Crossing Jurisdictional Paths:
The Growing Intersection Between State and Tribal Regulation

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Introduction

Something there is that doesn't love a wall,
That sends the frozen-ground-swell under it,
And spills the upper boulders in the sun;
And makes gaps even two can pass abreast.
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Before I built a wall I'd ask to know
What I was walling in or walling out,
And to whom I was like to give offense.

Mending Wall, Robert Frost.

For decades, the federal government's official Indian policy was one of separation and isolation. In 1830, Congress passed the Indian Removal Act, forcing the relocation of thousands of eastern Indians to territory west of the Mississippi. Congress created the permanent reservation system in 1851, forcing tribes onto smaller reservations and restricting their travel ostensibly to minimize conflicts between Indians and settlers. In the 1880s, the federal government abruptly changed course and sought to assimilate Indians into mainstream culture by dividing reservations into small plots of land for individual Indians. Over 90 million acres of land were lost as "surplus lands," through forced sales, or other similar means.

The checkerboard land tenure pattern seen in many reservations today is the product of this history and the source of hundreds of jurisdictional disputes. Whenever anyone enters Indian country, they become subject to a complex jurisdictional framework in which tribes, the federal government, and state and local governments each play a role. The problems this complexity generates is felt most acutely at the local level. With Indian and non-Indian communities geographically intermixed and economically interdependent, tribal and local governments must frequently navigate confusing jurisdictional questions, many of which do not have ready answers. Good neighbors, in this context, requires collaboration, not "good fences." The thousands of cooperative agreements and compacts tribes and local governments have negotiated attest to this. Compromise, when possible, is nearly always preferable to the costs, uncertainty, and divisiveness of litigation.

Some disputes, however, cannot be easily resolved through negotiation and compromise. Often, local governments face legal obstacles that prevent compromise. Local governments, after all, are creatures of state law, and their authority is constitutionally and statutorily limited. Other conflicts are intractable and require judicial intervention.

Regardless of the conflict being faced, having a broad understanding of the legal principles that govern the scope of state, local, and tribal jurisdiction on- and off-reservation is critical to navigating these disputes effectively. This paper provides a general overview of potentially applicable jurisdictional principles and discusses how local governments should approach jurisdictional disputes that arise in and outside of Indian country, with a particular emphasis on tax and natural resource disputes.

A. Who, What, and Where—Identifying the Applicable Framework for Evaluating Jurisdictional Disputes

Historically, most jurisdictional disputes have involved state and local efforts to regulate within Indian country. More recently, however, tribes have become increasingly engaged in decision-making that occurs outside Indian country when such decision-making has the potential to affect tribal interests. As tribes continue to strengthen their governmental capabilities and the pressure on land and resources continues to increase, those efforts are likely to expand, inevitably resulting in jurisdictional disputes.

Understanding who has jurisdiction turns on two key questions: (1) who is regulating what; and (2) where is the regulation occurring. While these questions may seem relatively easy to answer, that is often not the case.

1. Who or what is being regulated?

The first step in any jurisdictional dispute is to determine exactly who or what is being regulated under the law or regulation in question. This is fundamentally a question of law that requires a fair reading of the relevant statute, ordinance, treaty, or other legal authority. While this mandate seems easy enough to comprehend under contemporary approaches to statutory interpretation, it is important to recognize how courts analyzed these questions historically to determine the relative importance of various decisions.

In the tax context, for example, the modern rule looks to "who bears the *legal incidence* of the tax."[1] And as the Supreme Court has observed, the applicable test is "nothing more than a fair interpretation of the taxing statute as written and applied."[2] Despite this clear statement, parties often focus on who bears the *economic* incidence of a tax—a mistake that can result in the wrong analytical framework being applied—because the economic incidence was traditionally a critical part of the analysis.

Prior to 1937, courts applied the federal instrumentality or intergovernmental tax immunity doctrine to resolve tax challenges. The doctrine had its origin in *McCulloch v. Maryland*, which invalidated a state tax on the Second Bank of the United States—a private corporation chartered by Congress to handle the federal government's fiscal transactions.[3] Although *McCulloch* involved a discriminatory tax that applied only to the Second Bank, the Court extended *McCulloch* in *Weston v. City Council* to invalidate a nondiscriminatory tax on the income interest on federal government bonds.[4] The Court concluded that the tax was impermissible because it applied to "an operation essential to the important objects for which the government was created."[5] There, the Court focused not on

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[1] *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995) ("The initial and frequently dispositive question in Indian tax cases, therefore, is who bears the legal incidence of the tax."); *see also Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101 (2005) ("under our Indian tax immunity cases, the 'who' and the 'where' of the challenged tax have significant consequences").

[2] *Cal. Bd. of Equalization v. Chemehuevi Tribe,* 474 U.S. 9, 11 (1985).

[3] *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819).

[4] *Weston v. City Council of Charleston,* 27 U.S. (2 Pet.) 449, 472-73 (1829).

[5] *Id.* at 467.

whether the tax was generally applicable and non-discriminatory, but rather whether the tax was on federal operations or on federal property.[6]

Using the principles articulated in *Weston*, for the next century the Court resolved claims of tax immunity asserted by private parties by looking at whether the tax was a permissible tax on a federal agent's property or an impermissible tax on federal operations.[7] Many taxes that indirectly—often very indirectly—burdened the federal government, including, for example, a state sales tax on gasoline sold to federal contractors,[8] state income taxes on federal employees,[9] and license taxes on a telegraph company performing work for the Post Office, where held invalid.[10]

The Court extended the federal instrumentality doctrine to Indian country in *Choctaw, Okla. & G. R.R. v. Harrison*, where it struck down Oklahoma's tax on the gross sale of coal from mines leased by Choctaw and Chickasaw Indians to coal miners.[11] The miners, the Court explained, were federal instrumentalities responsible for carrying into effect the United States' duty to develop Indian lands. As such, they were not subject to state taxation.[12] In *Gillespie v. Oklahoma*, the Court adopted the same reasoning to strike Oklahoma's tax on income earned by a lessee from sales of his share of oil and gas received under leases of restricted Indian lands.[13] That was necessary because "a tax upon such profits is a direct hamper upon the effort of the United States to make the best terms that it can for its wards."[14] As the Court later explained, "[p]rivate lessees of restricted or tribal Indian lands came to be held 'federal instrumentalities' like the lands themselves, and so immune from various forms of state taxation ranging from a gross production tax on production from the leased lands to a tax upon the lessee's net income."[15]

In 1937, however, the Court abandoned the instrumentality doctrine in *James v. Dravo Contracting Co.* to uphold a nondiscriminatory tax on the gross receipts earned by a private contractor under a construction contract with the federal government.[16] The Court indicated that what was relevant was the legal incidence of the tax, and as long as the state tax was non-discriminatory and did not fall directly on the federal government or federal property, it was permissible.[17] A year later, the Court formally overruled *Choctaw* and *Gillespie* in *Helvering v. Mountain Producers Corp.*—a case involving

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[6] *Id.* at 468-69.

[7] *See Union Pac. R.R. v. Peniston*, 85 U.S. (18 Wall.) 5 (1873).

[8] *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218 (1928).

[9] *Dobbins v. Comm'rs of Erie Cty.,* 41 U.S. (16 Pet.) 435 (1842).

[10] *Leloup v. Port of Mobile*, 127 U.S. 640 (1888).

[11] *Choctaw, Okla., & Gulf* R.R. *Co. v. Harrison*, 235 U.S. 292 (1914).

[12] *Id.* at 298.

[13] *Gillespie v. Oklahoma,* 257 U.S. 501, 506 (1922).

[14] *Id.* (citing *Weston,* 27 U.S. (2 Pet.) at 468).

[15] *Okla. Tax Comm'n v. Texas Co.*, 336 U.S. 342, 354 (1949).

[16] *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937).

