit panel departed from strict principles of federal Indian law, noting in a postscript that its "holdings reflect a degree of precision not always present in the sources on which [the court] must rely."[156] The court reached a compromise which is appealing in theory but unfortunate in its failure to maintain principles of interpretation necessary to

153. 604 F.2d 1162 (9th Cir. 1979) (modified on denial of rehearing) (per curiam), *petition for cert. filed*, 48 U.S.L.W. 3572 (U.S. Jan. 21, 1980) (No. 79-1128). Subsequent to the date of opinion, Montana petitioned for rehearing on the basis of the Supreme Court decision in Wilson v. Omaha Indian Tribe, 99 S.Ct. 2529 (1979). The state argued that *Wilson* required the adoption of state law as a part of federal common law in determining the proper upper limit of the Big Horn bed and banks. *See* note 165 *infra* and accompanying text. In a per curiam opinion denying the petition for rehearing, the Ninth Circuit found that applying state law would frustrate the "federal policy and functions" and therefore declined to alter the original opinion. 604 F.2d 1173-74. As this issue is not directly related to the topic of this Note, textual discussion is omitted.

154. *Id.* at 1164.

155. *Id.* at 1166.

156. *Id.* at 1172.

increase certainty in federal Indian law cases.

A. BACKGROUND

The Crow Indian Reservation is a tract of land recognized in the 1851 Treaty of Fort Laramie[157] as belonging to the Crow Tribe. A subsequent treaty with the Crow Indians in 1868[158] designated approximately eight million acres of land as a reservation for the tribe. In a series of Congressional acts, the size of the reservation was decreased, and today it consists of approximately two million acres. Passing through the reservation is the Big Horn River, a navigable waterway. While entering into the treaties with the Crow Tribe and establishing the Crow Reservation, the United States claimed title to the bed and banks of the Big Horn River as public lands.[159] Montana contended that jurisdiction over the river and the river banks passed to the state when Montana entered the Union.[160]

Both federal and state agencies were involved in developing fishing on the Big Horn River. In 1970, the Crow Tribe entered into an agreement with the Bureau of Sports Fisheries and Wildlife, a federal agency, to aid the tribe in developing and managing the reservation fishing resources, and to stock the waters of the Big Horn River and the Big Horn Canyon Recreation Area. In addition to this program, Montana had stocked the waters of the Crow Reservation with fish since 1928. The State Department of Fish and Game also conducted wildlife studies on the Big Horn River, with no objection from the Crow Tribe or from the Federal Bureau of Indian Affairs.

In 1973, the Crow Tribal Council enacted Tribal Resolution 74-05[161] which prohibited anyone other than a member of the

157. Treaty of Fort Laramie, 11 Stat. 749 (1852) (hereinafter Treaty of 1851).
158. Second Treaty of Fort Laramie, 15 Stat. 649 (1868).
159. United States v. Montana, 457 F. Supp. 599, 601 (D. Mont. 1978).
160. *Id.*
161. Crow Tribal Council Resolution 74-05 states in part:

> Be it ordained by the Crow Tribe, meeting in a duly held and noticed council that hunting, fishing and trespassing within the exterior boundaries of the Crow Indian Reservation is hereby prohibited and the proper officials of the United States and the Crow Tribe of Indians are hereby directed and authorized to enforce the provisions of this ordinance and any federal statute which would prohibit such hunting and fishing and trespassing, provided, however, that the provisions of this ordi-

Crow Tribe from hunting or fishing on the reservation. Montana continued to authorize on-reservation hunting and fishing by non-Indians after the closing of the reservation to these activities, and to issue licenses to non-members of the Crow Tribe. The Crow Tribe, joined by the United States, brought an action in federal district court seeking a declaration that title to the bed and banks of the Big Horn River within the Crow Reservation was held by the United States in trust for the Crow Tribe.[162] The plaintiffs also sought a declaration that the Crow Tribe had the power to prohibit non-members of the tribe from hunting or fishing on the reservation, and that the state had no authority to regulate hunting or fishing by non-Indians on the Indian land.[163]

The district court exhaustively reviewed the history of the Crow Tribe and the legislative history of the Congressional acts affecting the reservation. The lower court held that Montana possessed title to the bed and banks of the river, and had the power and authority to regulate on-reservation hunting and fishing by non-Indians, including the application of state fish and game laws to these individuals.[164] The Crow Tribe, again joined by the United States, appealed the lower court findings to the Ninth Circuit.

