ARTICLE

PROTECTING HABITAT FOR OFF-RESERVATION TRIBAL HUNTING AND FISHING RIGHTS: TRIBAL COMANAGEMENT AS A RESERVED RIGHT

BY
ED GOODMAN*

As courts protected off-reservation resource rights for Native American tribes on paper, they consistently left unanswered the question of who will protect those resource rights on the ground. This Article traces the development of the recognition and protection of tribal off-reservation legal rights to demonstrate that tribes have an off-reservation comanagement right as well. Further, the Article articulates key principles that must be present in order for tribal comanagement to be successful.

* Project Manager, Oregon Water Trust; Natural Resources Law Institute Fellow, 1998–99, Northwestern School of Law of Lewis & Clark College; Staff attorney and litigation director, 1989–98, Native American Program, Oregon Legal Services; J.D. 1989, Harvard Law School; M.A. 1986, University of Maryland; B.A. 1982, State University of New York at Albany. The author wishes to thank the Natural Resources Law Institute for its generous support, and in particular the invaluable assistance of Professors Michael Blumm, Janet Neuman, Chris Wold, and Dan Rohlf, and Assistant Dean Janice Weis. Finally, this Article would not have been possible without years of work with my colleagues and comrades in arms, in particular Lea Ann Easton and David Thornburgh of the Native American Program, Patti Goldman of Earthjustice Legal Defense Fund, and Craig Bienz, Bud Ullman, Don Gentry, and Elwood Miller of the Klamath Tribes.

I. INTRODUCTION

After being suppressed under discriminatory regimes of state and federal fish and game management for much of this century, Indian tribes

and their members successfully began to assert their reserved rights[1] to hunt, fish, trap, and gather on lands and waters off their reservations in the 1960s and 1970s.[2] Many tribes, particularly in the Pacific Northwest and the Great Lakes regions, retained hunting, fishing, trapping, and gathering rights on lands and waters that were, by one mechanism or another, moved out of tribal ownership.[3] Exercise of reserved hunting and fishing rights remain a mainstay of many tribal economies, both for commercial and subsistence uses.[4] Exercise of these rights are also politically important because the rights are a significant component of a tribe's unique political identity.[5] Exercise of these rights are important, finally, as an essential cultural practice; for many tribes, it is through the exercise of such rights that tribal traditions are passed on from generation to generation, and the present and future are connected to a long history of place.[6]

Critical to the exercise of such rights is the existence, health, and vitality of the resources on which such rights depend—fish to be harvested,

[1] This Article uses the term "reserved right" rather than "treaty right" to refer to those unique rights held by Indian tribes to hunt, fish, trap, and/or gather. Such rights are held by tribes pursuant to various legal instruments and in various legal contexts, stemming from treaties, executive orders, and statutory sources. While the differing instruments and contexts create different legal significance for the exercise and protection of such rights, the term "reserved rights" captures the overall legal concept. It is a term that is more legally accurate and, perhaps more significantly, more politically accurate to the tribes. Use of the term "treaty right" implies that the rights at issue were created by the treaty. As the Supreme Court has repeatedly pointed out, such rights as are held by the tribes were rights that were always held by the tribes as part of their inherent sovereignty and were simply reserved by the operative legal instruments. *See, e.g.*, United States v. Winans, 198 U.S. 371, 380 (1905) (asserting that the Yakama "acquired no rights but such as they would have without the treaty").

[2] *See* Antoine v. Washington, 420 U.S. 194, 208 (1975) (affirming Colville Tribes' hunting rights on lands ceded in 1906 statute); Menominee Tribe v. United States, 391 U.S. 404, 406 (1968) (affirming hunting and fishing rights of Menominee Tribe on lands lost through termination); Kimball v. Callahan (*Kimball I*), 493 F.2d 564, 569 (9th Cir. 1974) (affirming Klamath Tribes' hunting and fishing rights on lands lost through termination); United States v. Washington, 384 F. Supp. 312, 339 (W.D. Wash. 1974) (affirming fishing rights of western Washington tribes on water ways ceded through treaty); Sohappy v. Smith, 302 F. Supp. 899, 911 (D. Or. 1969) (affirming fishing rights of Columbia River tribes).

[3] *See* discussion *infra* notes 18–44 and accompanying text.

[4] *See* FAY G. COHEN, TREATIES ON TRIAL: THE CONTINUING CONTROVERSY OVER NORTHWEST INDIAN FISHING RIGHTS 154–78 (1986) (describing economic importance of tribal fisheries); Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, UTAH L. REV. 109, 167–74 (1995) (discussing importance of tribal traditional economies).

[5] *See* Charles F. Wilkinson, *To Feel The Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa*, WIS. L. REV. 375, 381–89 (explaining the political effect of commercial trading on Chippewa society).

[6] *See* Shelley D. Turner, *The Native American's Right to Hunt and Fish: An Overview of the Aboriginal Spiritual and Mystical Belief System, the Effect of European Contact, and the Continuing Fight to Observe a Way of Life*, 19 N.M. L. REV. 377, 393–422 (1989) (explaining the cultural significance of hunting and fishing for Native Americans); *see also* Affidavit of Jeff Mitchell (Klamath Tribal Chairman), Klamath Tribes v. United States, 1996 WL 924509 (D. Or. Oct. 2, 1996) (No. 96-381-HA) (describing cultural importance of hunting and fishing to Klamath Tribes, including how hunting activities are one significant means by which tribal traditions are passed on to succeeding generations) (on file with author).

game to be hunted, and plants to be gathered. As described below, many court decisions and legal commentators have recognized that the tribes' reservation of these usufructuary rights includes a corresponding reserved right to the maintenance and well-being of those resources, a right which includes protection of the habitat upon which such resources depend.[7] However, increased pressures from resource exploitation activities, such as logging, mining, and grazing on public lands have in many instances led to the degradation of habitat and the consequent diminishment of reserved rights resources.[8]

Indian tribes, witnessing the continued loss of resources and the degradation of habitat, are asserting that their reserved rights—in light of the doctrines of tribal sovereignty—include the right to participate as comanagers in resource decision making on public lands and waters affecting their reserved rights.[9] Tribes seek to be incorporated into land and resource management decision making not merely as commentators, but as sovereign governments with power-sharing capacity. Some tribes have in fact begun to enter into agreements with federal agencies that provide for an increased tribal role in such resource decision making.[10] The tribal call for

[7] *See* discussion *infra* Part II.B.

[8] *See* Affidavit of Craig S. Bienz (Klamath Tribes' Chief Biologist), *Klamath Tribes* (No. 96-381-HA) (describing loss of species upon which Klamath tribal hunters rely due to loss and/or modification of habitat) (on file with author); ROBERT DOHERTY, DISPUTED WATERS: NATIVE AMERICANS AND THE GREAT LAKES FISHERY 3–5 (1990) (describing decimation of fish and game upon which Great Lakes tribes depend in exercising reserved rights); Michael C. Blumm & Brett M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. COLO. L. REV. 407, 409–10 (1998) (describing decline in Pacific Northwest salmon fisheries upon which tribes depend in exercise of reserved rights); *Saving a Regional Icon*, N. Y. TIMES, Mar. 18, 1999, at A24 (describing listing of various Pacific Northwest salmon species under the Endangered Species Act, including species relied upon by tribes in the exercise of reserved rights); *Species Act Now Covers NW Salmon, Steelhead*, THE OREGONIAN, Mar. 17, 1999, at A1.

[9] *See* AL GEDICKS, THE NEW RESOURCE WARS: NATIVE AND ENVIRONMENTAL STRUGGLES AGAINST MULTINATIONAL CORPORATIONS 193–94 (1993) (discussing Chippewa proposal for comanagement of an "environmental zone" in northern Wisconsin); CONFERENCE OF TRIBAL GOVERNMENTS, POLICY RESOLUTION: FISHING ISSUES (1977) (resolution calling on State of Washington to enter into comanagement arrangements with Washington tribes) (on file with author); CONFERENCE OF TRIBAL GOVERNMENTS, POLICY RESOLUTION: NATURAL RESOURCES (1977) (same); Charles F. Wilkinson, *Indian Tribal Rights and the National Forests: The Case of the Aboriginal Lands of the Nez Perce Tribe*, 34 IDAHO L. REV. 435, 450–61 (1998) (describing efforts of Nez Perce to participate in land management decisions impacting reserved rights resources); Wilkinson, *supra* note 5, at 403–11 (describing Chippewa Tribes' proposals to comanage fishery resources with State of Wisconsin). Nor is the indigenous call for natural resource comanagement limited to Indian tribes in the United States. *See* Richard Howitt et al., *Resources, Nations, and Indigenous Peoples*, *in* RESOURCES, NATIONS AND INDIGENOUS PEOPLES: CASE STUDIES FROM AUSTRALASIA, MELANESIA AND SOUTHEAST ASIA 1, 22–25 (Richard Howitt et al. eds., 1996) (describing indigenous comanagement initiatives in Laos, Thailand, the Philippines, and New Zealand).

[10] Courtenay Thompson, *Tribes Taking on New Role in Managing Public Lands*, THE OREGONIAN, June 15, 1999, at A1. This newspaper article describes two different agreements between Indian tribes and federal agencies. The first agreement is between the Confederated Tribes of the Grand Ronde Community of Oregon and the United States Bureau of Land Management (BLM) and the United States Forest Service (the Forest Service); it authorizes the

comanagement with the federal government—a call for recognition of their participation in a power-sharing arrangement over such decision making—is rooted in the prerogative of tribes, as sovereigns, to care for their people, their culture, and their economic well being.[11]

Many tribes and intertribal organizations have developed sophisticated natural resources departments staffed with technical experts familiar with the resources at issue.[12] Moreover, tribes often possess a unique and extraordinarily valuable expertise—a localized, deeply historical understanding and information about species and habitat developed from centuries of observation of, interaction with, and reliance upon such resources.[13] A number of federal agencies in fact recognize the tribal right to protection of such resources.[14] These same agencies, however, often strenuously resist the tribes' aspiration toward a comanagement role on the

Tribes to take over certain aspects of public lands management in lands near their reservation. The second is a Memorandum of Agreement between the Klamath Tribes (located in south-central Oregon) and the Forest Service; it sets out procedures by which the Klamath Tribes will play a greater role in decision making regarding former reservation lands on which the Tribes retain the reserved right to hunt, fish, trap, and gather. *See also* Jennifer L. Schorr, The Integration of Traditional Ecological Knowledge and Science Under Marine Mammal Protection Act Comanagement Agreements (1998) (unpublished masters thesis, University of Washington) (describing comanagement agreements between native communities in Alaska and the National Marine Fisheries Service (NMFS)).

[11] This Article focuses on tribal comanagement with *federal* agencies concerning federal lands and resources. Much of the legal precedent discussed herein would apply with equal force to the assertion of a tribal comanagement right vis-a-vis the individual states and their lands and resources. However, because the tribal relationship with the various states involves other complex issues of law and policy, a full discussion of the relationship between tribes and the states concerning natural resource management is beyond the scope of this Article.

[12] For example, the four tribes with reserved fishing rights on the mainstem Columbia River have organized the Columbia River Intertribal Fish Commission, staffed with biologists, policy analysts, lawyers, law enforcement personnel, and other technical staff, to assist the tribes in managing the complex issues affecting the Columbia River fisheries and the exercise of reserved rights. CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST 213 (1996).

[13] Such localized, indigenous understanding has come to be known as "traditional ecological knowledge," and the study of such knowledge and its applicability to contemporary resource management issues is growing rapidly. *See generally* BEFORE THE WILDERNESS, ENVIRONMENTAL MANAGEMENT BY NATIVE CALIFORNIANS (Kat Anderson ed., 1993); TRADITIONAL ECOLOGICAL KNOWLEDGE: A COLLECTION OF ESSAYS (Robert E. Johannes ed., 1989); TRADITIONAL ECOLOGICAL KNOWLEDGE: WISDOM FOR SUSTAINABLE DEVELOPMENT (Nancy M. Williams & Graham Baines eds., 1993).

[14] *See, e.g.*, U.S. DEP'T OF AGRIC., DEPARTMENTAL REGULATION: POLICIES ON AMERICAN INDIANS AND ALASKAN NATIVES, REG. NO. 1020-6, at 2–3 (1992) (stating that the Forest Service must consult with Indian tribes about impacts to treaty rights and must "protect and maintain the lands, resources, and traditional use areas of Indians"); U.S. DEP'T OF THE INTERIOR, MEMORANDUM TO ASSISTANT SECRETARY FOR FISH AND WILDLIFE AND PARKS FROM ASSISTANT SECRETARY FOR INDIAN AFFAIRS 2–4 (1994) (stating that government-to-government relationship requires federal agencies to incorporate tribes into the decision-making process and to refrain from unilateral action); U.S. FOREST SERV., UNITED STATES FOREST SERVICE MANUAL 1563.03, at 2 (1990) (stating that the Forest Service must maintain government-to-government relationship with Indian tribes and fulfill its trust obligation).

grounds that sharing decision-making power with tribes conflicts with the management authority delegated to the agency.[15]

This Article presents a detailed framework for the validation and implementation of tribal comanagement. The right to comanagement, this Article argues, is based on the understanding by the tribes that their off-reservation reserved rights included the right to participate in the management of such resources.[16] This understanding is based on and further bolstered by the doctrine of tribal inherent sovereign authority—a doctrine recognized by the federal judiciary, Congress, and the executive branch. Implementation of a comanagement framework will likely require consideration and action by all three branches of the federal government.[17] While it is up to and within the authority of the federal agencies in the executive branch to implement comanagement, it may well take Congressional and judicial action to move the agencies from their status quo position of resistance. The federal judiciary will also have a role to play, particularly in articulating the scope and relationship of the United States trust responsibility to tribes. Thus, this Article raises issues, arguments, and proposals addressed variously to decision makers in each of the three branches of the United States government.