[17] *Id.* at 158, 161. *See also Alabama v. King & Boozer*, 314 U.S. 1 (1941) (upholding sales tax from a government contractor performing a cost-plus-fixed-fee contract, even though the economic burden fell on the government); *Mayo v. United States*, 319 U.S. 441 (1943) (striking down tax charged directly against the United States on inspection of fertilizer as per se forbidden).

income taxes on a refinery producing oil from leases of federal law—with the observation that "immunity from non-discriminatory taxation sought by a private person for his property or gains because he is engaged in operations under a government contract or lease cannot be supported by merely theoretical conceptions of interference with the functions of government."[18] Thus, if a federal contractor is being subjected to the same taxes as a non-federal contractor engaged in the same enterprise, "there is no sufficient ground for holding that the effect upon the government is other than indirect and remote."[19]

The Court applied its analysis in *Helvering* to Indian country a decade later in *Oklahoma Tax Commission v. Texas Co.*[20] There, it upheld a state tax on the gross income derived from an Indian lease from oil and gas production, after observing that the Court had repudiated "those insubstantial bases for securing broad private tax exemptions, unjustified by actual interfering or destructive effects upon the performance of obligations to or work for the government, state or national."[21] Following those cases, "no implied constitutional immunity can rest on the merely hypothetical interferences with governmental functions here asserted to sustain exemption."[22]

Thus, *Helvering* and *Oklahoma Tax Commission* fundamentally changed tax immunity jurisprudence. Prior to those decisions, courts primarily focused on whether a tax permissibly fell on a federal agent's property or impermissibly fell on federal operations—a test that was difficult to administer and largely worked to deprive states of their taxing authority, while benefiting the federal government marginally at best. By shifting the test away from the extent to which a tax burdens the United States (or its instrumentalities) to the legal incidence of the tax, the Court substantially simplified the analysis.[23] As the Court later observed, "our focus on a tax's legal incidence accommodates the reality that tax administration requires predictability," which would not be possible if the Court "were to make 'economic reality' [its] guide."[24]

2. Where is the regulated party or property located?

The more difficult question is often where the regulation is occurring. Although cases typically use the term "Indian country" as the key distinguishing factor, the precise status of the land located *within Indian country* can be critical. The definition of "Indian country" is found in Title 18, which is the main criminal code of the United States. The criminal code defines "Indian country" broadly to include "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," "all dependent Indian communities," and "all Indian allotments,

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[18] *Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 386 (1938).

[19] *Id.* at 387.

[20] *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342.

[21] *Id.* at 364-65.

[22] *Id.* at 365.

[23] Because courts look to the legal incidence of a tax, parties cannot work to evade taxation by contractual agreement. *See, e.g., Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1190 (9th Cir. 2008) ("The Tribe attempts an end-run around the 'legal incidence' test by structuring its contract to designate subcontractors as 'purchasing agents' for the tax-exempt Tribe. . . . [W]e decline to extend the *per se* test . . . to provide tax shelters for non-Indian businesses.").

[24] *Chickasaw Nation,* 515 U.S. at 459-460.

the Indian titles to which have not been extinguished, including rights-of-way running through the same."[25] This definition includes all the land within the boundaries of an Indian reservation, including fee land owned by nontribal members.[26]

For the purpose of jurisdictional disputes, however, satisfying the definition of Indian country does not end the inquiry. When confronted with a jurisdictional question, it is important to have a general understanding of the history of Indian land tenure. For most tribes, two federal statutes have fundamentally shaped land ownership: (1) the Indian General Allotment Act of 1887;[27] and (2) the Indian Reorganization Act of 1934.[28] The first produced the checkerboard pattern seen today in many Indian reservations; the second prevented the eventual termination of Indian reservations generally.

Prior to the 1820s, the federal government negotiated treaties with tribes as sovereign nations primarily to establish borders, extend the "protection" of the United States, and prescribe the respective rights of the parties. The Indian Removal Act of 1830 marked a change in federal policy from one focused on establishing borders with sovereign nations to the complete removal of now "domestic dependent nations" to a permanent "Indian territory" west of the Mississippi in modern-day Oklahoma.[29] By 1851, however, Congress responded to increasing demands for land by creating the Indian reservation system to move tribes in Indian territory onto smaller farming reservations.[30]

Following the Civil War, the federal government again changed course. In 1868, President Ulysses S. Grant adopted a policy of assimilation. Three years later, Congress ended treaty-making with tribes, ceased recognizing them as independent nations, and legally designated Indians as "wards" of the federal government.[31] In 1887, Congress passed the General Allotment Act, which directed the transfer of up to 160 acres of communally owned reservation land to each tribal family and smaller allotments to individual Indians. The allotments were to be held in trust for a period of 25 years, after which the United States would issue the Indian owner a patent and grant him citizenship, and both would become subject to state law. Under the General Allotment Act, its amendments, and other tribe-specific allotment acts, approximately 60 million acres of Indian lands were ceded or sold as "surplus lands." Another approximately 30 million acres were lost through takings or forced sale under other authorities.

The federal government halted the loss of Indian lands with the passage of the Indian Reorganization Act of 1934 (IRA), which was also intended to reduce federal control of Indian affairs and facilitate Indian self-government. Application of the IRA, however, was voluntary, and

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[25] 18 U.S.C. § 1151; *see also Okla. Tax Comm'n v. Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) (stating that "the test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation.' Rather, we ask whether the area has been 'validly set aside for the use of Indians as such, under the superintendence of the Government'") (quoting *United States v. John*, 437 U.S. 634, 648-649 (1978)).

[26] *Seymour v. Superintendent*, 368 U.S. 351 (1962); *Solem v. Bartlett*, 465 U.S. 463, 465 n.2 (1984).

[27] General Allotment (Dawes) Act of 1887, ch. 119, 24 Stat. 388 (1887).

[28] Indian Reorganization (Wheeler-Howard) Act, ch. 576, 48 Stat. 984 (1934).

[29] *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

[30] Indian Appropriations Act of 1851, ch. 14, 9 Stat. 574, 586-87 (1851).

[31] Indian Appropriations Act of Mar. 3, 1871, ch. 120, 16 Stat. 466 (1871).

not all tribes voted for its application. In 1990, Congress extended the section of the IRA prohibiting allotment to all tribes, regardless of whether they voted for its application.[32]

This history is vastly simplified, of course, but allotment and reorganization created the jumble of land ownership found in reservations today. Land ownership within reservations today includes: tribal trust lands, lands allotted in restricted fee (often heavily fractionated), lands reacquired in trust by tribes or Indians pursuant to Section 5 of the IRA, and fee lands owned by tribes, Indians, and non-Indians. The legal status of land is highly consequential in any jurisdictional analysis. It is critical that the history of the land involved be understood. Moreover, it is not enough to identify the ownership status. Tribe-specific authorities must also be considered, including treaties, executive orders, and statutes.

B. Analyzing Jurisdictional Disputes *Within Indian Country*

Historically, most jurisdictional disputes have centered on activities occurring within Indian country. As the Court observed in *Nevada v. Hicks*, "State sovereignty does not end at a reservation's border."[33] But where exactly it does end is not always easy to determine. There are three key issues that affect the respective jurisdictional reach of tribes and local governments: (1) Indian status of the regulated parties; (2) where the regulation is occurring; and (3) the type of regulation involved. The following discussion outlines the general jurisdictional rules applied within Indian country.

1. *State* authority to regulate *Indians* in Indian country is very limited.