B. Ninth Circuit Opinion

The Ninth Circuit considered the issues raised in the district court, and the additional issue of whether the Crow Tribe could regulate or prohibit on-reservation hunting and fishing activities by non-Indians who possess fee patent land within the reservation boundaries. In reaching its four-part holding, the appellate court observed that title claims to the bed and banks of the Big Horn River had already been settled in the Ninth Circuit when they found that the bed and banks of the Big Horn

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> nance shall not apply to the members of the Crow Tribe of Indians.
>
> Be it further resolved, that the Crow Tribal officials inform the State Fish and Game Department for the State of Montana and Bureau of Indian Affairs (United States Department of Interior) that hunting and fishing on the Crow Reservation is hereby closed.

604 F.2d at 1164 n.4.

162. 457 F. Supp. 599, 600 (D. Mont. 1978).

163. *Id.*

164. *Id.* at 611.

River up to the ordinary high water mark was held by the United States in trust for the Crow Tribe.[165]

Considering the validity of Crow Tribal Regulation 74-05, which closed the reservation to non-Indian hunting and fishing, the court found that the treaties of 1851 and 1868 empowered the tribe to exclude non-members from the reservation lands for any purpose.[166] In support of this interpretation, the court cited a previous Ninth Circuit decision holding that "the right of Indians to control hunting, trapping and fishing on their lands is a prerogative of ownership which the United States recognizes as a matter of federal law."[167] Although affirming its earlier holding, the court observed in a footnote to the *Montana* decision that to the extent that any Crow Tribal Resolution was in conflict with the Supreme Court rejection in *Oliphant v. Suquamish Tribe*[168] of tribal criminal jurisdiction over non-indians, the Crow Tribal Resolution was invalid.[169]

The Ninth Circuit next considered the question of tribal power to prohibit on-reservation hunting and fishing by non-members of the Crow Tribe who owned fee patent lands on the reservation, an issue not raised in the district court. The Crow Tribe purported to exclude all non-tribe members from on-reservation hunting and fishing. Noting that the 1887 General Allotment Act and the Crow Allotment Act of 1920 provided that lands within the reservation could be sold to non-Indians as fee patent grants, the court stated that "it defies reason to suppose that Congress intended that non-members who reside on fee

165. 604 F.2d 1162, 1166, *citing* United States v. Finch, 548 F.2d 822, 831 (9th Cir. 1976), *rev'd on other grounds*, 433 U.S. 676 (1977). The *Montana* court distinguished its earlier decision in California v. Quechan Tribe of Indians, 595 F.2d 1153 (9th Cir. 1979), *see* section IV *supra*, noting that because the Crow Tribe itself brought suit, sovereign immunity did not apply. 604 F.2d at 1165 n.5.

166. *Id.* at 1169.

167. *Id.* at 1167, *quoting* United States v. Finch, 548 F.2d 822, 834 (9th Cir. 1976), *rev'd on other grounds*, 433 U.S. 676 (1977). The Ninth Circuit noted that "[a]lthough the Supreme Court vacated our decision on double jeopardy grounds, . . . our analysis of the title issue was in no way questioned." United States v. Montana, 604 F.2d at 1166 n.6.

168. 435 U.S. 191 (1978).

169. 604 F.2d at 1167 n.7. Crow Tribal Resolution 75-17b purported to grant criminal jurisdiction to the Crow Tribe over non-Indians committing offenses on the reservation. In *Oliphant*, the Supreme Court held that "[b]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." 435 U.S. 191, 210.

patent lands could hunt and fish thereon only by consent of the tribe."[170] Although finding that neither of the allotment acts explicitly qualified the tribe's rights to regulate hunting and fishing, and acknowledging that treaty right alteration is not to be lightly imputed to Congress,[171] the court nevertheless found that the exclusion of non-tribe members who resided on fee patent land on the reservation exceeded the powers of the Crow Tribe authorized by the treaties and by Congressional act.[172] The court, therefore, held that Crow Tribal Regulation 74-05 was invalid only insofar as it applied to hunting and fishing by non-tribal members who reside on their own fee patent land.[173] Non-member fee patent land owners who did not reside on the land could be excluded from hunting and fishing on their own land by the tribe. The tribal exclusion from these activities on other parts of the reservation was not affected.