Part II of this Article examines the legal backdrop of off-reservation reserved rights and the basis of the tribal right to habitat protection for off-reservation resources. Part III describes both the legal foundation for and the tribal understanding of a reserved right to exercise tribal sovereign authority outside reservation boundaries. Part IV of the Article describes the United States's practice—through all three branches of government—of recognizing the exercise of tribal governmental authority off-reservation. It demonstrates that the reasoning and policies underlying this recognition extends to the recognition of a tribal comanagement role over off-reservation rights and resources as an aspect of tribal sovereignty reserved by the tribes through the various treaties. This section further describes how the interplay of the doctrines of tribal sovereignty and the trust responsibility support the assertion of a tribal participatory role in management decision making over off-reservation resources and habitat. Finally, Part V describes how comanagement might work, setting out some basic principles as well as analyzing some possible models.

Comanagement embodies the concept and practice of two (or more) sovereigns working together to address and solve matters of critical concern

---

[15] *See* Federal Defendants' Memorandum of Law in Opposition to Preliminary Injunction at 32–36, Klamath Tribes v. United States, 1996 WL 924509 (D. Or. Oct. 2, 1996) (No. 96-381-HA) (asserting that Klamath Tribes' claim to a right to participate in decision making is not supported by treaty right and that the Forest Service has other mandates it must follow and meet along with treaty obligations); Federal Defendants' Summary Judgment Brief at 40–41, Okanagon Highlands Alliance v. Williams, 1999 WL 1029106 (D. Or. July 17, 1998) (Civ. No. 97-806-JE) (asserting that unless a treaty or statute contains specific language regarding tribal participation, an agency can comply with its trust obligation to tribes by following general notice and comment procedures of environmental statutes).

[16] *See infra* Parts III.A, IV.A.

[17] *See infra* Part III.B.

to each. Comanagement is not a demand for a tribal veto power over federal projects, but rather a call for an end to federal unilateralism in decision making affecting tribal rights and resources. It is a call for a process that would incorporate, in a constructive manner, the policy and technical expertise of each sovereign in a mutual, participatory framework. This Article seeks to clarify the legal and policy foundation for that framework.

II. BACKGROUND: THE RIGHT TO PROTECTION OF THE OFF-RESERVATION RESOURCE AND HABITAT

The westward expansion of the United States through the nineteenth century faced a significant legal and strategic obstacle: the lands that the country wanted to acquire and govern were already occupied. While the United States acquired dominion and title to much of these lands through a variety of means, including military invasion and displacement and encroachment by settlers, it acquired the majority of the lands by entering into treaties or other agreements with the inhabitant tribes.[18] For non-Indians, this latter method involved agreements aimed at avoiding armed conflict and facilitating non-Indian settlement and development. From the tribal perspective, the goal was to reserve certain lands for exclusive use and occupation, along with other critical resource use rights.[19] In a number of instances, the rights reserved by the tribes involved the rights to hunt, fish, trap, and gather outside reservation boundaries.[20]

At the time the tribes reserved these rights, fish and game were sufficiently abundant to allay concerns of competition or degradation. It was not long, however, before the massive influx of non-Indians, the expansion of non-Indian residential settlement, and the consequent development of non-Indian industries began to significantly diminish the resources.[21] Increased competition for the increasingly limited resources put further constraints on the exercise of the tribal rights reserved in perpetuity only a few generations earlier. As a result, it has become difficult for the tribes and their members to rely on the resources for their livelihoods and for the continuation of their cultural and spiritual traditions based on the harvest and use of those resources. The scarcity of those resources, particularly the environmental degradation that has lead to their decline, has produced

---

[18] FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 62–127 (1982) (describing treaties and legislation regarding Native Americans).

[19] *Id.*

[20] *See, e.g.*, Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957 (reserving hunting and fishing rights on ceded lands); Treaty with the Confederated Tribes of the Umatilla Indian Reservation, June 9, 1855, 12 Stat. 945 (reserving hunting and fishing rights on ceded lands); Treaty with Duwamish et al., Jan. 22, 1855, 12 Stat. 927 (reserving off-reservation fishing rights); Treaty with the Nisqually et al., Dec. 26, 1854, 10 Stat. 1132 (reserving off-reservation fishing rights).

[21] STEVEN DOW BECKHAM, THE INDIANS OF WESTERN OREGON: THIS LAND WAS THEIRS 126 (1977); *see also* COHEN, *supra* note 4, at 39–48 (describing loss of salmon and their habitat from non-Indian settlement and development in Pacific Northwest).

significant conflicts between the tribes and the federal agencies that manage the lands and waters that tribes rely upon.[22]

The tribal initiatives for comanagement are one of the fruits of this conflict and a product of the tribes' desire to ensure a meaningful supply of the resources upon which the exercise of their reserved rights depend. The legal foundation for comanagement, however, can be found in the case law that established the source and scope of the off-reservation reserved usufructuary rights.

A. The Right to Hunt, Fish, Trap, and Gather Off-Reservation

In 1905 the United States Supreme Court handed down *United States v. Winans*,[23] the case that has become the cornerstone for the recognition and protection of off-reservation reserved rights to hunt and fish.[24] *Winans* involved the interpretation of the Yakama Indian Nation's 1855 treaty with the United States, which reserved to the Tribe "the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them."[25] Two non-Indians (the Winans brothers) operated a number of state-licensed fish wheels near one of the Yakama Nation's usual and accustomed fishing places. They began excluding Yakama tribal members from the falls and destroyed their fish curing buildings.[26] The United States brought suit on behalf of the Yakama Nation to secure their right to access and use their usual and accustomed fishing sites.

The Supreme Court, in an oft-cited decision, ruled in favor of the Yakama Nation. The Court held that the right reserved through the 1855 treaty was more than a right of equal access to the fishery with non-Indians (which is what the trial court had held); instead, it was a servitude that burdened the non-Indians' land.[27] The Court articulated a principle of Indian treaty interpretation that has shaped the course of Indian law ever since: Indian treaties did not involve a grant of rights *to* the Indians, but were rather a grant *from* them, and therefore, reserved those rights not granted to the United States by the treaty.[28] The Supreme Court subsequently held that

22 Various tribes have filed lawsuits challenging federal actions that would damage habitat in off-reservation areas. *See, e.g.*, Okanagon Highlands Alliance v. Williams, Civ. No. 97-806-JE, 1999 WL 1029106 (D. Or. July 17, 1998) (challenging proposed open pit gold mine); Klamath Tribes v. United States, Civ. No. 96-381-HA, 1996 WL 924509 (D. Or. Oct. 2, 1996) (challenging Forest Service timber sales); No Oilport! v. Carter, 520 F. Supp. 334, 371–72 (W.D. Wash. 1981) (challenging authorization of an oil pipeline).

23 198 U.S. 371 (1905).

24 *See* 4 WATER AND WATER RIGHTS § 37.01(b) (Robert E. Beck ed.) (1996 & Supp. 1998).

25 Treaty with the Yakima Nation, June 9, 1855, U.S.–Yakima Nation, 12 Stat. 951, 953. In the early 1990s the Yakama Indian Nation changed the spelling of its name from Yakima to Yakama. This Article will respect the Nation's usage and refer to the Nation as the Yakama throughout.

26 *See* United States v. Winans, 73 F. 72, 75 (D. Wash. 1896).

27 *Winans*, 198 U.S. at 381.

28 *Id.* at 380–81 (finding that, at treaty time, the tribes were sovereigns whose rights over their lands and waters existed without "a shadow of impediment" and that the treaties were instruments by which the tribes granted certain of those rights and retained those not given

these same principles of construction apply whether the instrument reserving the rights was a treaty, executive order, congressional act, or other legal instrument reflecting an agreement between a tribe and the United States.[29]

Through a variety of legal instruments, many tribes have rights to hunt, fish, trap, and gather on lands and waters that are outside the current boundaries of their reservations. Despite the decision in *Winans*, most of these rights were suppressed or dormant until litigation in the late 1960s and 1970s opened the door for protection of tribes and their members exercising those rights.[30] The initial purpose of the litigation concerning these rights was to establish the ability of tribal members exercising such rights to do so under tribal, rather than state, regulation. The imposition of state regulations (including take and season restrictions that permitted only sport hunting and fishing) effectively denied tribal members the ability to exercise their rights to use the resources for their livelihood, thus frustrating the purpose for which the rights were reserved in the first place.[31]

The fishing tribes of the Pacific Northwest reserved extensive rights to fish in the waters of the Puget Sound; the Columbia River; and other lakes, rivers, and estuaries, all of which are off their reservations.[32] Also, a number of tribes reserved rights to hunt on lands they otherwise ceded to the United States.[33] Other tribes reserved rights to hunt on lands that were once part of their reservations, but that had been acquired by the United States.[34] While

away). The Court's rationale for this rule of construction was based on the existing principle that an Indian treaty was to be interpreted as the Indian signers would have understood it, because the treaties were negotiated and written in a language foreign to the Indians and the United States stood in a superior bargaining position. *Id.* For a more detailed discussion of the development of the *Winans* doctrine and its relation to habitat protection, see Blumm & Swift, *supra* note 8, at 435–45.

[29] Antoine v. Washington, 420 U.S. 194, 200–04 (1975).

[30] *See, e.g., id.* at 208 (affirming tribal hunting rights on lands ceded in a 1906 congressional enactment); Menominee Tribe of Indians v. United States, 391 U.S. 404, 411 (1968) (affirming ongoing tribal hunting and fishing rights on lands lost through termination); Kimball v. Callahan, 493 F.2d 564, 569–70 (9th Cir. 1974) (affirming ongoing tribal hunting and fishing rights on lands lost through termination).

[31] *See Antoine*, 420 U.S. at 206; *Menominee Tribe of Indians*, 391 U.S. at 406; *Kimball I*, 493 F.2d at 566.

[32] *See* United States v. Washington, 384 F. Supp. 312, 343 (W.D. Wash. 1974) (affirming that tribes in western Washington have right to 50% share of fisheries); Sohappy v. Smith, 302 F. Supp. 899, 912 (D. Or. 1969) (affirming right of Columbia River tribes to fish at usual and accustomed sites along Columbia).

[33] *See, e.g.*, Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957 (reserving hunting rights on ceded lands); Treaty with the Confederated Tribes of the Umatilla Indian Reservation, June 9, 1855, 12 Stat. 945 (same).

[34] *See Antoine*, 420 U.S. at 197–98 (affirming Confederated Colville Tribes' continuing reserved right to hunt, fish, trap, and gather on the former "north half" of their Executive Order reservation lands that were ceded pursuant to an 1891 agreement ultimately ratified by Congress in 1906); *Kimball I*, 493 F.2d at 569–70 (holding that the Klamath Tribes' right to hunt and fish on former Reservation lands survived the Termination Act); United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. 1983) (affirming Klamath Tribes' rights to hunt and fish, along with sufficient water to support such rights, on lands lost through termination); Kimball v. Callahan (*Kimball II*), 590 F.2d 768, 777 (9th Cir. 1979) (discussing the rights of Klamath Indians on

the scope and substance of each tribe's reserved rights are unique to that tribe,[35] some general conclusions can be drawn from the case law.

First, these rights are rights that tribes have generally held since time immemorial, and their reservation of such rights creates a cognizable property interest.[36] While Congress has the power to abrogate such rights,[37] courts will not presume that Congress has done so unless such abrogation is clear and express.[38]

Second, tribes who reserved off-reservation rights may exercise those rights under their own regulatory jurisdiction and generally may not be limited by the states in which those rights are exercised.[39] The courts have articulated one significant—albeit narrowly construed—exception to this rule: in certain instances, states may impose their regulations on tribal hunters and fishers if such regulations are necessary for conservation of the resource.[40] The case law suggests that, in order to impose "conservation necessity" regulations against Indian hunters and fishers, the state must first demonstrate that it has taken all the steps it can to protect the resource; such steps may include restrictions on the non-Indian harvest that are not applied to the Indian fishery.[41]

---

former Klamath Reservation lands).