Generally, states cannot regulate Indians in Indian country, absent congressional authorization.[34] For criminal purposes, Indian tribes have criminal jurisdiction over Indians in Indian country.[35] Under the Major Crimes Act, the federal government has jurisdiction over certain crimes—including, e.g., murder, assault, arson, and sexual offenses—committed by Indians in Indian country.[36] Indian status for purposes of the Act does not turn on tribal membership; it turns on whether an individual is a descendent of a person clearly recognized as an Indian or is recognized by a federally recognized tribe or the federal government as an Indian. Under the Indian Country Crimes Act, federal criminal laws that apply to military bases and national parks apply when a tribal member and a non-Indian are involved, except when the perpetrator and victim are both Indians and when an Indian has been punished under tribal law.[37] Congress has granted six states criminal jurisdiction and authorized the voluntary assumption of jurisdiction by other states.[38]

With respect to civil jurisdiction, tribes have inherent authority over tribal members, including the power to determine their membership to regulate domestic relations among tribal members, prescribe rules for the inheritance of property, and prosecute tribal members for violations of tribal

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[32] Pub. L. 101–301, § 3(a), 104 Stat. 207 (1990).

[33] *Nevada v. Hicks*, 533 U.S. 353, 361 (2001).

[34] *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 170-71 (1973).

[35] *See United States v. Lara*, 541 U.S. 193 (2004).

[36] *See* 18 U.S.C. § 1153.

[37] *See* 18 U.S.C. § 1152.

[38] *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987).

law.[39] States cannot impose sales taxes on tribes or tribal members for on-reservation sales, nor income taxes on tribal members living on reservation.[40]

When fee lands within Indian country are involved, however, the scope of state and local jurisdiction expands. Patented lands are subject to state law—including state taxation—by operation of federal allotment acts, even if a tribal member or the tribe itself purchases the land.[41] Immunity from state law requires the reacquisition of the land in trust.[42]

2. *Tribal* authority to regulate *non-Indians* in Indian Country is very limited.

Originally, tribes possessed sovereign authority over their territory and everyone within it.[43] Tribes have lost the power to regulate non-Indians, however, by "ceding their lands to the United States and announcing their dependence on the Federal Government."[44] For criminal purposes, tribes have no jurisdiction over non-Indians, absent congressional authorization.[45] In 2013, Congress granted tribes criminal jurisdiction over non-Indians who commit dating and domestic violence.[46]

Tribal efforts to assert civil regulatory and adjudicatory jurisdiction over non-Indians is a relatively new development, substantially because tribal governments historically lacked the power and resources to do so. In 1959, the Supreme Court held in *Williams v. Lee* that the Navajo Nation had exclusive authority to adjudicate civil claims against tribal members for disputes arising on-reservation.[47] That decision is often viewed as initiating the modern era's focus on tribal self-determination, which has helped to empower tribal governments. In 1981, the Supreme Court addressed the scope of tribal authority over non-Indians in *Montana v. United States*, which involved a quiet title action and tribal authority to regulate nonmember hunting and fishing activities on fee land within the reservation.[48] The Court concluded that although tribes maintain certain powers of self-government, those powers extend only to the control of "internal relations." Extension beyond

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[39] *See, e.g.*, *Fisher v. District Court*, 424 U.S. 382 (1976) (domestic relations); *Jones v. Meehan*, 175 U.S. 1 (1899) (property); *United States v. Wheeler*, 435 U.S. 313, 318, 322-23 (1978) (tribal prosecutions).

[40] *Chickasaw Nation*, 515 U.S. 450; *McClanahan*, 411 U.S. 164.

[41] *Cty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992); *City of Sherill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005). Whether tribally owned fee lands are subject to foreclosure or local zoning remains unresolved. *See also Upper Skagit Indian Tribe v. Lungren*, 138 S. Ct. 1649, 200 L.Ed.2d 931 (2018); *Gobin v. Snohomish Cnty.*, 304 F.3d 909 (9th Cir. 2002); *Cayuga Indian Nation of N.Y. v. Village of Union Springs*, 390 F. Supp. 2d 203 (N.D.N.Y. 2005).

[42] *City of Sherill*, at 224.

[43] *Duro v. Reina*, 495 U.S. 676, 685 (1990).

[44] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978); *see also United States v. Wheeler*, 435 U.S. 313, 326 (1978) ("The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and non-members of the tribe.").

[45] *Oliphant*, 435 U.S. at 195 n.6.

[46] Violence Against Women Act Reauthorization Act, Pub. L. 113-4, 127 Stat. 54 (2013).

[47] *Williams v. Lee*, 358 U.S. 217, 217 (1959).

[48] *Montana v. United States*, 450 U.S. 544 (1981).

that realm, would be "inconsistent with the dependent status of the tribes."[49] The Court identified two exceptions to that rule, however, known as the *Montana* exceptions:

- Tribes "may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members."[50]

- Tribes may regulate "the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe."[51]

With respect to the consensual relationship exception, the Court has generally required explicit consent—usually in the form of a contract.[52] To qualify under the health and welfare exception, there must be "catastrophic consequences."[53]

Tribes also have authority to regulate nonmember conduct when Congress has authorized them to do so, as with the sale of alcohol on reservations, tribal hunting and fishing ordinances, and implementation of certain environmental statutes, such as the Clean Water Act.[54]

3. *State* regulation of *non-Indians* in Indian country is messy.

State authority to regulate in Indian country also varies, based on who is being regulated and where. For criminal purposes, states have jurisdiction over crimes committed by non-Indians in Indian country, if the crimes do not involve an Indian victim.[55] And the flipside of the *Montana* rule is that states have regulatory jurisdiction over non-Indians on fee lands in Indian country—unless an exception applies.

But when non-Indian activity occurs on trust lands, no bright-line jurisdictional rule applies. In analyzing whether states can regulate such conduct, the Court has identified its "trend . . . away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption."[56] However, the preemption analysis that courts apply when Indian country is involved bears only passing resemblance to normal preemption analyses—apart from the initial inquiry whether state regulation is expressly preempted by treaty or federal statute. Instead, the preemption analysis must be "informed by historical notions of tribal sovereignty, rather than determined by them."[57] Accordingly, the Court will not "necessarily require that Congress explicitly pre-empt assertion of state authority insofar as Indians on reservations are concerned, but we have recognized

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[49] *Id.* at 564.

[50] *Id.* at 565.

[51] *Id.* at 566.

[52] *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 343-34 (2008).

[53] *Id.* at 341.

[54] *Arizona Public Service Co. v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000) (treatment of tribes as states).

[55] *United States v. McBratney*, 104 U.S. (14 Otto) 621 (1881); *Draper v. United States*, 164 U.S. 240 (1896).

[56] *McClanahan*, 411 U.S. at 172.

[57] *Rice v. Rehner*, 463 U.S. 713, 718 (1983).

that 'any applicable regulatory interest of the State must be given weight' and 'automatic exemptions as a matter of constitutional law' are unusual."[58]

But what, exactly, does that mean? In *White Mountain Apache v. Bracker*, the Court explained that, to resolve jurisdictional disputes over non-Indians in Indian country, it must undertake "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law."[59] State law is preempted "if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority."[60] Thus, courts are to balance federal, state, and tribal interests—though exactly how is not entirely clear—and determine whether, under the specific facts of the case, state law is preempted.

As a practical matter, courts have generally approached *Bracker* balancing in two ways, depending upon the nature of the regulation involved. For cases not involving state taxation, courts tend to focus more on tribal sovereignty, asking whether state regulation "would infringe on the right of the Indians to govern themselves."[61] As the Court acknowledged in *Rice v. Rehner*, "the role of tribal sovereignty in pre-emption analysis varies in accordance with the particular 'notions of sovereignty that have developed from historical traditions of tribal independence.'"[62] Resolution of this question tends to turn on whether compliance with both state and tribal law is impossible or whether state law prevents tribes from developing their own requirements. Thus, in *New Mexico v. Mescalero Apache Tribe*, the Court concluded that state hunting regulations were preempted because "concurrent jurisdiction would effectively nullify the Tribe's authority to control hunting and fishing on the reservation."[63] Allowing [c]oncurrent jurisdiction would empower New Mexico wholly to supplant tribal regulations."[64] Likewise, in *Segundo v. City of Rancho Mirage*, the Ninth Circuit concluded that local rent control ordinances, as applied to a non-Indian mobile park operator, were preempted because their application would have precluded the tribe from imposing its own rent control ordinance.[65]

In the taxation context, however, the infringement test is less important because concurrent taxation is not only possible, it is the norm. The Court has repeatedly rejected arguments in tax immunity cases that are based on concerns regarding concurrent taxing jurisdiction.[66] In fact, the Supreme Court has never invalidated a state tax because it infringed on tribal sovereignty.