This limited modification of a treaty right resulted from the court's recognition that those who live on the land in the West "are likely to regard hunting and fishing thereon to be as natural and ordinary as working, sleeping and eating" but that those who do not live on the land are "somewhat less inclined" to the activities.[174] Non-resident fee patent land owners were therefore not exempt from the prohibition contained in Tribal Regulation 74-05. Supporting its finding, the court reasoned: "[W]e must . . . live together, a process not enhanced by unbending insistence on supposed legal rights which if found to exist may well yield tainted gains helpful neither to Indians nor non-Indians."[175]

The court next considered the respective powers of the Crow Tribe and Montana to regulate on-reservation hunting and fishing by non-members of the Crow Tribe. The court noted that the private landowner has the power to exclude others from hunting and fishing on that land, and observed that the Crow Tribe is more than a mere owner, possessing "attributes of sovereignty over both [its] members and their territory."[176] The

170. 604 F.2d at 1168.

171. *Id.*, *citing* Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968).

172. 604 F.2d at 1167.

173. *Id.* at 1169.

174. *Id.*

175. *Id.* at 1170.

176. *Id.*, *quoting* United States v. Wheeler, 435 U.S. 313, 323 (1978). The *Montana*

court also observed that this sovereignty is limited, and "exists only at the sufferance of Congress and is subject to complete defeasance."[177] An earlier Ninth Circuit decision, where an Indian tribe sought to prevent local law enforcement officers from entering a reservation, the tribe was found to have the power to

> exercise several types of authority over non-members who enter the reservation to hunt or fish. These are the rights to determine who may enter the reservation; to define the conditions upon which they may enter; to prescribe rules of conduct; to expel those who enter the reservation without proper authority or those who violate tribal, state or federal laws; to refer those who violate state or federal laws to state or federal officials; and to designate officials responsible for effectuating the foregoing.[178]

The tribe could not, however, assert criminal jurisdiction over non-member tribal law violators, or confiscate a non-member's property as a consequence of a tribal law violation.

In an earlier Ninth Circuit case, the court accepted the finding of the Montana Supreme Court that the state could enforce its game laws on non-tribal members from on-reservation hunting and fishing unless precluded by an act of Congress, or unless it would interfere with the efforts of the tribe to affect self-government on the reservation.[179] The conservation of wildlife resources and the improvement of fish and game required the cooperation of the federal government, the Crow Tribe and the state. On the basis of this necessary cooperation, the court held that the Crow Tribe may, to the degree that non-member on-reservation hunting and fishing is permitted by the tribe, set seasons and limits for fish and game, as the tribe feels appropriate.[180] The tribe could not, however, subject non-members to the criminal processes of tribal courts. The tribe could impose fees on non-members for the privilege of hunting or

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panel cited its earlier decision in Confederated Tribes of the Colville Indian Reservation v. Washington, 591 F.2d 89 (9th Cir. 1979), noting that dual regulation of hunting and fishing on Indian reservations is not unknown. 604 F.2d at 1171.

177. *Id.*

178. Quechan Tribe of Indians v. Rowe, 531 F.2d 408, 411 (9th Cir. 1976).

179. United States v. Sanford, 547 F.2d 1085 (9th Cir. 1976), *affirming* State v. Danielson, 149 Mont. 438, 427 P.2d 689, 692-93 (1967).

180. 604 F.2d at 1171.

fishing on reservation lands, or completely exclude them, but could not confiscate the property of non-Indians found in violation of tribal or other laws.[181] Montana could regulate the non-tribal member on-reservation hunting and fishing in a prohibitory manner only,[182] and could apply relevant state fish and game laws to the extent that they were at least as restrictive as tribal regulations. Having reversed the holding of the district court, the Ninth Circuit remanded the case to the district court to enter judgment in keeping with the appellate court's holdings.[183]

C. SIGNIFICANCE

In *United States v. Montana*, the Ninth Circuit panel was confronted with a direct conflict between the inherent right of the Crow Tribe to exclude non-tribal members from hunting and fishing on its reservation, and the right of non-tribal member resident owners of on-reservation fee patent lands to hunt and fish on their own land. The court sought an equitable compromise between the conflicting rights. It therefore limited the tribe's power to exclude, but only in regard to the nonmember reservation land owners, and only on their own land. The tribe's right to exclude others from the reservation was affirmed.