[35] The cases that analyze the impacts of various governmental actions on treaty rights first look at the specific legal and factual circumstances setting out a particular tribe's relationship with the United States. *See, e.g.*, United States v. Dion, 476 U.S. 734, 737 (1986) (describing a situation in which the Yankton Tribe ceded all but 400,000 acres of its land under its treaty and was required to settle on its new land within two years in exchange for "quiet and undisturbed possession" of its reserved land, including exclusive hunting and fishing rights and future monies); *Antoine*, 420 U.S. at 197–98 (describing a situation in which the Confederated Tribes ceded the northern half of the Colville Reservation in exchange for $1,500,000 and exclusive hunting and fishing rights on the ceded portion of the reservation).

[36] *See Menominee Tribe of Indians*, 391 U.S. at 413 (finding that the abrogation of Tribe's reserved hunting and fishing rights would subject the United States to a claim for compensation from the Tribe).

[37] *See* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998) (noting that "Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights").

[38] *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202 (1999) ("Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so."); *Dion*, 476 U.S. at 738–40 (holding that the Court will not find Congressional abrogation of treaty rights unless there is "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty"); *Menominee Tribe of Indians*, 391 U.S. at 413 (stating that the Court expects Congress to state explicitly that it is destroying property rights that a treaty had conferred to a tribe).

[39] *See Antoine*, 420 U.S. at 197–98 (holding that tribal reserved rights to hunt and fish on reservation lands that had been ceded to the United States may not be regulated by state); *Menominee Tribe of Indians*, 391 U.S. at 413 (holding that tribe's exercise of reserved rights on terminated reservation lands may not be regulated by state); Tulee v. Washington, 315 U.S. 681, 684–85 (1942) (striking down state requirement that tribal members pay fees to obtain a license to exercise reserved fishing rights).

[40] Puyallup Tribe v. Department of Game, 391 U.S. 392, 398 (1968). The implications of the "conservation necessity" exception to the bar against state regulation are discussed *infra* notes 395–96 and accompanying text.

[41] *See* Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 668 F.

Third, the right involves a substantive entitlement to an actual harvest of resources.[42] Regulatory and other actions by the state that would favor non-Indian hunters and fishers to the substantive detriment of Indian hunters and fishers have also been struck down as invalid. The Supreme Court, in part of the complicated *United States v. Washington* fishing rights litigation, stated that the off-reservation fishing right involves more than the mere opportunity to dip a net in the relevant waterways.[43] Moreover, actions by states or private parties that would deny Indian hunters and fishers access to the resources are prohibited.[44]

More recently, the loss of resources through degradation and destruction of their habitat—and the corresponding adverse affect on the ability of the tribes to exercise their reserved rights[45]—has lead to the assertion that the rights reserved by the tribes include a right to habitat protection. As described in the following sections, courts and commentators have begun to recognize that the substantive nature of the off-reservation reserved right requires that fish and wildlife habitat be protected in order to ensure that the rights remain meaningful.

B. The Right to Off-Reservation Habitat Protection

The right to protection of off-reservation habitat that supports reserved-rights species flows from the legitimate expectation tribes had in reserving such rights: that there would be sufficient resources available to ensure that the rights were meaningful. Indeed, the principles underlying the initial

Supp. 1233, 1236–37 (W.D. Wis. 1987) ("It is unlikely that it would be necessary to conservation to apply a regulation to the Indian harvest if regulation of non-treaty harvesting would accomplish the same goal."); Sohappy v. Smith, 302 F. Supp. 899, 907–12 (D. Or. 1969) (holding that state regulation of tribes under "conservation necessity" must recognize that tribal reserved rights fishery is unique and distinct from that of non-Indian fishery and that broad power to restrict tribal fishery does not exist as it does with non-Indian fishery).

[42] *See* United States v. Washington, 384 F. Supp. 312, 344 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975). Known as the "Boldt Decision" after the judge who authored it, this decision guaranteed the Washington tribes a 50% share of the state's anadromous fish runs. The Boldt Decision was ultimately upheld in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n* (*Passenger Fishing Vessel*), 443 U.S. 658 (1979). *See also Sohappy*, 302 F. Supp. at 911 (holding that Columbia River treaty tribes have "an absolute right to that fishery, [and] are entitled to a fair share of the fish produced by the Columbia River system").

[43] *Passenger Fishing Vessel*, 443 U.S. at 684–85.

[44] *See* Tulee v. Washington, 315 U.S. at 684–85 (striking down state's requirement that tribal members pay fees to obtain a license to exercise reserved fishing rights); United States v. Winans, 198 U.S. 371, 384 (1905) (prohibiting operation of a fish wheel by non-Indians where such operation would completely deprive tribal members of ability to exercise reserved fishing rights).

[45] Several species of anadromous salmon harvested by the Washington and Oregon tribes are on the endangered species list. Blumm & Swift, *supra* note 8, at 410 n.7. Two species of fish traditionally harvested by the Klamath Tribes (the Lost River and shortnose suckers) are also listed. Determination of Endangered Status for the Shortnose Sucker and Lost River Sucker, 53 Fed. Reg. 27,130 (July 18, 1988). The decline of mule deer populations on the former "north half" of their reservation has lead the Colville Tribes to restrict tribal harvest. Affidavit of Wilfred Deb Louie, para. 17, Okanagon Highlands Alliance v. Williams, 1999 WL 1029106 (D. Or. June 1, 1998) (Civ. No. 97-806-JE).

litigation concerning off-reservation hunting and fishing rights clearly suggest as much.[46] Further, the trust obligation owed by the United States to Indian tribes provides further support for the tribes' claim to a legitimate and enforceable expectation that the federal government will not take actions that would degrade reserved rights resources and the habitat upon which such resources depend.[47] The following subsections address the legal doctrine underlying the tribal right to habitat protection for reserved rights.

1. Foundational Principles of Indian Law: Treaty Interpretation and the Trust Obligation

Over the course of the past 160 years, the Supreme Court has articulated specific principles concerning the interpretation of treaties and other agreements with Indian tribes that differ significantly from interpretive principles applied in other contexts.[48] These canons of treaty construction are meant to ensure a fair and sympathetic reading of the treaties from the Indians' perspective.[49] First, treaties are to be interpreted as the Indians who entered into them understood them.[50] Second, any ambiguities in the treaties are to be resolved in favor of the Indians.[51] Last, treaties are to be liberally construed in favor of the Indians.[52]

---

[46] *See, e.g., Winans*, 198 U.S. at 371 (prohibiting non-Indian actions that would have deprived tribal members of the ability to take fish pursuant to reserved rights); *Sohappy*, 302 F. Supp. at 910. The *Sohappy* court stated:

> The Supreme Court has said that the right to fish at all usual and accustomed places may "not be qualified by the state.". . . I interpret this to mean that the state cannot so manage the fishery that little or no harvestable portion of the run remains to reach the upper portions of the stream where the historic Indian places are mostly located.

Id. (quoting Puyallup Tribe v. Department of Game, 391 U.S. 392, 398 (1968)).

[47] For a thorough analysis of the trust responsibility doctrine, see Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, UTAH L. REV. 1471 (1994) [hereinafter Wood, *Trust Doctrine Revisited*]; Wood, *supra note 4*; Mary Christina Wood, *Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 ENVTL. L. 733 (1995) [hereinafter Wood, *Fulfilling the Executive's Trust Responsibility*].

[48] *See generally* Charles Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long As Water Flows, Or Grass Grows Upon the Earth"—How Long a Time Is That?*, 63 CAL. L. REV. 601 (1975) (analyzing judicial role in determining treaty abrogation and suggesting that treaties should only be abrogated upon express congressional intent).

[49] *Id.* at 617–18.

[50] Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970).

[51] *Id.*

[52] *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973) (explaining that the Court considered the Navajo Tribe's lack of bargaining power when interpreting the treaty); Choctaw Nation v. United States, 318 U.S. 423, 431–32 (1943) (asserting that courts must "construe treaties more liberally than private agreements, and to ascertain their meaning [courts] may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties"); Tulee v. Washington, 315 U.S. 681, 684–85 (1942) (asserting that the Court must consider the Yakama Tribe's relative bargaining power when construing the terms of the treaty).

The application of these canons of construction has had significant impact on the disputes over off-reservation fisheries in the Pacific Northwest. For example, courts determined that the rather vague and ambiguous language in the relevant treaties reserving to the tribes the right to take fish "in common with" United States citizens was understood by tribal negotiators to guarantee more than the same rights as United States citizens; that language in fact guaranteed an actual allocation of up to one half the harvestable fish.[53]

There is an additional unique interpretive principle that applies to Indian treaties: although the Supreme Court has recognized that Congress does have the power to unilaterally abrogate treaties,[54] the Court will not conclude that a treaty has been abrogated by a congressional act unless there is clear evidence that Congress considered the conflict between its action and a treaty and chose to resolve that conflict by abrogating the treaty.[55] Even where Congress has taken express action to "terminate" an Indian tribe, courts have construed the effect of termination on reserved rights narrowly, reasoning that the abrogation of treaty rights to hunt and fish would open the United States to claims for money damages and would therefore require express congressional action.[56]

These canons of construction help illuminate the other critical foundational premise: the trust obligation owed by the United States to Indian tribes. The trust obligation was articulated initially in Chief Justice John Marshall's decision in *Cherokee Nation v. Georgia*,[57] where he characterized tribes as "domestic dependent nations" and concluded that "their relation to the United States resembles that of a ward to his guardian."[58] The trust doctrine has developed into a broad, if somewhat ill-defined, obligation on the part of the United States to protect the rights and assets of Indian people and tribes.[59] The cases stand for the proposition that

53 *See* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 671 (1979) (stating that a tribe was found to be entitled to forty-five percent to fifty percent of the harvestable fish that pass through recognized tribal fishing grounds).

54 Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903).

55 *See* United States v. Dion, 476 U.S. 734, 738–40 (1986) (describing test for finding congressional abrogation of a tribal reserved right).

56 *See* Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968) (explaining that the Court presumes that Congress has not abrogated treaty rights unless it explicitly states that it is doing so).

57 30 U.S. (5 Pet.) 1 (1831).

58 *Id.* at 17. The case involved the Cherokee Nation's attempt to prevent the application and enforcement of Georgia's laws on the Cherokee reservation. The Court found that the "domestic dependent" status of the Cherokee Nation denied the Nation standing to sue Georgia because the Nation was not a "foreign state" within the meaning of Article III, section 2 of the U.S. Constitution. *Id.* at 16–20.

59 *See* Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 113 (1919) (striking down Secretary of the Interior's disposal of Indian lands in the same manner as public lands). In *Seminole Nation v. United States*, 316 U.S. 286 (1942), the Court discusses some of the federal government's responsibilities under the doctrine:

> [T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. In carrying out its treaty obligations with the Indian tribes, the Government is something

the federal executive branch, in dealing with the affairs and assets of Indian people, is held to a "strict standard of compliance with fiduciary duties."[60] Moreover, the trust doctrine applies to all federal agencies[61] and imposes restrictions in addition to any applicable statutes or regulations.[62] The Supreme Court has held that the trust obligation also applies when a federal agency exercises pervasive and "elaborate control" over certain tribal property and that mismanagement of such property to the detriment of the Indians provides the source of a claim against the United States for money damages.[63] Some lower court cases have invoked the trust doctrine to compel the United States to take affirmative action to protect tribal lands and resources.[64]

2. United States v. Washington, Phase II

In the *United States v. Washington* litigation, the United States and a coalition of Washington Indian tribes sued the State of Washington, seeking to clarify the meaning and scope of the language in the tribes' various treaties with the United States that guaranteed to the tribes off-reservation rights "to take fish in common with" non-Indian settlers "at all usual and accustomed places."[65] The federal district court split the case into two

> more than a mere contracting party. Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

Id. at 296-97.

60 COHEN, *supra* note 18, at 226; *see Seminole Nation*, 316 U.S. at 297 (holding that officials of the United States are bound by the same standards as a private fiduciary when distributing assets of a tribal judgment fund); United States v. Creek Nation, 295 U.S. 103, 109–10 (1935) (holding that the United States is liable for money damages for the exclusion of lands from a reservation by an erroneous survey).

61 *See* Nance v. Environmental Protection Agency, 645 F.2d 701, 711 (9th Cir. 1981).

62 *See* Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252, 256–57 (D.D.C. 1972) (striking down the Secretary of the Interior's diversion of water away from reservation lake as violating trust responsibility even though there was no statutory or regulatory violation).

63 United States v. Mitchell, 463 U.S. 206, 225 (1983).

64 *See, e.g.*, Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 380 (1st Cir. 1975) (ordering United States to file a claim on behalf of tribe to recover tribal lands improperly ceded to the State of Maine in 1794); Klamath Tribes v. United States, Civ. No. 96-381-HA, 1996 WL 924509, at *8 (D. Or. Oct. 2, 1996) (holding that the Forest Service must consult with tribes on a government-to-government basis to ensure avoidance or mitigation of adverse effects to tribal reserved rights); Northern Cheyenne Tribe v. Hodel, 12 Indian L. Rep. 3065, 3071 (D. Mont. May 28, 1985), *remanded for modification of injunction*, 851 F.2d 1152 (9th Cir. 1988) (requiring Secretary of the Interior to fully consider, disclose, and analyze information regarding land management projects specific to their effects on tribal rights); *Pyramid Lake Paiute Tribe*, 354 F. Supp. at 256 (holding that the Secretary of the Interior must ensure protection of tribal rights to the fullest extent possible).