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[58] *Id.* at 719 (quoting *White Mountain Apache v. Bracker*, 448 U.S. 136, 144 (1980)).

[59] *White Mountain Apache v. Bracker*, 448 U.S. 136, 145 (1980).

[60] *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983) (citing *Bracker*, 448 U.S. at 145).

[61] *Williams v. Lee*, 358 U.S. at 223.

[62] *Rice*, 463 U.S. at 719 (quoting *Bracker*, 448 U.S. at 145).

[63] *Mescalero Apache Tribe*, 462 U.S. at 338.

[64] *Id.*

[65] *Segundo v. City of Rancho Mirage*, 813 F.2d 1387 (9th Cir. 1987); *see also Williams v. Lee,* 358 U.S. 217 (Indian jurisdiction over civil suit against Indian on reservation).

[66] *Wagnon,* 546 U.S. at 114 ("Nor is the Nation entitled to interest balancing by virtue of its claim that the Kansas motor fuel tax interferes with its own motor fuel tax."); *Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 189 (1989) ("Unless

Taxation cases are resolved substantially on the state's ability to justify the tax. Federal, state, and tribal interests are each discussed below.

a. Federal Interests

Courts look to the relevant statutes and regulations when evaluating the federal interest at stake. The relevant statutes and regulations are those authorizing the on-reservation activity related to the presence of the non-Indian taxpayer.[67] In the context of possessory interest taxes, for example, the relevant statute is the Long-Term Leasing Act, 25 U.S.C. § 415, which authorizes leasing of Indian lands, and the implementing regulations at 25 C.F.R. Part 162. When rights-of-way are involved, the applicable regulations are set forth at 25 C.F.R. Part 169.

Because courts first look to the federal policies reflected in the applicable statutes, there is a temporal aspect to the analysis. Statutes passed during periods where federal policies were more paternalistic are more likely to reflect a preemptive intent, and courts from those periods may take a different view. For example, in 1965, the Court held in *Warren Trading Post Company v. Arizona Tax Commission* that the Indian Trader Statutes preempt state taxes, as applied to the sale of machinery to a registered Indian trader.[68] The Indian Trader Statutes, passed in 1876, prohibited trade with Indians except by licensed Indian traders.[69] The implementing regulations were first promulgated in 1957 and updated in 1965.[70] At that time, the Court held that the "detailed regulations prescribe[ed] in the most minute fashion" the regulation of trade.[71] Beginning in 1976 with *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation* and in 1994 in *Department of Taxation and Finance of New York v. Milhelm Attea & Bros.*, the Court retreated from that absolutist position to uphold cigarette taxes.[72] Certain tribal natural resources are so comprehensively regulated that the Court has held state taxes to be preempted. The timber resources involved in *Bracker* are a prime example.[73]

More modern efforts to relieve tribes from the most oppressive paternalistic policies, whether through legislation or regulatory reform, often result in the conclusion that state taxes are permissible. The Long-Term Leasing Act is a good example. Passed in 1955, the Act authorized the leasing of Indian lands for a variety of purposes. The Act does not expressly preempt state and local taxes, and while various courts have found the implementing regulations to be pervasive—the regulations govern all aspects of the formation of the lease, including its duration and the amount of rent, and require federal approval, but they say nothing about the nature of the lessee's occupation

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and until Congress provides otherwise, each of [the state and the tribe] has taxing jurisdiction over all of Cotton's leases."); *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134. 158 (1980) ("There is no direct conflict between the state and tribal schemes, since each government is free to impose its taxes without ousting the other.").

[67] *Bracker,* 448 U.S. at 145-147; *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N.M.,* 458 U.S. 832, 839-840 (1982).

[68] *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 691 (1965).

[69] *Id.* at 689.

[70] *See* 22 Fed. Reg. 10670 (Dec. 24, 1957); 30 Fed. Reg. 8267 (June 29, 1965).

[71] *Id.*

[72] *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976); *Dep't of Taxation and Finance of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994).

[73] *Bracker,* 448 U.S. at 145-147.

and use of the land and do not purport to regulate any conduct of the lessee or its business—they have not invalidated state possessory interest taxes on that basis.[74] That is true even after the Secretary revised the regulations in 2013, ostensibly to reflect the strong federal interest in preempting state taxes, "[s]ubject only to applicable Federal law."[75]

Those decisions were clearly informed by the fact that the taxes on lessees' possessory interests are not directly regulated by the federal government in any way—a question that should be evaluated in any dispute. In *Cotton Petroleum Corp. v. New Mexico,* for example, the Court examined regulation of the taxpayer's economic activity—oil and gas production—not regulation of formation of the lease pursuant to which the lessee was engaged in economic activity on reservation.[76] But also relevant is the purpose of the relevant statute itself and the regulatory reform—which in the modern context is usually to remove federal obstacles to economic development and tribal self-determination.

b. Tribal Interests

Tribal interests are generally similar to and aligned with federal interests, although an activity might be regulated by a tribe rather than the federal government. Tribal interest may include tribal sovereignty and economic self-determination. Courts have generally resisted arguments that state taxes preclude tribal taxation or otherwise reduce tribal revenues. With respect to the first argument, it is well established that concurrent taxation by two sovereigns does not conflict or offend either jurisdiction's sovereignty.[77] It may be that because of dual taxation, neither sovereign can maximize the amount of revenue collected. But courts have generally resisted this expansion and most cases have failed.[78] Likewise, courts have uniformly held that state tax laws are not preempted simply because they may serve to reduce tribal revenues.[79]

Although some cases suggest that a tax on non-Indians in Indian country may be invalidated based on an alternative preemption theory that the tax interferes with tribal sovereignty or self-governance,

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[74] *See* 25 U.S.C. § 415.

[75] 25 C.F.R. § 162.017.

[76] *Cotton Petroleum Corp.*, 490 U.S. 163; *see also Gila River Indian Cmty. v. Waddell,* 91 F.3d 1232 (9th Cir. 1996), and *Salt River Pima-Maricopa Indian Cmty. v. Arizona,* 50 F.3d 734 (9th Cir. 1995), where little weight was given to Indian lease regulations when taxpayers were operating retail establishments.

[77] *See supra,* n.66.

[78] *See, e.g., Wagnon,* 546 U.S. at 95 (Kansas motor fuel tax upheld); *Agua Caliente Band of Cahuilla Indians v. Riverside Cty.,* 749 Fed. Appx. 650 (9th Cir. 2019) (California possessory interest tax upheld); *Mashantucket Pequot Tribe v. Connecticut,* 913 F.2d 1024 (2d Cir. 1990) (Connecticut personal property tax upheld); *Barona Band of Mission Indians,* 528 F.3d 1184 (California sale tax upheld); *Yavapai-Prescott Indian Tribe v. Scott,* 117 F.3d 1107 (9th Cir. 1997) (Arizona business privilege tax upheld); *Gila River Indian Cmty.,* 91 F.3d 1232 (Arizona sales tax upheld); *Salt River Pima-Maricopa Indian Cmty.,* 50 F.3d 734 (Arizona sales and gross receipts tax upheld).