The court analyzed the original treaties in the context of subsequent Congressional acts, concluding that, though not expressly stated, Congress intended to limit the right of the Crow Tribe to exclude by sanctioning the sale of reservation lands to non-tribal members. The Ninth Circuit panel failed to apply the federal Indian law principle that Indian treaty rights may be modified or abrogated only when Congress has *expressly* indicated the intent to do so. At this time of rapid development in Indian law, well delineated principles of law are needed to standardize the adjudication of similar issues, and to increase the predictability of their resolution. The court's application of the express abrogation doctrine[184] might have resulted in the finding that in the absence of an express statement modifying tribal rights in subsequent Congressional acts, the tribe could

181. *Id.*
182. *See* note 120 *supra*.
183. 604 F.2d at 1172-73.
184. *See* notes 23 & 24 *supra* and accompanying text.

exercise its reserved right to exclude even fee patent land residents from hunting or fishing on their own land. Recognizing hunting and fishing as property rights,[185] the court might then have required compensation be paid to the landowners by the Crow Tribe if their rights were abrogated.

In support of its decision, the court stated: "We [Indians and non-Indians] must, however, live together, a process not enhanced by an unbending insistence on supposed legal rights which if found to exist may well yield tainted gains helpful neither to Indians nor to non-Indians."[186] This statement, although eloquent in its intent to reflect equity and justice, and appealing in its reason, also represents the continuation of the practice of interpreting treaties on the basis of implication, often using current standards, rather than by. the application of standardized rules of interpretation. The Ninth Circuit appeared aware of the potential threat this practice poses, adding a postscript which indicated the limited nature of its modification of the tribal right, and reflected frustration at having to resolve issues left unclear by Congress.[187] The court's decision is in accord with its finding in *Kimball II*[188] that the alienation of former reservation lands to non-Indians results in the alteration of treaty rights from exclusive to non-exclusive on those lands; the *Montana* panel appropriately construed its holding narrowly.[189] The efforts of the Ninth Circuit to clarify and limit its holding may indicate that the court recognized the direct con-flict of rights requiring a compromise between strict law and equity, rather than that the court rejected use of objective standards of construction in federal Indian law. The question whether the Ninth Circuit will adopt the requirement that treaty rights may only be altered by an express statement by Congress, as a strict standard, will have to await a case without rights conflicting.

185. Hunting and fishing rights are property within the meaning of the fifth amendment, and must be compensated for if limited or abrogated. *See* Menominee Tribe of Indians v. United States, 388 F.2d 998 (Ct. Cl. 1967), *aff'd*, 391 U.S. 404 (1968); Hynes v. Grimes Packing Co., 377 U.S. 86, 105 (1949).

186. 604 F.2d at 1169.

187. *Id.* at 1172.

188. 590 F.2d 768 (9th Cir. 1979); *see* discussion at III *supra*.

189. "When cessions are made or rights are extinguished they are to be construed narrowly as affecting only matters specifically mentioned." FEDERAL INDIAN LAW, *supra* note 5, at xxi.

VII. *CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION V. WASHINGTON:* TRIBAL SOVEREIGNTY V. FEDERAL PREEMPTION DOCTRINE

In *Confederated Tribes of the Colville Indian Reservation v. Washington*[190] (*Confederated Tribes*), the Ninth Circuit, in a decision marked by a dissent, again considered the power of a state to enforce its fish and game laws on non-Indians engaged in on-reservation hunting and fishing. A majority of the panel members applied federal preemption doctrine rather than principles of Indian tribal sovereignty. Its analysis focused on whether state on-reservation fish and game regulation of non-Indians had been expressly preempted by Congress or the Confederated Tribes, or whether the state's action would represent an obstacle to federal policy. The dissent also applied federal preemption principles but reached a contrary decision.