65 United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975). For a general background on the fishing rights controversy in the Pacific Northwest, see COHEN, *supra* note 4, and MARY ISLEY ET AL., UNCOMMON CONTROVERSY: FISHING RIGHTS OF THE MUCKELSHOOT, PUYALLUP AND NISQUALLY INDIANS (1970).

phases. *Phase I* dealt with the scope and quantity of the tribes' right to fish off-reservation free of state regulation, and ultimately determined that the tribes' reserved right entitled them to a fifty percent share of the resource.[66] *Phase II* involved the following two issues: 1) did the tribes' right to a fifty percent allocation include hatchery-raised fish, and 2) did the tribes have a broad right to enjoin environmental degradation statewide that could adversely impact anadromous fish habitat and populations?[67] Litigation regarding *Phase II* commenced in 1976 and ultimately resulted in an opinion in 1980 by presiding Judge Orrick.[68]

Judge Orrick ruled for the tribes on both *Phase II* issues.[69] First, Judge Orrick concluded that the tribes were entitled to fifty percent of the hatchery-raised fish, because, he reasoned, the state's hatchery program was developed in large part to mitigate for the loss of salmon populations resulting from environmental degradation, and the hatchery fish involved "an ever increasing proportion of the total fish population"[70]:

> The inescapable conclusion is that if hatchery fish were to be excluded from the allocation, the Indians' treaty-secured right to an adequate supply of fish, the right for which they traded millions of acres of valuable land and resources, would be placed in jeopardy. The tribes' share would steadily dwindle and the paramount purpose of the treaties would be subverted.[71]

Judge Orrick then determined that the resolution of the environmental protection issue in favor of the tribes flowed from the principles enunciated regarding the hatchery allocation issue.[72] He held that the treaty clause reserving the right to fish, which had "overriding importance" to the tribes, "implicitly incorporated . . . the right to have the fishery habitat protected from man-made despoliation . . . . The most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken."[73] According to Judge Orrick, the allocation of sufficient fish to assure the tribes a "moderate living" required that the state protect fisheries habitat to the degree necessary to ensure that the tribes could maintain a moderate living through their commercial fishery.[74] Since the partial motion for summary judgment did not ask for a finding that the state was in fact violating the environmental right and/or for appropriate remedial relief,[75] the court did not go further than to articulate the right. Washington State appealed the decision to the Ninth Circuit.[76]

---

66 United States v. Washington, 384 F. Supp. at 413.

67 United States v. Washington, 506 F. Supp. 187, 190 (W.D. Wash. 1980), *aff'd in part, rev'd in part*, 694 F.2d 1374 (9th Cir. 1982), *partially vacated*, 759 F.2d 1353 (9th Cir. 1985).

68 *Id.*

69 *Id.* at 191.

70 *Id.* at 198.

71 *Id.* at 198–99 (citations omitted).

72 *Id.* at 202.

73 *Id.* at 203.

74 *Id.* at 193 (citing Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 689 n.30 (1979)).

75 *Id.* at 202.

76 United States v. Washington, 694 F.2d 1374 (9th Cir. 1982), *partially vacated*, 739 F.2d

A three-judge panel of the Ninth Circuit, in an opinion written by Judge Snead, upheld Judge Orrick's decision on the hatchery fish allocation, but in large part reversed the habitat protection ruling.[77] The court rejected Judge Orrick's "moderate living"-based standard for habitat protection and instead articulated a requirement that both the states and the tribes would have to take "reasonable steps" to protect and enhance the fishery.[78] The tribes petitioned the Ninth Circuit for a rehearing, and the court granted the petition, agreeing to review the case en banc.[79]

The en banc panel upheld the district court on the hatchery allocation issue,[80] but vacated Judge Orrick's opinion concerning habitat protection.[81] The court determined that the habitat protection issue was not ripe for decision, because the tribes had sought broad declaratory relief against the State of Washington against all activities that would harm habitat.[82] The court required that the tribes bring a case alleging specific harms before the case would be ripe for adjudication, noting that it would be judicially imprudent to make a declaration regarding the right to habitat protection without a case raising concrete facts.[83]

Although the issue has yet to be addressed directly, the right to protection of habitat can be reasonably inferred from the existing case law. As Judge Orrick noted, the habitat protection issue was "all but resolved" by the United States Supreme Court in its previous rulings.[84] Judge Orrick was referring to the Supreme Court's rejection of the State of Washington's argument in *Phase I* that the tribes were merely entitled to an opportunity to fish.[85] The Supreme Court has stated that the relevant treaties ensured the tribes something more tangible than "merely the chance . . . occasionally to dip their nets into the territorial waters."[86]

1353 (9th Cir. 1985).

77 *Id.* at 1375.

78 *Id.* at 1389. At least one commentator has criticized the three-judge panel's approach as lacking any substantive protection for tribal rights. Judith W. Constans, Note, *The Environmental Right to Habitat Protection: A Sohappy Solution*, 61 WASH. L. REV. 731 (1986). Constans argued that the moderate-living-based standard provided clear and measurable criteria for the state's obligation to protect fisheries habitat, but that the "reasonable steps" approach provided no meaningful standard for habitat protection. *Id.* at 753.

79 United States v. Washington, 759 F.2d 1353 (9th Cir. 1985).

80 *Id.* at 1357.

81 *Id.* at 1359.

82 *Id.* at 1357.

83 *Id.*

84 United States v. Washington, 506 F. Supp. 187, 203 (W.D. Wash. 1980) (citing Washington v. Washington Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979)), *aff'd in part, rev'd in part*, 694 F.2d 1374 (9th Cir. 1982), *partially vacated*, 759 F.2d 1353 (9th Cir. 1985).

85 *Id.*

86 *Passenger Fishing Vessel*, 443 U.S. at 679. Judge Orrick noted in his opinion:

> The Supreme Court's use of the term "harvestable" in describing the population of allocable fish did not, contrary to the State's contention, put the tribes at the mercy of any and all, natural and man-made, fluctuations in the resource. The term simply differentiates between the total fish population and those fish subject to allocation under the treaty. The remainder must escape for spawning purposes in order to perpetuate the resource.

Indeed, a number of federal courts have ruled that activities that would deprive Indians of access to or destroy the resources upon which exercise of their reserved rights depend are prohibited as unauthorized violations of the legal instruments reserving those rights.[87]

3. Fisheries Protection Cases

Nearly a century ago the Supreme Court recognized that an Indian tribe's reserved right to an off-reservation fishery would be meaningless if nontribal parties were permitted to engage in fishing activities that would deprive the tribe of their ability to fish at their usual and accustomed fishing site.[88] While *Winans* did not directly address the habitat question, it did expressly prohibit actions authorized by the state that would consume the resource and deny tribal members the ability to harvest fish.[89]

The cases dealing with habitat alteration began in the 1970s. The Confederated Tribes of the Umatilla Indian Reservation obtained a declaratory judgment against the construction and operation of the Catherine Creek Dam in northeastern Oregon, which would have inundated a number of tribal fisheries.[90] Following the logic of *Winans*, Judge Belloni of the District Court of Oregon concluded that construction of the dam and flooding of the reservoir would jeopardize reserved fishing rights on Catherine Creek because it would entirely eliminate certain fish runs that the tribes relied upon at certain of their "usual and accustomed stations."[91] The court held that absent express congressional authorization, a federal agency cannot undertake actions that would jeopardize the exercise of reserved rights[92]:

United States v. Washington, 506 F. Supp. at 204 (citation omitted).

87 *See* discussion *infra* Part II.B.3.

88 *See* United States v. Winans, 198 U.S. 371, 381 (1905).

89 *Id.* at 381–82 ("And [this] right was intended to be continuing against . . . the State and its grantees.).

90 Confederated Tribes of the Umatilla Indian Reservation v. Alexander (*Umatilla Indian Reservation*), 440 F. Supp 553, 556 (D. Or. 1977).

91 *Id.* at 555. Judge Belloni also concluded that the Army Corps of Engineers's proposed mitigation measures (a fish hatchery and trapping and hauling fish upstream of the dam) were not sufficient to avoid abrogation of the Tribes' reserved rights, which involved the right to fish at certain specific locations:

> Some of the Indian fishing stations on Catherine Creek will be inundated by the reservoir which the dam will create. These stations will be covered by as much as 200 feet of water. Such a flooding will deprive the Indians of their right to occupy the fishing stations and of their right to access for that purpose. I find unpersuasive the government's argument that 200 feet of water will not impair access to these traditional stations. The dam will also prevent all wild fish from swimming upstream. Chinook will be trapped and hauled above the dam to mitigate the loss, but the steelhead run will be eliminated entirely at all stations upstream from the dam. Whatever the merits of the government's mitigation program, the treaty right to fish at all usual and accustomed stations will be destroyed as to those stations within the reservoir.

Id. (citations omitted).

92 *Id.*

> In order to nullify treaty rights in this way, Congress must act expressly and specifically. The right to destroy Indian rights will not be inferred from a general project authorization such as that for this dam. Congress authorized this project in 1965 without knowing that the dam would affect treaty rights. The Corps of Engineers' first knowledge of the existence of fishing rights in the area came in 1972. Therefore, the Congress has not authorized the taking of Indian fishing rights for the Catherine Creek Project.[93]

Similarly, in 1973 the Pyramid Lake Paiute Tribe in western Nevada successfully sued to enjoin the Secretary of the Interior from authorizing the diversion of water that would have adversely affected spawning habitat for the cui-ui, a fish relied upon by tribal members in the exercise of their treaty reserved fishing rights.[94] The court determined that in adopting the regulation and authorizing the diversions, the Secretary had made a "judgment call" that involved balancing various competing interests and attempting an accommodation among those interests "calculated to placate temporarily conflicting claims to precious water."[95] Such attempted accommodation, the court ruled, was a violation of the Secretary's "moral obligations of the highest responsibility and trust" to the Pyramid Lake Paiute Tribe,[96] and in order to fulfill this fiduciary duty, "the Secretary must insure," by and through the use of his discretionary authority, "that all water not obligated by court decree or contract with the District goes to Pyramid Lake."[97]

In 1980 the Yakama Nation sought to protect its reserved right to fish by requesting the Yakima Basin watermaster to maintain certain water flows in order to benefit sixty salmon redds (nests of eggs).[98] The flows requested by the Yakama Nation were specifically for the protection of habitat—to prevent the dewatering of the redds and increase their likelihood of survival.[99] The issue of the watermaster's authority and what steps he was required to take was presented to the District Court for the Eastern District of Washington. Judge Quackenbush issued an unpublished decision ordering a number of measures aimed at protecting the redds.[100] The irrigation districts appealed, and the Ninth Circuit ultimately affirmed the measures called for by Judge Quackenbush as well as the authority of the district court to protect the Yakamas' fishing rights in such a manner.[101]

---

93 *Id.* at 555–56 (citations omitted).

94 Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D. Nev. 1973). For a description of the history and background of this conflict, see WILKINSON, *supra* note 12, at 9–15.

95 *Pyramid Lake Paiute Tribe*, 354 F. Supp. at 256–57.

96 *Id.* at 256 (citing Seminole Nation v. United States, 316 U.S. 286, 297 (1942)).

97 *Id.*

98 Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 763 F.2d 1032, 1033–34 (9th Cir. 1985).

99 *Id.*

100 *Id.* (discussing Judge Quackenbush's unpublished opinion).

101 *Id.* This opinion was in fact the third that the Ninth Circuit issued regarding Judge Quackenbush's decision. The first was an unpublished slip opinion that explicitly held that dewatering the redds' habitat was a violation of the reserved fishing right. Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., No. 80-3505, slip op. (9th Cir. Sept. 10, 1982). The second opinion replaced the first. While it affirmed the lower court's decision, it stated that the

The underlying principle requiring sufficient water to maintain off-reservation fisheries has been applied to the assertion of instream flow claims to support tribal fishing rights. In 1983 the Ninth Circuit held that the Klamath Tribes had a reserved right to sufficient instream flow to provide aquatic habitat to support the Tribes' fishing rights.[102] While the court said that the right did not provide for a "wilderness servitude," it did find that the Tribes' reserved rights to hunt and fish entitled them to enough water to ensure that they would have sufficient hunting and fishing resources to maintain a "moderate living."[103] The court concluded that this right to instream flows sufficient to provide for fisheries habitat survived the termination of the Klamath Tribes[104] and the subsequent transfer of its reservation lands to the ownership of the United States Forest Service and others, thus recognizing the right to protection of habitat off-reservation.[105]

4. Hunting Rights Protection

The same principles that underlie the protection of off-reservation fishery habitat apply to hunting rights.[106] The Klamath Tribes obtained judicial recognition of the right to prevent adverse effects to their ability to exercise off-reservation hunting rights through an injunction against activities that would destroy habitat for mule deer, a species heavily relied upon by tribal members in the exercise of their reserved rights.[107] In 1996 the Klamath Tribes sued the Forest Service to enjoin eight timber sales on the Tribes' former reservation, alleging that the timber sales would destroy mule deer habitat and thus adversely affect mule deer populations.[108] Judge

scope of the reserved right need not be addressed. Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 752 F.2d 1456 (9th Cir. 1985) (withdrawn). This opinion was withdrawn after the en banc decision in *United States v. Washington, Phase II* came down. *See* Blumm & Swift, *supra* note 8, at 465–67.