[79] *See, e.g., Cotton Petroleum Corp.,* 490 U.S. at 187 (rejecting the "long-discarded and thoroughly repudiated doctrine" of invalidating every state tax that has "[a]ny adverse effect on the Tribe's finances caused by the taxation of a private party contracting with the Tribe"); *Confederated Tribes of the Colville Reservation,* 447 U.S. at 156-157 (tax is not invalidated "merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they currently are receiving"); *Gila River Indian Cmty.,* 91 F.3d at 1239 ("[T]he Ninth Circuit and [U.S.] Supreme Court have repeatedly held that 'reduction of tribal revenues does not invalidate a state tax.'") (quoting *Salt River Pima-Maricopa Indian Cmty.* 50 F.3d at 737).

the Supreme Court has never applied this theory to invalidate a tax.[80] In fact, that rationale is inconsistent with the Court's abandonment of the federal instrumentality doctrine in *Helvering*, where the Court rejected "insubstantial bases for securing broad private tax exemptions, unjustified by actual interfering or destructive effects upon the performance of obligations to or work for the government, state or national."[81] Moreover, it ignores cases that indicate that sovereign functions of a tribe are unlikely to be implicated by state taxation of non-Indians.[82] Thus, unless the tax involved is extraordinary or the state has no ability to justify the tax, courts are not likely to conclude that state taxation is preempted on the basis of tribal sovereignty.

c. State Interests

The state's interests are the provision of governmental services and potentially regulatory policies, such as public health with cigarette taxation. With respect to governmental services, the inquiry is based on the reasoning that a tax is more readily justified when the taxpayer benefits from the expenditure of the tax revenues. The inquiry does not demand that the benefits be proportionate to the tax burden, or that a specific taxpayer consume the governmental service provided.[83] For example, a childless taxpayer remains liable for taxes that fund public education although the taxpayer's family may not use the school system.[84] Cases uniformly hold that if the taxing jurisdiction provides governmental services to the taxpayer, the services reflect a state interest that generally justifies the imposition of the tax.

Some early cases appeared to suggest a narrow scope of relevant services—only those that were directly connected to the on-reservation taxed activity or services specifically funded by the tax revenues—were permissible.[85] A later Supreme Court case stated that the relevant services include those provided on and off-reservation, and those provided to the taxpayer and to the tribe,

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[80] The one case that applied interference with sovereignty to invalidate a tax did so on an extraordinary fact pattern where trial evidence and expert testimony established that a 32.9% state tax adversely effected the marketability of Indian coal and taxed a component of the land itself. *See Crow Tribe of Indians v. Montana,* 819 F.2d 895 (9th Cir. 1987), *summarily aff'd,* 484 U.S. 997 (1988). The Court subsequently explained that the tax was invalidated "not because the state lacked the power to tax the coal at all, but because the taxes were so 'extraordinarily high.'" *Montana v. Crow Tribe of Indians,* 523 U.S. 696, 709-710 (1998).

[81] *Okla. Tax Comm'n v. Texas Co.*, 336 U.S. at 364-65.

[82] *See Confederated Tribes of the Colville Reservation,* 447 U.S. at 161 ("Nor would the imposition of Washington's tax on these purchasers [Indians of another tribe] contravene the principal of tribal self-government, for the simple reason that nonmembers are not constituents of the governing tribe."). In fact, the only cases to have followed this line of reasoning involved the application of federal law in Indian country, which turned on the distinction between core governmental functions called intramural activities, and commercial enterprises called intermural activities. *See, e.g., Reich v. Mashantucket Sand & Gravel Co.*, 95 F.3d 174 (2d Cir. 1996); *Reich v. Great Lakes Indian Fish & Wildlife Comm'n,* 4 F.3d 490 (7th Cir. 1993); *Donovan v. Coeur d'Alene Tribal Farm,* 751 F.2d 1113 (9th Cir. 1985).

[83] *Cotton Petroleum Corp.,* 490 U.S. at 185 n.15 ("Not only would such a proportionality requirement create nightmarish administrative burdens, but it could also be antithetical to the traditional notion that taxation is not premised on strict *quid pro quo* relationship between the taxpayer and the tax collector.").

[84] *E.g., Carmichael v Southern Coal & Coke Co.,* 301 U.S. 495, 523 (1937) ("A corporation cannot object to the use of taxes it pays for the maintenance of schools because it has no children.").

[85] In *Ramah Navajo School Bd.,* for example, the Court found that services provided to the taxpayer off-reservation "is not a legitimate justification for a tax whose ultimate burden falls on the tribal organization." 448 U. S. at 844, 845 n.10.

regardless of the source of funding.[86] Subsequent court of appeals decisions suggest that what is most relevant is whether the taxpayer receives some services or benefit from the taxing jurisdiction, and that the governmental services bear some relationship to the taxed activity.[87] Under the prevailing view of the interest balancing test, state taxes will be preempted only where the state does not regulate the taxed activity or provide services or benefits to the taxpayer, and, perhaps, only where the federal regulation preempts the field. Accordingly, very few challenges to taxation of non-Indians will be successful.

C. Growing Jurisdictional Disputes Outside of Indian Country

Outside Indian country, tribes and tribal members are generally subject to state jurisdiction.[88] However, tribes are increasingly working to influence state and local regulation outside Indian country when that regulation potentially impacts tribal interests. Three general categories of such efforts involve: (1) tribal rights to on-reservation resources that affect off-reservation resources; (2) tribal treaty rights to off-reservation resources; and (3) tribal consultation rights regarding off-reservation cultural resources. A few examples are discussed below.

1. Water Rights

a. Federal Reserved Water Rights

The federal statutes and treaties that first created reservations often did not address the water needs of tribes. In 1908, the Supreme Court held in *Winters v. United States* that there is an implied right to sufficient water to fulfill the purposes of the reservation when an Indian reservation is established.[89] Over a century after the *Winters* decision, the doctrine of federal reserved water rights has expanded substantially through cases decided by the state courts.[90]

While most western states are well versed in water rights litigation, the issue of groundwater rights has gained attention. Both the Arizona and Montana Supreme Courts, for example, have held that in determining a tribe's reserved water rights, the question is whether the water is necessary to the purpose of the reservation;[91] whether the water is surface water or groundwater is immaterial.

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[86] *Cotton Petroleum Corp.,* 490 U.S. at 189 ("the relevant services provided by the State include those that are available to the lessees and the members of the Tribe off the reservation as well as on it").

[87] *Hoopa Valley Tribe v. Nevins,* 881 F.2d 657, 661 (9th Cir. 1989) ("[t]o be valid, the California tax must bear some relationship to the activity being taxed"); *Barona Band of Mission Indians,* 528 F.3d at 1190 ("provision of . . . state services to the party the state seeks to tax") (internal quotation marks and citation omitted); *Agua Caliente Band of Cahuilla Indians v. Riverside Cty.*, No. ED CV 14-0007-DMG (DTBx), 2017 WL 4533698, at *18 (C.D. Cal. 2017) ("state revenues flowing from the tax must fund . . . services that advance and support the [taxpayer's] leasehold interest"), *aff'd*, 749 Fed. Appx. 650 (9th Cir. 2019).

[88] *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973); *Chickasaw Nation*, 515 U.S. at 458.

[89] *Winters v. United States*, 207 U.S. 564 (1908).

[90] States courts have jurisdiction over comprehensive water rights adjudications due to the 1952 McCarran Amendment, which waived federal sovereign immunity over water rights adjudications. 43 U.S.C. § 666.

[91] *In re General Adjudication of All Rights to Use Water in Gila River System and Source*, 195 Ariz. 411, 419, 989 P.2d 739, 747 (1999) ("The significant question for the purpose of the reserved rights doctrine is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation.") (*Gila River III*); *Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Stults*, 312 Mont. 420, 439, 59 P.3d 1093, 1098 (2002) ("there is no

Neither court determined whether groundwater was actually necessary to the purpose of the respective reservations.