A. BACKGROUND

The Colville Indian Reservation in eastern Washington was established by Executive Order in 1872.[191] The Colville Tribes enacted a constitution and bylaws in 1938, providing a fourteen-member business council as the tribes' governing body. The tribes owned a resort located on the reservation, and encouraged tourism and non-Indian sport fishing on the reservation. The United States Fish and Wildlife Service aided in keeping reservation waters stocked with fish. The tribes enacted ordinances requiring that non-Indians entering the reservation to fish purchase a tribal fishing license, but not requiring a Washington state license.

In 1975, Washington game enforcement officers entered the Colville Reservation and issued citations to non-Indians found fishing without state licenses. Tribal police officers contested the state's authority to issue citations on the reservation, and the state officers departed. The tribes brought an action seeking a declaratory judgment that Washington had no authority to regulate any fishing on the reservation, and a permanent injunction against state regulation on the reservation.

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190. 591 F.2d 89 (9th Cir. Feb., 1979) (per Choy, J.; Duniway, J., dissenting; the other panel member was Grant, D.J.).

191. Executive Order of July 2, 1872 *reprinted in* 1 C. KAPPLER, *supra* note 2, at 916.

The district court opinion cited Supreme Court dicta that "the trend had been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption."[192] The court also noted that Indian hunting and fishing rights are implied in agreements establishing reservations, and that these rights are exclusive on reservation lands unless clearly relinquished by the tribes. Being inherent and not granted, these rights are presumed reserved, unless relinquished, whether the reservation was created by treaty or by executive order. The district court found that the United States had preempted state regulation of fishing on the Colville Reservation by assuming that jurisdiction when the reservation was formed, and had delegated that power to the Colville Tribes. Therefore, it held that the state's power to "regulate or control fishing by Indians or non-Indians on the Colville Reservation"[193] was preempted, and the state lacked jurisdiction. Washington appealed, and the case came before the Ninth Circuit.

B. Ninth Circuit's Majority Opinion

The appellate court, in a 2-1 decision, reversed the decision of the district court, and held that the state was not precluded from requiring non-Indians to purchase state licenses to fish on the Colville Reservation, or from imposing state regulations equal to or more restrictive than those applied by the tribes to Indians and non-Indians fishing on the reservation.[194] The majority noted that the district court had stated the applicable rule of federal preemption, and appropriately interpreted the effect of the supremacy clause of the United States Constitution; however, the majority disagreed with the lower court's conclusion that tribal regulations preempted state regulation.[195] The Supreme Court had stated that the purpose of the supremacy clause is to invalidate those state laws which stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,[196] and that "[e]nactments of the federal government passed to protect and guard its Indian wards only affect the operation . . . of such state laws as conflict

192. Confederated Tribes of the Colville Indian Reservation v. Washington, 412 F. Supp. 651, 654 (E.D. Wash. 1976) *rev'd*, 591 F.2d 89, *quoting* McClanahan v. State Tax Comm'n, 411 U.S. 164, 172 (1973).

193. 412 F. Supp. at 656.

194. 591 F.2d at 92.

195. *Id.* at 91.

196. 591 F.2d at 91, *citing* Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

with the federal enactments."[197] The appellate court further noted the Supreme Court finding that:

> If Congress is authorized to act in a field, it should manifest its intention clearly. 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.[198]

Having reviewed federal preemption doctrine, the court considered whether state fish and game regulation on the Colville Reservation had been preempted. The majority found that the tribes had conceded state jurisdiction would not represent an obstacle to their program of developing and regulating on-reservation fishing, citing a provision of the Colville Tribal Hunting and Fishing Code, which stated "where tribal law is more restrictive than state law the tribal law shall prevail."[199] This provision was interpreted as an effort by the tribes to aid and support state law game enforcement, rather than as an indication that state law should never apply. The court found support in tribal council resolutions that limited the scope of tribal permits to the state's definition of fishable waters, and that provided the tribal "[f]ishing season shall be identical to the Washington State Fishing Season."[200] The court took note that the resolutions regarding tribal fishing permits stated that "[t]he permittee must have appropriate State of Washington Hunting and Fishing license and must comply with State seasons, species and limitations as required by State law."[201] The court concluded that the program developed by the tribal council allowed for dual state-federal jurisdiction, and did not indicate the intent to preempt state action.

The majority saw the issues as narrow ones, since Washington, in keeping with *Quechan Tribe of Indians v. Rowe*,[202] had conceded that tribal members were free of state regulation on the reservation, and that the tribes could either

197. 591 F.2d at 91, *citing* Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 483 (1976).