102 United States v. Adair, 723 F.2d 1394, 1414–15 (9th Cir. 1983).

103 *Id.*

104 The Klamath Tribes were terminated by the Act of Aug. 13, 1954, Pub. L. No. 587, 68 Stat. 718 (codified as amended at 25 U.S.C. §§ 564, 564a–564w (1994)). The Klamath Tribes were restored to federal recognition in 1986, although the reservation was not returned to tribal ownership. Klamath Tribe Restoration Act, Pub. L. No. 99-398, 100 Stat. 849 (codified at 25 U.S.C. §§ 566, 566a–566h (1994)).

105 *Adair*, 723 F.2d at 1411–12; *see* Blumm & Swift, *supra* note 8, at 472 n.319 (arguing that *Adair* is more similar to an off-reservation rights case than an on-reservation case because even though the reservation was terminated, the Tribes' rights were preserved).

106 In fact, some of the instream flow reserved water rights cases involved water necessary for the habitat needs of terrestrial as well as aquatic species. *See, e.g.*, *Adair*, 723 F.2d at 1414–15 (finding a reserved right to water sufficient to preserve tribal hunting of fowl and big game as well as fishing rights).

107 Klamath Tribes v. United States, Civ. No. 96-381-HA, 1996 WL 924509, at *9 (D. Or. Oct. 2, 1996).

108 *Id.* at *1. The Forest Service had authorized the harvesting of these sales despite the fact that the Tribes' administrative appeals were still pending because the Forest Service believed it was required to do so by the "Salvage Rider" of the 1995 rescissions bill, Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-Terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and

Haggerty of the Federal District Court for Oregon granted the Tribes' motion to enjoin seven of the eight sales.[109] The court concluded that the "Salvage Rider" to the 1995 Rescissions Act—which authorized expedited harvest of certain timber sales and exempted such sales from environmental laws[110]—did not abrogate the Klamath Tribes' reserved rights. The court also held that the Forest Service was under a trust obligation to ensure that the resources on which those rights depend were protected "'to the fullest extent possible.'"[111] Judge Haggerty's opinion required the Forest Service to consult with the Klamath Tribes on a government-to-government basis to ensure protection of the resources.[112] The opinion recognized that the Tribes held both a procedural right—a right to consultation and participation in decision making—as well as the substantive right to prevent harm to their off-reservation resources.[113]

In a dispute concerning big game populations on the Wind River Indian Reservation, on which both the Northern Arapahoe and the Shoshone Tribes were settled, the Tenth Circuit recognized the United States's authority and responsibility to ensure that its regulation of on-reservation wildlife resources protect and preserve the ability of tribes to exercise their reserved right to such resources.[114] In the early 1980s, significant declines in big game populations on the reservation, coupled with the inability of the two Tribes to agree on a wildlife management plan, led the Bureau of Indian Affairs to adopt and enforce its own wildlife management plan.[115] The Northern Arapahoe sued to enjoin enforcement of the regulations because of restrictions the regulations would impose on hunting by tribal members.[116] The Tenth Circuit held that the reserved rights of the Shoshone Tribe and the attendant federal trust obligation gave the United States the authority to act, upon the request of the Shoshone Tribe, to protect the resources upon which the Tribe's reserved rights depend.[117]

Recissions Act of 1995, Pub. L. 104-19, § 2001, 109 Stat. 194, 240 (codified as amended at 16 U.S.C. § 1611 (Supp. IV 1998). *Klamath Tribes*, 1996 WL 924509, at *9. The "Salvage Rider" authorized the expedited harvest of salvage timber sales as well as other "backlogged" timber sales in Pacific Northwest forests. The rider exempted such sales from administrative appeals as well as from the application of most environmental protection laws. For a detailed history of the salvage rider and the litigation it spawned, see Patti A. Goldman & Kristen L. Boyles, *Forsaking the Rule of Law: The 1995 Logging Without Laws Rider and its Legacy*, 27 ENVTL. L. 1035 (1997).

109 *Klamath Tribes*, 1996 WL 924509, at *9–10. The court found that the Tribes had not filed an administrative appeal of the eighth sale—the John Timber Sale—when the sale was issued by the Forest Service, and this precluded their right to judicial review of that sale. *Id.* at *6, 10.

110 *See supra* note 108.

111 *Klamath Tribes*, 1996 WL 924509, at *8 (quoting Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252, 256 (D.D.C. 1973)).

112 *Id.* at *8.

113 *Id.* at *7.

114 Northern Arapahoe Tribe v. Hodel, 808 F.2d 741, 750 (10th Cir. 1987).

115 *Id.* at 746.

116 *Id.*

117 *Id.* at 750. The court stated that

> [t]he Government's right extends to preventing overuse by the Arapahoe of their shared right when that overuse endangers the resource and threatens to divest the Shoshone of

C. Habitat Protection and Tribal Comanagement

The case law that has developed around habitat protection, as well as the legal commentary on this critical issue,[118] has established certain foundational points regarding the basis of a right to habitat protection for off-reservation resources. Tribal off-reservation hunting and fishing rights are unique and distinct from hunting and fishing rights as exercised by non-Indians.[119] These rights, reserved through government-to-government agreements in which the tribes often gave up significant tracts of land, were meant to guarantee more than equal access to fishing and hunting areas with non-Indians.[120] These rights have a substantive component, guaranteeing the tribes the ability to maintain a livelihood through the exercise of such rights.[121] Further, the cases and commentary establish the doctrinal foundation for the common sense point, made by Judge Orrick in his vacated opinion,[122] that a right to hunt and fish is meaningless without a resource that one can harvest in the exercise of that right.[123]

Unfortunately, the mere recognition of a right to such protection is not sufficient to guarantee such protection: what is necessary is a meaningful decision-making role for the tribes as sovereign governments in the planning processes involved with habitat and resource issues. Without the guarantee of such a role, the tribes are forced into the position of reacting to proposals, activities, and authorizations developed by other parties. The right to habitat

---

their right. Because the right to the resource is shared, however, federal regulation of hunting on the reservation must accommodate the rights of both tribes.

Id.

118 *See, e.g.*, Martin H. Belsky, *Indian Fishing Rights: A Lost Opportunity for Ecosystem Management*, 12 J. LAND USE & ENVTL. L. 45, 58–61 (1996) (discussing the ecosystem management model as applied to fishery habitat protection); Blumm & Swift, *supra* note 8, at 462–500 (examining the habitat protection issue in regards to salmon in the northwestern United States); Constans, *supra* note 78, at 740–59 (arguing that in *United States v. Washington, Phase II* habitat protection should have been found implied within the Tribes' fishing rights); Gary D. Meyers, United States v. Washington (Phase II) *Revisted: Establishing an Environmental Servitude Protecting Treaty Fishing Rights*, 67 OR. L. REV. 771, 773–74 (1988) (arguing that the Tribes' "right to take fish" includes protection of fish habitat).

119 United States v. Winans, 198 U.S. 371, 380–81 (1905).

120 *Id.; see also* Washington v. Washington State Passenger Fishing Vessel Ass'n, 443 U.S. 658, 679 (1979) (holding that the Court's prior interpretations of Native American fishing rights were broad and rejecting "the State's 'equal opportunity' approach").

121 *See Passenger Fishing Vessel*, 443 U.S. at 678–79 (stating that through reserved fishing rights, Native Americans exercise "the right to meet their subsistence and commercial needs").

122 United States v. Washington, 506 F. Supp. 187, 203 (1980) ("The most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken.").

123 *See* Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 763 F.2d 1032, 1034–35 (9th. Cir. 1985) (affirming the lower court's order to maintain water flow from a reservoir to protect Tribe's fishing rights); Umatilla v. Alexander, 440 F. Supp. 553, 555–56 (D.Or. 1997) ("Such a flooding [of fishing stations] will deprive the Indians of their right to occupy the fishing stations and their right to access for that purpose."); Klamath Tribes v. United States, Civ. No. 96-381-HA, 1996 WL 924509, at *8 (D. Or. Oct. 2, 1996) ("[T]he Forest Service [has] acknowledged its duty to manage habitat to support populations necessary to support Tribal use and non-Indian harvest, including consideration of habitat needs for any species hunted or trapped by Tribal members." (internal quotations omitted)).

protection must also include a right to meaningful tribal participation in the decision-making process regarding such habitat.[124]

First, the relegation of the tribes to a role merely equal to that of other members of the general public puts the tribes at a significant disadvantage regarding protection of habitat. The habitat necessary for the protection of fish and wildlife resources is comprised of natural resources of significant economic value to other parties. Those parties are usually more politically powerful, and certainly more well-financed, than the tribes whose rights may conflict with such use.[125] The ability to control the scientific and economic analysis and discussion of what ecological components are necessary to protect the resources on which a tribe's right depends will, to a significant degree, control the scope of protection of the right. The federal agencies and the well-financed parties with economic interests in these areas can all too often frame the discussion and terms of the analysis in light of protecting their interests, to the detriment of the tribes.

Second, characterization of the right to habitat protection as merely a "negative" right—a right to stop activities, but not necessarily to participate in decision making,[126] does not provide an adequate process to ensure the protection of habitat. Again, such protection puts the tribes in the position of having to react to proposals already developed, and it places significant and undue burdens on the tribes to prove harm on a case-by-case basis.[127] Further, a negative right places natural resource decision making in the courts; while having ultimate recourse to the courts is necessary for the protection of the tribal right, the courts would not appear to be the most efficient forums for addressing such issues in the first instance.

Third, as discussed in more detail below,[128] the trust obligation owed by the United States to Indian tribes includes a procedural obligation to engage in meaningful consultation with tribes concerning impacts to tribal reserved rights resources. This procedural trust obligation, along with the United

---

124 Blumm & Swift, *supra* note 8, at 497.

125 For example, the Battle Mountain Gold Mining Company, which is seeking to operate the Crown Jewel gold mine on ceded lands that once comprised the north half of the Confederated Colville Tribes' reservation, has spent $80 million to date in their quest to obtain the approximately $500 million worth of gold underneath Buckhorn Mountain. Statement of Legal Counsel for Battle Mountain Gold at Summary Judgment Oral Argument, Okanagon Highlands Alliance v. Williams, Civ. No. 97-806-JE (Oct. 9, 1998). Approximately $23 million of that money has been spent in legal fees to fight challenges to the project brought by the Confederated Colville Tribes, among others. *Id.* Moreover, when a Department of the Interior Solicitor's interpretation of the controlling mining law would have blocked planned development of the mine, Battle Mountain Gold was successful in persuading Senator Slade Gorton (R-Wash.) to introduce a rider to an appropriations bill that invalidated the Solicitor's interpretation and specifically authorized the approval of the Crown Jewel Mine project. Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 106-31, § 3006, 113 Stat. 57.

126 *See* Blumm & Swift, *supra* note 8, at 412 (describing a "negative" property right as a property right that gives the owner of the right—in these type of cases, characterized as a environmental servitude—the ability to have a court enjoin the owner of the dominant estate from destroying the resources protected by the servitude).

127 *See* United States v. Washington, 759 F.2d 1353, 1357 (9th Cir. 1985) (requiring tribes to make a showing of harm to reserved rights based on concrete facts).

128 *See infra* notes 381–94 and accompanying text.

State's obligation to protect and preserve the exercise of tribal sovereignty and self-determination,[129] requires the United States to incorporate tribes into the decision-making process, rather than simply make decisions for them.

The substantive trust obligation alone—that is, the obligation upon the United States to ensure that tribal resources are protected—has simply proven insufficient to preserve reserved rights resource habitat. The trust obligation requires federal action to protect reserved rights resources, particularly those resources under pervasive and elaborate federal control,[130] but the varying articulations of the trust standard by the federal courts[131] have given the United States a great deal of flexibility in interpreting and implementing its role in protecting tribal resources.[132] Federal agencies, and some federal courts, have asserted that the federal trust obligation is merely of a general nature and that in the absence of specific statutory language establishing a particularized trust responsibility, the agency need only follow the procedures outlined by existing, general statutory regimes.[133] As Professor Wood points out, however, interpreting the trust obligation as merely coextensive with general statutory obligations is not consistent with the tribal-specific legal foundation of the trust doctrine,[134] and she notes that the majority of courts have refused to follow this limitation of the doctrine.[135]

The need for requiring tribal participation in the agency decision-making process is highlighted by the experience of the treaty tribes who have reserved fishing rights in the Columbia River, which involves a massive and complex hydropower, irrigation, fisheries, and navigational management system, with control and regulation spread among a number of federal and state agencies.[136] Despite the tribes' reserved rights and pervasive federal control, several stocks of Columbia River salmon have been listed as threatened or endangered under the Endangered Species Act.[137] In 1994 the

129 *See infra* note 386 and accompanying text.