More recently, however, the Ninth Circuit not only held that reserved water rights can include groundwater, it also analyzed whether groundwater was necessary to the purpose of the Agua Caliente Reservation.[92] The federal government and the Tribe sued the Coachella Valley Water District and the Desert Water Agency to establish and quantify rights to groundwater in the Coachella Valley aquifer. The Ninth Circuit concluded that, in the western United States where groundwater may be the only viable water source, "a reservation without an adequate source of surface water must be able to access groundwater."[93]

Although the Ninth Circuit limited tribal groundwater rights to groundwater appurtenant to the reservation land,[94] a number of tribes have asserted rights to off-reservation surface and groundwater. The Havasupai Tribe, for example, asserted rights to an off-reservation aquifer because that aquifer fed Havasu Creek, the reservation's main water source.[95] The Tribe argued that the Anasazi Water Company's use of the aquifer constituted unlawful interference and asked the court to enjoin further withdrawal of groundwater in order to prevent any reduction of the flow of Havasu Creek.[96] Although the case ultimately was dismissed before the court reached the merits, the Tribe is in settlement discussions with the Arizona Department of Water Resources.[97]

Courts have placed restrictions on reserved rights to surface and groundwater, but tribes have and likely will continue to pursue more expansive water rights claims. Water quantification, for example, continues to be highly contested in ongoing litigation. The Court first addressed quantification in 1963 in adjudicating the rights to the Colorado River. In *Arizona v. California*, the Court established the practicably irrigable acreage standard (PIA), under which reservations are entitled to as much water as is necessary to irrigate all "practicably irrigable" reservation land.[98] Since then, the PIA has been analyzed and applied by other courts.[99]

Some western states, however, have opposed the standard as a threat to water supplies for metropolitan areas, as well as non-Indian farmers, ranchers, manufacturers, and others. The Arizona Supreme Court rejected the PIA approach because it could lead to inequitable treatment of tribes based on their geographic location.[100] Tribes with more irrigable acreage would be allocated "an

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distinction between surface water and groundwater for purposes of determining what water rights are reserved because those rights are necessary to the purpose of an Indian reservation").

[92] *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262 (9th Cir. 2017).

[93] *Id.* at 1271.

[94] *Id.* at 1271-72.

[95] *Havasupai Tribe v. Anasazi Water Co.,* 321 F.R.D. 351 (D. Ariz. 2017).

[96] *Id.* at 353.

[97] The court dismissed the case for failure to join the United States as an indispensable party. *See id.* at 358.

[98] *Arizona v. California*, 373 U.S. 546, 600 (1963), *amended by* 383 U.S. 268 (1966).

[99] *See, e.g.*, *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76, 100-01 (Wyo. 1988), *aff'd by an equally divided court sub. nom.*, *Wyoming v. United States*, 492 U.S. 406 (1989) ("*Big Horn II*").

[100] *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 201 Ariz. 307, 317, 35 P.3d 68, 78 (2001) (*Gila River V*).

overabundance of water," while tribes with limited irrigable acreage would not receive enough.[101] Thus, the court established a new approach: a reservation must be allocated water necessary to achieve its purpose as a permanent homeland, tailored to the reservation's minimal needs.[102] This was the first case in which a court abandoned the PIA in favor of a different standard to quantify reserved water rights. The homeland standard also was applied in a recent case in front of the Supreme Court of Idaho concerning the Coeur d'Alene Tribe's water rights for instream flows located on both tribal-owned and non-tribal-owned lands on its reservation.[103]

There are, however, limits water quantification litigation. For example, tribes must be able to show that their ability to fulfill the purposes of their reservations has been injured by an insufficient supply of water. [104] But meeting that standard may become increasingly easy as climate change and increased droughts impact water supplies.

b. Water Quality

Water quality is another issue that is becoming increasingly contentious. Water quality standards (WQS) provide the regulatory and scientific foundation for protecting water quality under the Clean Water Act (CWA).[105] Originally, the CWA did not provide tribes with a mechanism to regulate water quality. However, in 1987, Congress authorized the EPA to allow tribes to be "treated as a state" (TAS) under CWA § 518(e) for the purpose of certain CWA provisions, including CWA § 303 which authorizes states to establish and administer WQS.[106] If EPA grants TAS status to a tribe, then the tribe can enact its own WQS for its reservation.

Since the creation of TAS status, courts have addressed the reach of WQS created by tribes. The Ninth Circuit has clarified that the WQS apply to all reservation lands, regardless of whether the sources are located on land owned by members or non-members.[107] Courts have also extended tribal WQS beyond waters within reservation boundaries. In 1996, the Tenth Circuit upheld EPA's

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[101] *Id.* at 79.

[102] *Id.* at 79-81. The court listed potential factors for consideration in the quantification: (1) the tribe's history of and cultural need for water; (2) the nature of the land and associated resources of the reservation; (3) the tribe's economic status and the proposed economic development to the extent that they involve a need for water; (4) historic reliance of the tribe on water for the proposed purpose; and (5) the tribe's current and projected population.

[103] *Coeur d'Alene Tribe: In re CSRBA Case No. 49576 Subcase No. 91-7755*, 165 Idaho 517, 448 P.3d 322 (2019), *reh'g denied* (Nov. 4, 2019) (holding that the tribe has reserved rights to instream flows for homeland purpose).

[104] During the second phase of the *Agua Caliente* litigation, the court limited the ability of the Tribe to seek quantification of rights. *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, No. EDCV-13-00883 JGB (SPx), 2019 WL 2610965 (C.D. Cal. Apr. 19, 2019), *recons. denied*, 2019 WL 4565178 (C.D. Cal. Aug. 14, 2019). The court dismissed the Agua Caliente Tribe's quantification claims on standing grounds because the Tribe was not injured where it was not using and had no plans to use water from the aquifer in question. *Id.* at *12. The court explained: "[A]lthough non-use does not destroy the Tribe's federally reserved water right, it affects whether the Tribe has standing to adjudicate the scope, extent, and character of that right." *Id.* at *9.

[105] 33 U.S.C. § 1251 *et seq.* (1972).

[106] 33 U.S.C. §§ 1377, 1313.

[107] *Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1998) (upholding EPA's decision to grant TAS status to the Confederated Salish and Kootenai Tribes to promulgate WQS applicable to pollutant emissions sources on reservation land owned by both members and non-members).

authority to enforce a tribe's standards against upstream off-reservation polluters.[108] The Seventh Circuit went one step farther, acknowledging that a tribe with TAS status "has the power to require upstream off-reservation dischargers . . . to make sure that their activities do not result in contamination of the downstream on-reservation waters . . . ."[109]

In addition to establishing their own WQS, tribes recently have been involved in litigation challenging *state* WQS as insufficient to protect tribal rights to use water. In Maine, for example, the state was engaged in litigation for several years against the EPA, the Penobscot Nation of Maine, and the Houlton Band of Maliseet Indians regarding Maine's WQS.[110] In 2015, the EPA rejected several of Maine's WQS affecting tribal lands because those standards were inadequate to protect the right of tribal members to fish for sustenance.[111] The EPA took the position that waters where tribes exercise fishing rights must have WQS that are sufficient to ensure that tribal members can harvest fish for sustenance without endangering their health through exposure to dangerous levels of toxins.[112] Maine challenged the EPA's determination in court, arguing that the agency improperly heightened the WQS.[113] The case was ultimately dismissed, after the Court remanded to EPA for reconsideration of its February 2015 decision.[114] But the litigation spurred an important development: in June 2019, while the case was still active, Maine passed legislation (1) designating several waterways in the state as areas protected for sustenance fishing by local tribes and (2) requiring the Maine Department of Environmental Protection to adopt rules that establish water quality criteria protective of human health for toxic pollutants and the sustenance fishing designated use.[115] Through this legislation, the tribes ultimately prevailed in their bid for more stringent water quality criteria.

Similar litigation regarding EPA's May 2019 revisions to Washington's WQS is ongoing in federal district court. Washington sued the EPA last June to block the agency's May 19 revisions to state WQS, arguing that the revisions have improperly loosened the guidelines for dozens of substances.[116] The Sauk-Suiattle Indian Tribe and Quinault Indian Nation were then permitted by the court to join the case because they alleged that the new WQS will disproportionately affect them because they eat more fish than typical Washingtonians.[117] The cases in Washington and Maine suggest an increased interest among tribes to protect their sustenance fishing rights through more stringent state-level WQS.