198. 591 F.2d at 91, *citing* New York Dep't of Social Servs. v. Dublino, 413 U.S. 405, 413 (1973).

199. 591 F.2d at 91.

200. *Id.*

201. *Id.* at 92.

202. 531 F.2d 408 (9th Cir. 1976).

charge a fee for non-Indian fishing, or close the reservation lands to non-Indians completely. The state sought only the authority to apply state licensing requirements to non-Indians fishing on the reservation, claiming only the authority to apply prohibitory regulations, not to authorize activity prohibited by tribal regulations. The majority concluded that no clear manifestation of Congressional or tribal intent to preempt regulation by Washington was present, and that there had been no showing that state regulation presented an obstacle to achieving any federal policy. The court observed: "[W]e need not decide now whether tribal efforts if made to preempt the State would be consistent with Congressional intent, or whether such efforts, if consistent with congressional goals, would preempt state regulation."[203] The Ninth Circuit, having rejected the findings of the district court, reversed the lower court judgment.

C. The Dissent

The dissent would have affirmed the lower court finding that the enactment by the Colville Tribes of a comprehensive program for administering on-reservation fishing preempted state regulation. Contending that there was no requirement for express premption in law, the dissent concluded that the tribes' resolutions made the intent to preempt state on-reservation regulation of non-Indian fishing sufficiently clear. The evidence cited by the majority supported a clear manifestation of the tribes' efforts to adopt their own regulations and to preempt the state. The dissent suggested that tribal adoption of the state fishing season was "merely a convenient shorthand."[204] Similarly, the wording of the tribal permit, indicating that the permittee must also possess a state hunting or fishing license, could as readily have been interpreted as a warning of what the "state says it requires"[205] as the majority's finding, that it represented a recognition by the tribe that the state was entitled to require it. Finally, the dissent observed that hunting and fishing have historically been the basis of Indian survival, and argued that these rights have always been within the powers of Indian tribes to regulate. Concluding that the exercise of enforcement powers by the Colville Tribes preempted the power of Washington to regulate on-reservation hunting and fishing by

203. 591 F.2d at 92.
204. *Id.* at 93 (Duniway, J., dissenting).
205. *Id.* at 94.

non-tribal members, the dissent indicated that the district court decision should have been affirmed.

D. SIGNIFICANCE

The Ninth Circuit's application of federal preemption principles as the primary determinant of the issue of state jurisdiction in regulating non-Indian on-reservation hunting and fishing represents a serious threat to the efforts of Indian tribes to institute self-government. As applied by the majority in *Confederated Tribes*, federal preemption doctrine, originally used in federal Indian law to protect Indian tribes from state encroachment and taxation of Indian property, appears to replace the *Winans*[206] doctrine of reserved rights. The *Winans* doctrine, by which tribal rights continue unless expressly abrogated by Congress, is in direct contrast to this theory of the preemption doctrine, which affords states the opportunity to assume tribal powers unless the tribe or Congress expressly and clearly manifests the intent to preempt the state action. This subtle shift in the burden of manifesting a clear and express intent represents a rejection of the federal Indian law principle that Indian tribal rights are not grants from the United States, but powers which derive from an original sovereignty and are reserved unless expressly abrogated by Congress.

Most harmful is the implication that an Indian tribe is a mere federal instrumentality.[207] This interpretation, rather than representing a shield from state taxation of federal entities, subjects Indian tribes to the restraints placed on federal agencies to prevent federal usurpation of those powers reserved to the states. In contrasting states' rights with Indian tribal rights, and defining an Indian tribe as a federal instrumentality, the Ninth Circuit establishes the supremacy of the states except in those areas where the state is expressly preempted by the Constitution, or by an act of Congress. Although implying in this case that a clearly expressed intent by an Indian tribe to preempt the action of a state could be adjudged adequate to receive judicial support, it appears that the Ninth Circuit will inter-

206. United States v. Winans, 198 U.S. 371 (1905); *see* text accompanying notes 27 & 28 *supra*.

207. *See generally* Kissel, *The Ninth Circuit's Federal Instrumentality Doctrine—A Threat to Tribal Sovereignty*, 53 NOTRE DAME LAW. 358 (1978).

pret all but the most strident indications of intent as insufficient.