130 *See* discussion *supra* note 47 and accompanying text.

131 *See* Wood, *Fulfilling the Executive's Trust Responsibility*, *supra* note 47, at 750.

132 *See id.* ("The trust doctrine, like so many areas of federal common law, has developed in an ad hoc manner in response to specific factual circumstances. . . . Absent overall direction . . . agencies are likely to render—and indeed have already rendered—scattered and variable interpretations of their responsibilities towards the tribes.").

133 *See, e.g.*, Morongo Band of Mission Indians v. Federal Aviation Admin., 161 F.3d 569, 574 (9th Cir. 1998) (holding that FAA complied with trust obligation to consult with the Tribe regarding impacts of increased airplane overflights by using consultation procedures required by NEPA); North Slope Borough v. Andrus, 642 F.2d 589, 611–13 (D.C. Cir. 1980) (holding that the Secretary of the Interior's compliance with section 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1994), regarding the bowhead whale was sufficient to meet trust obligation to the Inupiat Native Community, which had a reserved right to hunt the whales).

134 Wood, *Fulfilling the Executive's Trust Responsibility*, *supra* note 47, at 746–47.

135 *Id.* at 746–48.

136 *See generally* NORTHWEST WATER LAW AND POLICY PROJECT, A SURVEY OF COLUMBIA RIVER BASIN INSTITUTIONS AND POLICIES (Michael C. Blumm & Brett M. Swift eds., 1997).

137 16 U.S.C. §§ 1531–1544 (1994). Snake River sockeye are listed as endangered. 50 C.F.R. § 222.23(a) (1999). Threatened runs include Snake River spring/summer chinook, *id.* § 227.4(f), Snake River fall chinook, *id.* § 227.4(g), Snake River Basin steelhead, *id.* § 227.4(l), and Lower

Oregon District Court noted that the demands of the Endangered Species Act would require "a major overhaul" in system operations.[138] However, only three years later, the same judge upheld a revised biological opinion from the same agency regarding the same river, even though the revised opinion only called for relatively small steps—not a major overhaul—and did not incorporate the majority of the substantive suggestions made by the affected tribes.[139] Even though the tribes committed significant resources to undertake scientific analysis and offer substantive programmatic approaches, the National Marine Fisheries Service was not required to adopt the tribal approaches nor even offer a detailed analysis of why such approaches would not be adopted.[140] It is critical to recognize the necessity of a tribal governmental role in the decision-making process of federal agencies regarding lands and waters that supply resources for tribal reserved resource rights. It is also essential that the ability of tribes to participate *as decision makers* be clearly defined, so that such participation is more than mere consultation or comment making, but rather is substantive and substantial. The refusal of federal agencies to grant the tribes such a participatory, decision-making role is apparent from the various challenges to agency decisionmaking impacting reserved rights resources.[141]

One commentator on the habitat protection issue asserted that, in the *Sohappy v. Smith*[142] fishing rights litigation, the Oregon District Court laid

Columbia River steelhead, *id.* § 227.4(m).

138 Idaho Dept. of Fish & Game v. National Marine Fisheries Serv., 850 F. Supp. 886, 900 (D. Or. 1994), *remanded with instructions to vacate as moot*, 56 F.3d 1071 (9th Cir. 1995).

139 American Rivers v. National Marine Fisheries Serv., No. 96-384-MA, slip. op. (D. Or. Oct. 17, 1997).

140 *Id.* at 22. Proposals regarding jeopardy and risk developed by tribes were not adopted by NMFS, but NMFS's decision was upheld on the principle of deference to the agency's exercise of "professional judgement." *Id. See* Blumm & Swift, *supra* note 8, at 260 (citing excerpts from a tribal attorney memo explaining that tribes do not have a "comanagement" role in the Columbia River system because of lack of truly substantive role in critical decision making concerning habitat). See also *Okanagon Highlands Alliance v. Williams*, Civ. No. 97-806-JE, 1999 WL 1029106 (D. Or. Dec. 31, 1998), in which the Colville Tribes challenged the construction and operation of an open-pit gold mine on lands where the Tribes exercised reserved hunting and fishing rights. *Id.* at *1. The plaintiffs contended that the construction and operation of the mine would likely result in the significant alteration of terrestrial and aquatic habitat. *Id.* at *1–3. The Forest Service and the mining company argued that given the complexity of the issue and reams of data, the agency should be given judicial deference in its decision making because of its expertise—a position with which the court, in part, agreed. *Id.* at *4.

141 *See, e.g.*, *Okanagon Highlands Alliance*, 1999 WL 1029106, at *1 (challenging authorization of gold mine on former reservation lands because of Forest Service's failure to consult with Colville Tribes on a government-to-government basis); Klamath Tribes v. United States, Civ. No. 96-381-HA, 1996 WL 924509 at *9–10 (D. Or. Oct. 2, 1996) (enjoining timber sales authorized without required government-to-government consultation between the Forest Service and the Tribes). Authors Michael Blumm and Brett Swift drew a detailed response from an attorney for the Columbia River Intertribal Fish Commission when they argued that a purported comanagement regime among the tribes, states, and federal agencies did not in fact exist, because the tribes did not have a participatory role in critical decision making concerning management of habitat in the Columbia River. Blumm & Swift, *supra* note 8, at 260.

142 302 F. Supp. 899 (D. Or. 1969).

out a "cooperative approach" that provides "workable guidelines for the implementation of the treaty right."[143] Judith Constans noted that the *Sohappy* court concluded that the tribes and their members must be given notice and the opportunity to "participate meaningfully" throughout the course of the decision-making process.[144] While this phrase is laudable, the concept of meaningful tribal participation has yet to be defined with any degree of specificity. Constans ultimately describes such participation in terms of the disclosure and analysis requirements found in the National Environmental Policy Act (NEPA).[145] NEPA's provisions, however, have been found to be exclusively procedural in their import[146]; NEPA dictates a process, but it does not ultimately dislodge an agency's ultimate and exclusive discretion.[147] Thus, it falls short of providing the procedural means for tribes to protect their resource rights.

Some courts have also begun to define the nature of a meaningful tribal role in the decision-making process. In *Klamath Tribes v. United States*,[148] the district court expressly recognized that the trust obligation owed by the United States to the Klamath Tribes to protect their reserved rights involved a substantive as well as a procedural component.[149] The court enjoined seven timber sales until the federal government "ensur[ed], in consultation with the Klamath Tribes on a government-to-government basis, that the resources on which the tribes' treaty rights depend [would] be protected."[150] The court's language strongly suggests that however the government-to-government process is defined, it is apparently to be carried out in a manner designed to achieve substantive results.

Unfortunately, while the case law recognizes the requirement of consultation, to date no court has given express meaning to the phrase "government-to-government" consultation. As described in the sections below, in order to give the substantive component of the reserved rights trust obligation any meaning, government-to-government consultation must in fact involve the tribes as decision makers in the planning process. Achieving the substantive result, in other words, requires recognizing that the procedural element of the process must involve the tribes not merely as commentators, but as sovereign governments with power-sharing capacity. Tribes are distinct from other property rights holders who have a servitude

143 Constans, *supra* note 78, at 732.

144 *Id.* at 759. *Sohappy*, however, did not deal directly with habitat protection issues, but rather with management of the fisheries.

145 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370d (1994); Constans, *supra* note 78, at 758–59 (citing NEPA sections 4332(C)(i)–4332(C)(iii)).

146 *See* Robertson v. Methow Valley, 490 U.S. 332, 333 (1989) (holding that NEPA does not require agencies to mitigate adverse environmental impacts or include a fully developed mitigation plan in the NEPA analysis); Strycker's Bay Neighborhood Council, Inc., v. Karlen, 444 U.S. 223, 227–28 (1980) (holding that judicial review under NEPA is limited to procedural compliance; the substantive choice of whether to proceed with a project is vested in the agency).

147 *See Robertson*, 490 U.S. at 333; *Strycker's Bay Neighborhood Council*, 444 U.S. at 227–28.

148 Civ. No. 96-381-HA, 1996 WL 924509 (D. Or. Oct. 2, 1996).

149 *Id.* at *8.

150 *Id.* at *9.

on the lands of another: they are sovereign governments whose rights derive from an inherent sovereignty, and, as governments, they have a responsibility to their people to ensure the protection of those rights.

III. TRIBAL SOVEREIGNTY AND THE EXTRATERRITORIAL EXERCISE OF TRIBAL GOVERNMENTAL AUTHORITY

The European colonial powers, and subsequently the United States, recognized that tribes were independent sovereigns with the full attributes of sovereignty prior to contact with the Europeans.[151] While the United States courts have found that some of these attributes of sovereignty have been lost through conquest, treaty making, and tribal dependent status,[152] the courts have repeatedly affirmed the continuing vitality of inherent tribal sovereignty as a basis for the exercise of tribal governmental authority.[153]

The doctrine of inherent tribal sovereignty has generally been examined in the context of a tribe's authority over its territory, and in particular, its reservation lands.[154] But both the legal doctrine of inherent sovereignty and the particular context of tribal relationship to territory have allowed for the consideration and exercise of such authority outside reservation boundaries.[155] This Part details the foundation for the assertion that the tribes who reserved off-reservation usufructuary rights would have understood that they also reserved the right to participate as governmental comanagers over resources as an aspect of such sovereignty.

---

151 COHEN, *supra* note 18, at 47–70.

152 *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (noting that in some treaties, Native Americans "acknowledge themselves to be under the protection of the United States"); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 567 (1823) (holding that European "discovery" of new lands subordinates any proprietary claims Native Americans may have to those lands); *see also* discussion *supra* notes 192–94 and 189–91 and accompanying text.

153 *See, e.g.*, Montana v. United States, 450 U.S. 544, 565–66 (1981) (recognizing that "Indian tribes retain inherent sovereign power to exercise some form of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands"); United States v. Wheeler, 435 U.S. 313 (1978) (holding that it is not double jeopardy for a criminal defendant to be tried successively by the United States and a tribe for the same crime committed on-reservation because tribes are sovereigns distinct and separate from the United States federal system); Williams v. Lee, 358 U.S. 217, 223 (1959) (holding that a claim involving a general store on reservation land should have been dismissed because "allow[ing] the exercise of state jurisdiction [in the case] would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves"). *See also* discussion *infra* Part III.C.

154 *See Cherokee Nation*, 30 U.S. (5 Pet.) at 17 (describing the subordinate role of Native American ownership); *Johnson*, 21 U.S. (8 Wheat.) at 567–68 (stating the discovery rule of title that limits Native American rights); *see also infra* Part III.B.

155 *See* Kiowa Tribe v. Manufacturing Tech., Inc., 523 U.S. 751, 754 (1998) (examining whether tribal immunity extended to promissory note delivered outside tribal lands); Settler v. Lameer, 507 F.2d 231, 237 (9th Cir. 1974) (holding that a tribe's right to control fishing activity extends to off-reservation areas); *see also infra* Part IV.

A. Precontact Tribal "Sovereignty" and Usufruct-Based Arrangements and Institutions

As an initial step, it is important to understand Indian tribal theory and practice of sovereign governmental authority before and during the time of contact and treaty making with the colonial powers, because of the two foundational precepts of United States law concerning the interpretation of Indian treaties. The first such precept is the liberal canons of construction of Indian treaties, which require reading ambiguities in favor of the Indians as well as giving effect to the understanding and expectations of the tribes at the time the agreement was signed.[156] The second and equally critical precept is that treaties must be construed not as a grant of rights *to* the Indians, but rather as a grant *from* them—and, correspondingly, an implied reservation of those rights and powers not granted.[157] This principle is particularly relevant when the issue concerns off-reservation usufructuary rights: while courts will look more closely at language and circumstances when considering whether certain rights had been reserved on lands otherwise ceded,[158] they have not required express and specific language in order to determine that rights had been reserved on ceded lands.[159]

Many of the tribes that reserved usufructuary rights on ceded lands and waters had developed systems and institutional arrangements for the allocation and protection of usufruct resources—particularly to prevent

---

[156] *See* Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970) (applying the rule to a treaty regarding the Arkansas River); Tulee v. Washington, 315 U.S. 681, 684–85 (1942) (recognizing responsibility to interpret treaty to protect Native American interests); United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938) (stating treaty terms are to be interpreted "in the sense in which naturally the Indians would understand them"); Carpenter v. Shaw, 280 U.S. 363, 367 (1930) (noting contractual terms are to be liberally construed); Winters v. United States, 207 U.S. 564, 576–77 (1908) (refusing to interpret treaty as giving up water rights necessary to use reservation lands for agriculture); United States v. Winans, 198 U.S. 371, 380–81 (1905) (interpreting treaty in consideration of the circumstances of Native Americans).