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[108] *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996).

[109] *Wisconsin v. EPA*, 266 F.3d 741, 478 (7th Cir. 2001).

[110] *Maine v. Wheeler*, No. 1:14-CV-00264-JDL (D. Me.).

[111] *See* Letter from H. Curtis Spalding, Regional Administrator, EPA, to Patricia W. Aho, Commissioner, Maine Dep't of Environmental Protection (Feb. 2, 2015); letter from H. Curtis Spalding to Patricia W. Aho (Mar. 16, 2015); letter from H. Curtis Spalding to Patricia W. Aho (June 5, 2015).

[112] *Id.*

[113] Second Amended Complaint at 3-4, *Maine v. Wheeler*, No. 1:14-CV-00264-JDL (D. Me. Oct. 8, 2015), ECF No. 30.

[114] Joint Stipulation of Dismissal Without Prejudice, *Maine v. Wheeler*, No. 1:14-CV-00264-JDL (D. Me. July 31, 2020), ECF No. 201.

[115] An Act to Protect Sustenance Fishing, Pub. L. 2019, ch. 463 (effective Sept. 19, 2019).

[116] *Washington v. EPA*, No. 2:19-CV-00884-RAJ (W.D. Wash.).

[117] *Washington v. EPA*, No. 2:19-CV-00884-RAJ, 2020 WL 1955554, at *1 (W.D. Wash. Apr. 23, 2020).

2. Off-Reservation Fishing Rights

Many tribes possess treaty rights to utilize off-reservation resources for hunting, fishing, and other purposes. In Washington, tribes possess treaty rights to fish in "usual and accustomed" areas (referred to as U&A rights) outside of their reservations. These tribes have at times successfully opposed federal authorizations of in-water structures on the basis of U&A rights, both on the grounds of the obstruction of physical access to U&A areas, and that development would harm the tribes' rights to 50% of the available anadromous fish under a series of landmark cases known as the *Boldt* decisions.

a. U&A Fishing Rights Generally

Under the United States Constitution, treaties are accorded precedence equal to federal law; treaty rights are binding on all federal and state agencies, and take precedence over State constitutions, laws and judicial decisions.[118] Under the federal trust responsibility to Indian tribes, the federal government and its agencies have an obligation to protect tribal land, assets, and resources that it holds in trust for tribes, and a responsibility to ensure that its actions do not abrogate tribal treaty rights.[119] The rights defined in Indian treaties were not a grant of rights from the United States to the tribes, but are instead a reservation of rights held by the tribe as a sovereign people from time immemorial.[120]

As a consequence, Indian treaty rights are property rights which may not be taken without an act of Congress, and treaty terms, and the rights arising from them cannot be rescinded or cancelled without explicit Congressional consent. States have limited inherent power to regulate the exercise of treaty rights, but Congress can provide for federal regulation of the exercise of treaty rights or authorize state regulation, such as for example, to achieve conservation purposes (*e.g.*, time, place, or manner restrictions).[121]

U&A rights are derived from what are known as the Stevens Treaties, a series of treaties negotiated with tribes of the Pacific Northwest by Territorial Governor Isaac Stevens in 1854-55, all of which contain a similar provision securing "[t]he right of taking fish at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory."[122] U&A rights include both the right to access U&A areas and the right to take half of the harvestable fish found in such areas, as separate and independent rights.[123]

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[118] Const. art. VI, § 2 (Supremacy Clause).

[119] *See generally*, Cohen, Handbook of Federal Indian Law, § 5.04[3] (Federal trust responsibility).

[120] *See generally*, Cohen, § 5.01[2] (Treaty Clause).

[121] *See generally*, Cohen, §§ 5.01[2], 5.04[3]; *see also United States v. Washington*, 384 F. Supp. 312, 333-334 (W.D. Wash. 1974) (*Boldt I*) (establishing that U&A rights include the right to take 50% of all harvestable fish in U&A areas), *aff'd*, 520 F.2d 676 (9th Cir. 1975); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 684–85 (1979) (rejecting collateral attack on *Boldt I*).

[122] *See generally,* Cohen, Handbook of Federal Indian Law § 18.04[2][e][ii]; Treaty of Olympia (Treaty with the Quinaielt [*sic*], etc.), art. III, 12 Stat. 971 (1855).

[123] *See Northwest Sea Farms v. Wynn*, 931 F. Supp. 1515, 1521-22 (W.D. Wash. 1996) (upholding Army Corps of Engineers denial of permit for fish farm that would obstruct fishing over 11 acres); *Boldt I*, 384 F. Supp. 312.

b. Rights of Access

The U.S. Army Corps of Engineers (Corps) has relied on U&A rights to deny authorization to place structures in navigable waters under Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403, where such structures would result in a more than *de minimis* infringement on physical access to U&A areas.[124] The Corps takes the position that if impacts to U&A rights are greater than *de minimis*, the Corps is required to deny a Section 10 permit, because only Congress can abrogated treaty rights.

In 2016, the Corps denied a Section 10 permit on this basis for the Gateway Pacific rail-to-ship coal terminal proposed for Cherry Point, north of Bellingham, Washington.[125] To make this determination, the Corps relied on affidavits of tribal members and other reports describing fishing use of the relevant area on a more than extraordinary basis—all of which occurred before the Corps undertook any environmental review under the National Environmental Policy Act (NEPA). The Corps concluded that a more than *de minimis* infringement would occur based on the physical occupation of 122 acres of fishing area by the proposed wharf, interference with current fishing activities in the surrounding area due to increased vessel traffic, and impairment of the area for future fishing activities should the local herring stock recover.[126] Although the project was ultimately abandoned, the Corps' interpretation is subject to dispute.[127] But until that is resolved, U&A rights are likely to override state regulatory efforts.

c. Environmental Servitude

The litigation known as the *Boldt* series of decisions began in 1970, when the United States in its capacity as trustee for several Western Washington Indian Tribes sued Washington to clarify the scope of tribal fishing rights. The initial litigation proceeded in two phases, which are referred to as *Boldt I* and *Boldt II* for the judge who rendered the decisions. In *Boldt I*, the court held that U&A fishing rights entitled tribes to up to fifty percent of the harvestable fish from their grounds and

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[124] Where no tribe has raised U&A objections, the Corps regularly authorizes in-water activities under its *de minimis* standard. *See, e.g.,* https://www.nws.usace.army.mil/Portals/27/docs/environmental/resources/2016EnvironmentalDocuments/FINAL%20FONSI%20and%20EA%20Chehalis-Centralia%202016.pdf?ver=2016-09-30-141917-547 (2016 Finding of No Significant Impact for Chehalis-Centralia Airport Levee Rehabilitation). *See also Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1511 (W.D. Wash. 1998) (enjoining Corps permit for construction of 1200-slip marina on U&A grounds). According to press reports, the marina was ultimately built after the marina owners agreed to pay the Muckleshoot more than $1 million and agreed to pay the tribe eight percent of gross annual revenues for the next century.

[125] *See* https://www.nws.usace.army.mil/Portals/27/docs/regulatory/NewsUpdates/GPT%20denial%20letter%20-%209%20May%202016.pdf (Corps denial letter); https://www.nws.usace.army.mil/Portals/27/docs/regulatory/NewsUpdates/160509MFRUADeMinimisDetermination.pdf (Corps Memorandum for Record); https://www.nws.usace.army.mil/Media/News-Releases/Article/754951/army-corps-halts-gateway-pacific-terminal-permitting-process/ (Corps press release).

[126] *See* Corps Memorandum at 31-32.