The application of federal Indian law principles to the issues raised in this case would require a holding contrary to the Ninth Circuit's. In the absence of an express abrogation of a tribal right by Congress, or the express delegation of jurisdiction to a state, neither of which occurred in this case, the regulation of on-reservation fishing by both Indians and non-Indians should be reserved to the tribes.

The application of federal preemption requirements, and the apparent extension of the federal instrumentality doctrine to jurisdiction issues between an Indian tribe and a state may represent the most serious threat to Indian rights since the federal termination policy. It is of particular concern that the threat emanates from the judiciary, which has traditionally emanates represented the single source of protection for Indian tribal rights.

CONCLUSION

The United States Supreme Court first considered a conflict arising from the effort of a state to enforce its game laws on an Indian exercising a claimed treaty right to hunt in 1896.[208] Since that date, tribes and individual Indians have repeatedly turned to the federal courts for protection of their traditional hunting and fishing rights. This repeated return to the courts, expending personal and often limited tribal resources, reflects Indian determination to maintain rights often viewed as basic to their culture. Tribes seeking to augment tribal income by developing on-reservation wildlife resources are increasingly confronted by state attempts to share in the proceeds derived from hunting and fishing, or state efforts to enforce its regulations to conserve a resource endangered by over-exploitation.

The issues confronting the courts are complex. No law of general application defines or governs the hunting and fishing rights of all Indians. Treaties and agreements made with various tribes over a period of two centuries differ in significant detail and reflect the often conflicting policies of the United States, which have fluctuated between the forced assimilation of Indians

208. Ward v. Race Horse, 163 U.S. 504 (1896).

and the protection of their rights and culture. Promises made to Indian tribes in return for the cession of tribal land sometimes reflect the naiveté or avarice of the negotiators, while the often unpopular decisions of the courts indicate the difficulty of constructing an equitable interpretation of early treaties or agreements in modern terms.

The competition for a limited resource has resulted in conflicts so severe that they are often reflected by confrontations outside of the courtroom. From the Hoopa Reservation of California and the Puyallup Reservation of Washington, to the Cherokee Reservation of North Carolina, Indians and non-Indians have attempted to resolve the issues in increasingly violent interactions. In the Northwest, the conflict over Indian treaty fishing rights has resulted in what has been termed the most significant challenge to federal authority and supremacy by a state since the Civil War.[209]

The absence of an adequately developed body of Indian law further confounds judicial efforts to resolve the issues. The variations in initial federal dealings with Indian tribes and the absence of consistently applied general principles of interpretation result in an uncertainty which requires the repeated judicial hearing of similar issues.

During the last term, the Ninth Circuit considered Indian hunting and fishing rights in five cases reviewed in this article. In three of the cases,[210] the court of appeals applied traditional principles of federal Indian law in considering the issues and reached findings consonant with the development of predictability in Indian law. In the fourth case,[211] however, the court found justification for failing to adopt a standard which lessens the danger of inconsistent interpretation of similar issues

209. *Cf.* Puget Sound Gillnetters Ass'n v. United States Dist. Court, 573 F.2d 1123, 1126, (9th Cir. 1978), *aff'd in part, vacated in part*, 99 S. Ct. 3055 (1979) (In this Indian fishing rights decision, the Ninth Circuit stated that "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."). *See also* Petty, *Accomodation of Indian Treaty Rights in an International Fishery: An International Problem Begging for an International Solution*, 54 WASH. L. REV. 403 n.3 (1979).

210. Kimball v. Callahan, 590 F.2d 768; California v. Quechan Tribe of Indians, 595 F.2d 1153; United States v. Jackson, 600 F.2d 1283.

211. United States v. Montana, 604 F.2d 1162.

by different courts. In the fifth case,[212] the Ninth Circuit continued a trend away from established federal Indian law, applying instead the doctrine of federal peemption as the primary determinant of an Indian tribe and state conflict. The expansion of this theory of interpretation with the corollary use of federal instrumentality doctrine represents a significant threat to the concept of tribal sovereignty and the efforts of Indian tribes to preserve on-reservation autonomy and self-government.

Ben E. Fox

212. Confederated Tribes of the Colville Indian Reservation v. Washington, 591 F.2d 89.