[157] *See Winans*, 198 U.S. at 380–82. As discussed above, *supra* Part II.A, courts have consistently applied the *Winans* rule to conclude that tribes reserved substantial usufructuary rights off-reservation. *See, e.g.*, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 679 (1979) (upholding allocation to tribes of 50% of off-reservation fishery in Washington State); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 668 F. Supp. 1233, 1242 (W.D. Wis. 1987) (upholding broad reservation by Chippewa Tribes of usufructuary rights on public lands of northern Wisconsin).

[158] *See* Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 768 (1985) (holding that Klamath Tribes did not reserve hunting rights on lands ceded pursuant to a 1901 agreement resolving dispute over lands excluded from tribal reservation due to an erroneous survey).

[159] *See* Antoine v. Washington, 420 U.S. 194, 205 (1975). *Antoine* examined the Colville Tribes' cession of the "north half" of their reservation by an agreement ratified by Congress in 1906. The Court held that the Colville Tribes had reserved hunting and fishing rights on the ceded lands through a provision in the 1906 agreement which stated that the Tribes' right to hunt and fish on such lands "in common with all other persons . . . shall not be taken away or otherwise abridged." *Id.* at 196. *See also* Menominee Tribe of Indians v. United States, 391 U.S. 404, 410–12 (1968) (holding that 1954 act "terminating" the Menominee Tribe and its reservation did not abrogate treaty-reserved hunting and fishing rights on such lands, despite language in the termination act that state laws shall apply to tribal members "in the same manner as they apply to other citizens or persons within their jurisdiction").

degradation caused by human activity—on lands and waters used by more than one clan, community, or tribe.[160] The development and implementation of such systems and protections, in place at the time of the relevant treaties, was a crucial aspect of the various tribes' conception of their own sovereignty—an aspect that they would have expected to continue as an essential corollary to the reservation of usufructuary rights.

While "sovereignty" is a European term,[161] the indigenous communities of the Americas exercised sovereignty long before Europeans "discovered" the Western Hemisphere, in that such communities were self-determining, exercised authority over their own affairs, and developed institutions for law and order, distribution and allocation of resources, and resolution of disputes.[162] Yet these indigenous communities did not organize themselves as nation-states resembling the European model (around which the modern conceptions of sovereignty are built).[163] In particular, while indigenous communities did, to a greater or lesser extent, recognize certain territorial boundaries, such boundaries had a significantly different form and function than those upon which modern European notions of territorial sovereignty were founded.[164]

---

160 *See* discussion *infra* notes 166–81 and accompanying text.

161 The concept of sovereignty as the source of governmental power and authority had been discussed at least as early as the days of the Roman Empire, but sovereignty as a significant subject of political discourse began in the European Middle Ages. *See* Kirke Kickingbird et al., *Indian Sovereignty*, *in* NATIVE AMERICAN SOVEREIGNTY 1 (John R. Wunder ed., 1996) (citing R.R. PALMER, A HISTORY OF THE MODERN WORLD 10 (1962)). Many writers posit that the notion of sovereignty has been part of many cultures throughout recorded and unrecorded history. *See, e.g.*, MICHAEL R. FOWLER & JULIE M. BUNCK, LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY 21 (1995) (discussing examples of the concept of sovereignty in the 7th and 16th centuries); Vine Deloria, Jr., *Self-Determination and the Concept of Sovereignty*, *in* NATIVE AMERICAN SOVEREIGNTY, *supra*, at 118; Kickingbird et al., *supra*, at 1, 2–3. On the other hand, some contemporary political theorists see sovereignty as part of the discourses of the nation-state and argue that other political communities (such as the nomadic warriors of the Asian steppe) were organized specifically in ways that resisted the formation of nation-states and sovereignty. *See* FOWLER & BUNCK, *supra*, at 4–5 (looking at the evolution of sovereignty through the Middle Ages); EVAN LUARD, TYPES OF INTERNATIONAL SOCIETY 312–29 (1976) (describing international bodies and practices, such as the Chou monarchy and the Greek city-states that predated or precluded the development of sovereignty); GILLES DELEUZE & FELIX GUATTARI, A THOUSAND PLATEAUS: CAPITALISM AND SCHIZOPHRENIA 351–423 (1987) (postulating that war was used by primitive societies to resist the formation of states).

162 *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 542–43 (1832) (noting that Indian nations existed prior to European contact, "having institutions of their own, and governing themselves by their own laws"); *see also* DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT 20–21 (1997) (discussing tribal conceptions of sovereignty); Kickingbird et al., *supra* note 161, at 1, 5 (describing precontact tribal conceptions and practice of sovereignty).

163 In fact, reference to Indian tribes as "nations" began with the Europeans. *See Worcester*, 31 U.S. (6 Pet.) at 559 (noting that the word "nation" is not a word used by the Indian communities, but rather is a "word[] of our own language, selected in our diplomatic and legislative proceedings"); *see also* WILLIAM G. MCLOUGHLIN, AFTER THE TRAIL OF TEARS: THE CHEROKEES STRUGGLE FOR SOVEREIGNTY 1839–1880, at 6 (1993) (noting that the term "nation" was not a term initially used by Indians but was first used to describe Indian tribal entities by the Europeans).

164 The European link between nations, territorial borders, and sovereignty is an artifact of a

An analysis of the various precontact forms of political organization within Indian communities would take volumes and is well beyond the scope of this Article. Further, the variety of socio-political organization among tribes makes any attempts to generalize difficult. However, because the relevant legal analysis of reserved sovereign rights requires looking at the contemporaneous understanding of the Indians at the time of the treaties, a brief consideration of some general distinctions between European political organization and indigenous communities concerning sovereignty, land use, and resource management is necessary.

European sovereignty theory focused on the need for centralized organization and clear hierarchies.[165] Indian country, in contrast, focused on less centralized institutional arrangements and management systems.[166] These relatively autonomous units cooperated and coordinated with each other as needs dictated, even where they would otherwise be in conflict.[167] It was through these smaller units, whose responsibilities, authorities, and rights changed over time and across varying circumstances, that many Indian communities implemented systems of resource use, allocation, and protection.[168] This mode of political organization recognized and

particular historical moment. BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 19 (2d ed. 1991). Anderson describes a Europe prior to the rise of nationalism and strictly defined territorial sovereignty, a Europe organized politically in a manner perhaps more closely resembling that of America's indigenous communities:

> In the modern conception, state sovereignty is fully, flatly, and evenly operative over each square centimeter of a legally demarcated territory. But in the older imagining, where states were defined by centres, borders were porous and indistinct, and sovereignties faded imperceptibly into one another.

Id.

165 Thomas Hobbes, for example, argued that a central, unified government was critical to the political and material well being of the commonwealth. THOMAS HOBBES, LEVIATHAN 155–67 (E.P. Dutton & Co. 1950) (urging against the dangers of conflicting lines of authority).

166 Indian communities were often organized at the band, clan, or tribelet level, rather than the larger tribal level. EUGENE S. HUNN, NCH'I WANA, "THE BIG RIVER": MID-COLUMBIA INDIANS AND THEIR LAND 214–17 (1990) (stating that no one tribe dominated the Columbia Plateau region; villages and families maintained a high degree of political and economic autonomy); ALVIN M. JOSEPHY, THE NEZ PERCE INDIANS AND THE OPENING OF THE NORTHWEST 30 (1965) (explaining that the Nez Perce organized into autonomous villages each under their own civil headman); THEODORE STERN, THE KLAMATH TRIBE: A PEOPLE AND THEIR RESERVATION 17–20 (1965) (stating that clans, villages, and tribelets were the main units of sociopolitical organization among the Klamaths). The notion of the tribe as the basic organizing unit is a result of contact with Europeans, who sought and often imposed these larger, overarching structures on Indian communities. *See* COLIN G. CALLOWAY, NEW WORLDS FOR ALL: INDIANS, EUROPEANS, AND THE REMAKING OF EARLY AMERICA 142–43 (1997).

167 SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 104–05 (1994) (discussing the Brule Sioux's "band" organization and police powers in the late 19th century); HUNN, *supra* note 166, at 214–17 (describing Nez Perce Tribe's autonomous family structure and system of headmen and chiefs); FRANK G. SPECK, PENOBSCOT MAN 203–12, 239–45 (1940) (describing socio-political organization of the Penobscot Indians of Maine).

168 *See* WINFRED BUSKIRK, THE WESTERN APACHE: LIVING WITH THE LAND BEFORE 1950, at 116 (1986) (stating that the Apache did not have individual or family owned hunting tracts, but shared resources in common); DIANE NEWELL, TANGLED WEBS OF HISTORY: INDIANS AND THE LAW IN CANADA'S PACIFIC COAST FISHERIES 40–45 (1993) (describing aboriginal systems for managing

implemented resource management regimes across various territorial boundaries.[169]

The systems of land and resource use and allocation in the indigenous communities also differed significantly from that of the Europeans.[170] Many of America's indigenous communities were organized around the exercise, management, and protection of usufructuary practices.[171] Usufructuary systems generally defined indigenous land tenure, and shared use of resources at some group level was the norm, although the size of such groups varied substantially from region to region.[172] In contrast, at the time of contact European nation-states and sovereignty theorists were organizing around territorial conceptions of sovereignty that evolved from principles of private property and working the land via cultivation.[173] Indeed, Locke referred to the "wild *Indian*, who knows no Inclosure" as merely a "tenant in common" on aboriginal Indian lands.[174]

The precontact tradition of tribal use, allocation, and management of land and water resources differed significantly from the European conception. Scholars have established that many, if not most, indigenous societies were organized around shared usufructuary practices rather than private, individualized land holdings.[175] The usufruct relationship resulted in

salmon resources in shared fishing areas along the Pacific Northwest Coast).

169 *See* sources cited *supra* notes 166–68; *see also* Sean L. Swezey & Robert F. Heizer, *Ritual Management of Salmonid Fish Resources in California*, *in* BEFORE THE WILDERNESS: ENVIRONMENTAL MANAGEMENT BY NATIVE CALIFORNIANS 299, 299–328 (Thomas Blackburn & Kat Anderson eds., 1993) (analyzing the various "first salmon" rituals and other related rituals of the Northern Californian fishing tribes and describing a complex system of intertribal coordination and cooperation in management and allocation of salmon runs).

170 As one scholar notes, "[t]he connections of indigenous peoples to land has often been intricate, subtle and tremendously complex in ways that make the European criteria of ownership seem simplistic." RICHARD J. PERRY, . . . FROM TIME IMMEMORIAL: INDIGENOUS PEOPLES AND STATE SYSTEMS 8 (1996).

171 *See generally* LINDA S. PARKER, NATIVE AMERICAN ESTATE: THE STRUGGLE OVER INDIAN AND HAWAIIAN LAND 15–23 (1989) (describing different practices of possession and proprietorship over the usafruct in tribes of the Pacific Northwest).

172 *Id.*; *see also* Whitefoot v. United States, 293 F.2d 658, 661–62 (Ct. Cl. 1961) (describing communal land ownership as "in accord with normal Indian custom"); Prairie Band of Potawatomi Indians v. United States, 165 F. Supp. 139, 146–47 (Ct. Cl. 1958) (finding that "Indian title . . . covers the right to use only").

173 *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 350 (Peter Laslett ed., Cambridge University Press 1988) (stating that the preservation of property was indeed "the great and *chief end* . . . of Mens uniting into Commonwealths, and putting themselves under governments"). Locke further asserted that all the world is property held in common until such time as a man mixes his labor with the soil and, by thus working it, makes it his own private property. *Id.* at 285–302. Moreover, Locke repeatedly uses the "Indians of America" as a negative example of the kind of exploitation of land that does not involve the mixing of labor into the soil and, therefore, does not result in the creation and protections of private property.

174 *Id.* at 287.

175 *See* IMRE SUTTON, INDIAN LAND TENURE: BIBLIOGRAPHIC ESSAYS AND A GUIDE TO THE LITERATURE 24–27 (1975); *see also* PARKER, *supra* note 171, at 15–23. Following a brief review of indigenous land tenure systems, Parker asserted:

> In summary the Indian and the Hawaiian valued land for its products rather than the land per se. They maintained a metaphysical relationship with the land and neither conceived of land in terms of absolute ownership. Inherited usufruct provides a more conclusive

a significantly different relationship between the community organization and land issues than that found in Europe and developed in the United States. The conception of property and territory based on group usufruct involved the development of institutions aimed at protection of resources whose use was shared by various individuals and groups.[176]

Indigenous communities could and did envision a scheme of shared and participatory management over usufructuary rights and resources.[177] Many indigenous communities practiced shared or participatory resource management concerning shared usufructuary resources, recognizing the transboundary nature of such resources and the necessity of cooperation and shared authority to protect, preserve, and enhance those resources.[178]

These systems of usufructuary resource management focused not only on allocation of resources, but included a significant emphasis on regulating human activity that would adversely affect the resources, thus seeking to avoid situations of scarcity where possible.[179] The Chippewa and Ottawa Bands of northern Michigan, for example, developed a system of territorial allocation that sought to ensure that hunting and fishing pressures on scarce resources did not adversely impact such resources.[180] Religious and cultural components of such systems often incorporated prohibitions aimed at protecting depletion or destruction of resources.[181]

---

description of Indian land tenure than either communal, in common, or individual.