[127] In particular, there is a strong argument that treaty rights are subordinate to the federal navigational servitude, and therefore the Corps has the authority to issue a Section 10 permit that impairs access to U&A grounds. *See United States v. Cherokee Nation of Okla.*, 480 U.S. 700 (1987) (holding the Cherokee Tribe had no right to compensation for damages to its property interests resulting from the Corps' exercise of the navigational servitude). The Corps, however, would still retain the authority to deny such a permit, as a matter of discretion under its public interest review standard, based on the impacts to U&A rights.

stations.[128] In *Boldt II,* the court held that the tribes' right to "a sufficient quantity of fish to satisfy their moderate living needs" entailed a "right to have the fishery habitat protected from man-made despoliation."[129]

The Ninth Circuit would later overturn this portion of *Boldt II's* holding, because the issue was "too broad and varied to be resolved in a general and undifferentiated fashion, and that the issue of human-caused environmental degradation must be resolved in the context of particularized disputes."[130] However, the notion of the environmental servitude was revived in litigation involving culverts in Washington State. In the "Culverts Case," a number of tribes in Washington sued to have state-owned fish-passage-blocking culverts removed or replaced with salmon-friendly culverts, due to the significant decline in the salmon population.[131] The district court agreed with the tribes' arguments that U&A rights imposed a duty upon the state of Washington to refrain from building culverts that adversely affected salmon populations and ordered the State to replace barrier culverts.[132] In 2016, the Ninth Circuit affirmed and held that the State violated its treaty obligations by building and maintaining culverts that degrade fish habitat.[133] It also held that the treaties promised that the tribes would have enough harvestable salmon to provide a "moderate living' and that the state violated this promise by degrading fish habitat."[134] On appeal to the Supreme Court, the Court ultimately affirmed the judgment by an equally divided Court.[135]

The Ninth Circuit's decision raised the possibility that impacts to fish populations and fish habitat could also infringe on U&A rights and serve as a basis to preclude development without tribal assent and establishes requirements on state action previously not understood to exist.[136] Although the decision likely will influence state and local regulation in other contexts, it is not yet clear how.

3. Cultural Resources Consultation

Given the history of the federal government's reservation policy, it is not surprising that there are extensive areas outside of reservations that contain cultural resources important to tribes. In addition to the opportunities for public comment afforded under more general authorities, such as the

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[128] *Boldt I*, 384 F. Supp. at 355; *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (*Washington I*).

[129] *United States v. Washington*, 506 F. Supp. 187, 203, 208 (W.D. Wash. 1980) (*Boldt II*), *aff'd in part, rev'd in part*, 694 F.2d 1374 (9th Cir. 1982).

[130] *United States v. Washington*, 759 F.2d 1353, 1359-60 (9th Cir. 1985) (en banc) (*Boldt III*).

[131] *United States v. Washington*, No. CV 70-9213, 2013 WL 1334391 (W.D. Wash. Mar. 29, 2013) (*Washington IV*); *United States v. Washington*, 853 F.3d 946, 959 (9th Cir. 2017) (*Washington VI*), *cert. granted*, 138 S. Ct. 735, 199 L. Ed. 2d 602 (2018) (citing *Boldt III*, 759 F.2d at 1357).

[132] *Id.* at *24-25.

[133] *United States v. Washington,* 827 F.3d 836, 852-53 (9th Cir. 2016), *opinion amended and superseded by* 853 F.3d 946 (9th Cir. 2017) (*Washington V)*.

[134] *Id.*

[135] *Washington v. United States*, 138 S. Ct. 1832, 1833, 201 L. Ed. 2d 200 (2018) (*Washington VII*).

[136] The Court, however, deadlocked because Justice Kennedy recused himself, but Justice Kennedy's seat on the Court has since been filled by Justice Kavanaugh, whose recent dissent in *Washington State Dept. of Licensing v. Cougar Den, Inc.*, No. 16-1498 (March 19, 2019) (slip op.) interprets the "in common with" language of the Stevens treaties in a way that casts uncertainty in how the Court will continue to interpret the Stevens treaties over the long term.

NEPA, a panoply of federal and state statutes and policies specifically require government agencies to consult with tribes regarding impacts to such resources that result from activities undertaken or authorized by agencies.[137] Among the most prominent of these are:

- The National Historic Preservation Act (NHPA), which establishes comprehensive review and consultation requirements regarding impacts to historic resources similar to those established under NEPA for environmental impacts.[138]

- The Native American Graves Protection and Repatriation Act (NAGPRA) and the Archeological Resources Protection Act (ARPA), which among other things, protect Native American human remains and other cultural resources found on federal and tribal lands, including inadvertently, from unauthorized excavation or removal.[139]

- Executive Order 13175, which directs federal agencies to consult with Indian tribes regarding regulatory policies and actions that have tribal implications.[140]

- A prominent state law example is California's AB 52, which requires public agencies to consult with Indian tribes with respect to projects subject to the California Environmental Quality Act (CEQA).

Although many of these authorities impose only procedural requirements and do not necessarily dictate substantive outcomes, tribes can significantly influence the review process, including through shaping required mitigation.[141] For example, consultation requirements can require notice to a tribe even when public comment opportunities are not mandated, such as when a federal agency complies with NEPA. An unusual example where off-reservation cultural resource impacts are squarely at issue is the proposed Lake Powell Pipeline, which would convey water 140 miles from Lake Powell in northeast Arizona to fast-growing Washington County in southwest Utah.[142] Although the Washington County Water Conservancy District proposed a route that would follow an existing utility corridor to the south of the Kaibab Band of Paiute Indians' Reservation, the Tribe—which opposes the project generally—proposed following an existing highway corridor through its Reservation to avoid cultural resources. That route, however, requires tribal consent and federal approval, but the Tribe and Water District have been unable to reach agreement on the terms of the right-of-way, affecting the timeline of the review process at a minimum.[143]

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[137] 42 U.S.C. § 4321 *et seq.*

[138] 16 U.S.C. § 470 *et seq.*

[139] 18 U.S.C. § 1170, 25 U.S.C. §§ 3001-3013; 16 U.S.C. § 470aa *et seq.*

[140] Consultation and Coordination with Indian Tribes, E.O. 13175 of Nov. 6, 2000.

[141] *See, e.g., Quechan Tribe of the Fort Yuma Reservation v. Dep't of the Interior,* 755 F. Supp. 2d 1104, 1120 (S.D. Cal. 2010) (granting preliminary injunction; NEPA claim was "less clear" but tribe was likely to prevail on claim that it was not adequately consulted under NHPA before solar energy project was approved).

[142] *See generally*, Washington County Water Conservancy District, *Lake Powell Pipeline*, available at: http://lpputah.org (last visited Sept. 21, 2020).

[143] Bureau of Reclamation, *Lake Powell Pipeline Project Draft Environmental Impact Statement* (June 2020), available at: https://www.usbr.gov/uc/DocLibrary/EnvironmentalImpactStatements/LakePowellPipeline/index.html (last visited Sept. 21, 2020).

Tribes have substantially influenced other projects through consultation. For example, federal agencies are currently prohibited from issuing authorizations for the proposed Jordan Cove Liquified Natural Gas export terminal project in Coos Bay, Oregon, following a Consistency Objection by the state of Oregon under the federal Coastal Zone Management Act,[144] which requires federal agency authorizations to be consistent with state coastal management plans prepared under that Act.[145] The State's Consistency Objections was based on, among other things, adverse impacts to off-reservation cultural resources of the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians.[146] Other projects have faced similar concerns.

Conclusion

As pressure for resources increases and tribes strengthen their governmental capacity, jurisdictional conflicts will only increase, both on- and off-reservation. The best neighbors will work to resolve their disputes through communication and cooperation, whenever disputes can be resolved without judicial intervention. But in either case, an understanding of the history of tribal lands, the tribe itself, and the applicable jurisdictional framework at the outset is critical.

[144] 16 U.S.C. § 1451 *et seq.*

[145] 16 U.S.C. § 1456(c)(3).

[146] Oregon Department of Land Conservation and Development, *Federal Consistency Determination for Jordan Cove Energy Project/Pacific Connector Gas Pipeline* (Feb. 19, 2020), available at: https://www.oregon.gov/LCD/OCMP/Pages/Federal-Consistency.aspx (last visited Sept. 21, 2020).