Id. at 23.

176 For a general description of such systems, see FIRKET BERKES, SACRED ECOLOGY: TRADITIONAL ECOLOGICAL KNOWLEDGE AND RESOURCE MANAGEMENT 59–126 (1999); J. DONALD HUGHES, NORTH AMERICAN INDIAN ECOLOGY 34–44 (2d. ed. 1996); NEWELL, *supra* note 168, at 40–45.

177 *See* ROBERT DOHERTY, DISPUTED WATERS: NATIVE AMERICANS AND THE GREAT LAKES FISHERY 10–22 (1990) (describing territorially based resource protection and allocation systems of the Chippewa and Ottawa Tribes of northern Michigan); HUGHES, *supra* note 176, at 37–39 (describing game and fish protection institutions developed by the Ojibway and the Plains Tribes); Christopher Vecsey, *American Indian Environmental Religions*, *in* AMERICAN INDIAN ENVIRONMENTS: ECOLOGICAL ISSUES IN NATIVE AMERICAN HISTORY 1, 1–37 (Christopher Vecsey & Robert W. Venables eds., 1980) (describing role of religious beliefs and practices in environmental protection regimes of various Indian tribes).

178 *See* BERKES, *supra* note 176, at 111–26 (describing Chiasabi Cree fishing practices as "adaptive management"); COHEN, *supra* note 18, at 18–25 (describing fisheries management in the traditions and practices of Northwest salmon fishing tribes); ARTHUR MCEVOY, THE FISHERMAN'S PROBLEM: ECOLOGY AND LAW IN THE CALIFORNIA FISHERIES 1850–1980, at 19–91 (1986) (describing intertribal fisheries management in northern California); NEWELL, *supra* note 168, at 40–45 (discussing aboriginal "regionally based" systems of fisheries resource management and distribution); Swezey & Heizer, *supra* note 169, at 299–328 (describing religious rituals, including "first salmon" rite, which acted to preserve salmon by ensuring that no fishing took place during ceremonial period).

179 *See* sources cited *supra* notes 177–78.

180 *See* DOHERTY, *supra* note 177, at 16. Doherty states:

> The right to take the scarcest and most crucial goods, animals for winter hunting, was assigned to small groups as an exclusive right to harvest game within a specified territory. Rights to more abundant goods, maple sugar and fish, for example, were assigned to larger groups on a less exclusive basis.

Id.

181 *See* BERKES, *supra* note 176, at 79–93 (describing Cree worldview of fish and game and

Thus, from the perspective of many indigenous communities, particularly those that sought to reserve usufructuary rights outside reservation boundaries, the exercise of some degree of participatory management on shared, usufruct-based territory was understood to be part of the bundle of sovereign powers exercised by the governing institutions of an Indian tribe. In particular, such powers would have been understood as involving the protection of resources through regulation of human activity potentially affecting those resources, including regulation exercised through a shared or participatory management framework. As the succeeding sections show, the United States has long recognized the concept of inherent tribal sovereignty and has affirmed that such sovereignty is retained by the tribes unless it has been granted away, expressly terminated by Congress, or lost due to the tribes' dependent status. Further, the United States courts,[182] Congress,[183] and the executive branch[184] have each recognized, in a variety of contexts, continuing Indian tribal authority to exercise certain sovereign powers outside reservation borders.

B. A Brief History of Tribal Sovereignty Under United States Law

The United States has a long history of treating tribes as independent, sovereign nations through a government-to-government treaty-making process.[185] The recognition of native sovereignty was built into federal Indian law from the start, and it is evident in the three foundational Supreme Court opinions authored by Chief Justice John Marshall (commonly known as the "Marshall Trilogy"): *Johnson v. M'Intosh*,[186] *Cherokee Nation v. Georgia*,[187] and *Worcester v. Georgia*.[188]

In *Johnson v. M'Intosh*, which held that after discovery by the European powers tribes no longer had the ability to freely alienate tribal land, Marshall noted that while the tribes' "rights to complete sovereignty, as independent nations, were necessarily diminished," the tribes retained those attributes of their original, inherent sovereignty not inconsistent with their new status.[189] Marshall also concluded that Indian tribes, as sovereigns, hold

human relation to these animals); Swezey & Heizer, *supra* note 169, at 299–328 (discussing "first salmon" and related rituals of tribes of Northern California which curtailed or completely eliminated salmon fishing for a ceremonial period of days or weeks); Vecsey, *supra* note 177, at 9–37 (explaining three types of integration between religion and environment in Native American society).

182 *See infra* Part IV.D.

183 *See infra* Part IV.B.

184 *See infra* Part IV.B.

185 *See* COHEN, *supra* note 18, at 53–127. For example, the 1778 Treaty between the rebelling Colonies and the Delawares was later described by Chief Justice John Marshall as "in its language, and in its provisions, . . . formed, as near as may be, on the model of treaties between the crowned heads of Europe." Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 550 (1832); *see* Treaty with the Delawares, Sept. 17, 1778, U.S.-Delaware Nation, 7 Stat. 13, 13–15.

186 21 U.S. (8 Wheat.) 543 (1823).

187 30 U.S. (5 Pet.) 1 (1831).

188 31 U.S. (6 Pet.) 515 (1832).

189 21 U.S. (8 Wheat.) at 573–74.

a continuing title of use and occupancy to their aboriginal territory until such time as such title is extinguished through purchase or conquest by one of the sovereign European powers or the United States.[190] *Johnson* recognized that although tribal lands were held and managed in a manner significantly different than European lands, traditional tribal systems of use and occupancy established valid and protected legal rights inherent in tribes as sovereigns and that such lands as they held remained under the jurisdiction of their laws and customs until expressly extinguished through purchase or conquest.[191]

The other two cases comprising the Marshall Trilogy also established tribal sovereignty as the bedrock of federal Indian law. In *Cherokee Nation*, the Cherokees sought United States Supreme Court original jurisdiction against the State of Georgia for the state's attempt to impose its laws within Cherokee territory, in violation of the Cherokee treaties.[192] The Court rejected the suit on the grounds that it had no jurisdiction; the Cherokee Nation, the Court found, was not a foreign state but rather a "domestic dependent nation."[193] Marshall again acknowledged that although tribes lost certain attributes of sovereignty when they came under the dominion of the United States, they retained all those attributes that were not inconsistent with this dependent status.[194]

Worcestor v. Georgia, a direct outgrowth of *Cherokee Nation*, contained perhaps the most detailed analysis and explication of tribal sovereignty under United States law both before and after contact with the Europeans.[195] Marshall noted that prior to contact, tribes were fully independent sovereigns: "America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws."[196] Tribal sovereignty, therefore, was inherent in the tribes, not a power granted or delegated by the United States.[197] Marshall then noted, consistent with the Court's opinions in *Johnson* and *Cherokee Nation*, that contact with the European conquerors and a treaty-making alliance with the United States, through which the tribe placed itself under the protection of the United

190 *Id.* at 571–73, 588–94.

191 *Id.* at 587, 593.

192 30 U.S. (5 Pet.) at 4. The Cherokee Nation had asserted its status as a "foreign state" to sue one of the United States in the Supreme Court. *Id.* at 3. The United States Constitution provides that the Supreme Court shall have original jurisdiction over "controversies . . . between a state or the citizens thereof, and *foreign states*, citizens, or subjects." U.S. CONST. art. III, § 2 (emphasis added).

193 30 U.S. (5 Pet.) at 17–18.

194 *Id.* Marshall noted that the relationship between Indians and the United States was "unlike that of any other two people in existence" and, as a result, was "marked by peculiar and cardinal distinctions which exist no where else." *Id.* at 16.

195 *Worcester v. Georgia* involved a challenge to the application of Georgia's laws on Cherokee lands by an on-reservation missionary who was convicted of violating such laws. 31 U.S. (6 Pet.) 515, 536, 539–40 (1832).

196 *Id.* at 542–43.

197 *Id.* at 559–60.

States, resulted in the loss of some attributes of sovereignty, but that the tribe fully retained those powers that had not been lost.[198] Marshall took care to note that although the Cherokees were a "dependent" nation under his ruling in *Cherokee Nation*, significant vestiges of their inherent sovereignty remained intact:

> [T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.[199]

Marshall undertook a close and careful reading of the Cherokee treaties to determine those attributes of sovereignty that had been granted away, and he found that the tribe's right to enforce its own laws in its own territory and to prevent the application of Georgia's laws within that territory remained in full force.[200] *Worcestor*'s strong affirmation of tribal sovereignty remains good law today.

A full century after the *Worcestor* decision, after a prolonged period of intense state resistance to the *Worcestor* holding[201] and the federal antisovereignty policy of allotment,[202] Congress adopted the Indian Reorganization Act of 1934 (IRA).[203] The IRA was a broad, remedial piece of legislation, with the goal of restoring the strength and vigor of tribal governments. It was specifically designed to bolster the exercise of sovereign governmental authority by the tribes.[204] The IRA established a process by which local tribal governments could reorganize and obtain federal recognition of their authority to exercise powers of self-rule on the reservation.[205] Even those tribes that did not adopt the IRA form of government[206] benefited from the prosovereignty policy embodied by the IRA.[207] A 1934 Solicitor's Opinion interpreting the IRA strongly articulated

198 *Id.* at 560–61.

199 *Id.*

200 *Id.* at 551–63.

201 For a discussion of the resistance of state courts to the *Worcestor* decision see HARRING, *supra* note 167, at 104–05.

202 Congress's policy of "allotment," begun in the 1880s, in many instances weakened the practical ability of tribes to exercise their sovereign authority on-reservation. Tribal lands, held in common by tribal governments, were subdivided into individual parcels and distributed among individual tribal members; the unallotted remainder was declared "surplus," to be disposed of by sale or transfer to non-Indians. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified at 25 U.S.C. §§ 331–334, 339, 341–342, 348–349, 354, 381 (1994)). Allotment decimated the tribal land base, reducing the tribal land estate nationally from 138 million acres to 52 million acres, and created a "checkerboard" of Indian, non-Indian, state, county, and federal ownership on-reservation. *See* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 56 (1995).

203 Pub. L. No. 106-73, § 1, 48 Stat. 984 (codified at 25 U.S.C. §§ 461–479 (1994)).

204 H.R. REP. NO. 73-1804, at 1, 6 (1934); S. REP. NO. 73-1080, at 1 (1934).

205 *See* 25 U.S.C. §§ 476–477 (1994).

206 Many tribes, though far from all, adopted what have come to be known as IRA governments. *See* Rebecca L. Robbins, *Self-Determination and Subordination: The Past, Present and Future of American Indian Governance*, *in* NATIVE AMERICAN SOVEREIGNTY, *supra* note 161, at 287, 294–98.

207 *See* CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 67–68 (1987).

and defended the concept of inherent tribal sovereignty: "[T]hose powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished."[208]

In the late 1960s and early 1970s, after the brief but destructive "termination" era,[209] all three branches of the federal government began to implement the prosovereignty policy of tribal self-determination. In 1968 Congress adopted the Indian Civil Rights Act (ICRA).[210] One of its primary purposes was the strengthening of tribal governmental institutions, particularly the tribal courts.[211] In 1975 Congress adopted the Indian Self-Determination and Education Assistance Act (ISDEAA),[212] which authorized tribes to contract with and take over operation of programs run by the federal government.[213] From the late 1970s through the mid-1990s, Congress adopted a number of additional statutes[214] and amended a number of other

[208] U.S. Dep't of the Interior, *The Powers of Indian Tribes*, *in* OPINIONS OF THE SOLICITOR: INDIAN AFFAIRS 445, 447 (U.S. Gov't Printing Office 1946). Among the various inherent sovereign powers of tribes, the opinion listed the following: adopting a form of government, creating offices and officers and prescribing duties and procedures for carrying out the governmental will of the tribe, defining conditions of membership, regulating the use of property, and administering justice. *Id.* at 410.

[209] The termination era was named after one of its most notorious and destructive policies: Congress's unilateral revocation of the federally recognized status of a number of tribes. *See, e.g.*, Klamath Termination Act, Pub. L. No. 587, 68 Stat. 718 (1954) (codified as amended at 25 U.S.C. §§ 564, 564a–564w (1994)); Alabama and Coushatta Indians of Texas Termination Act, Pub. L. No. 627, 68 Stat. 768 (1954) (codified as amended at 25 U.S.C. §§ 721–728 (1994)); Paiute Indians of Utah Termination Act, Pub. L. No. 762, 68 Stat. 1099 (1954) (codified as amended at 25 U.S.C. §§ 741–760 (1994)). Most tribes subjected to termination lost their reservation lands. COHEN, *supra* note 18, at 175. The termination era also involved the unilateral imposition of state law onto a number of reservations through the act that came to be known as Public Law 280. Act of Aug. 15, 1953 (Public Law 280), ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (1994) and 28 U.S.C. § 1360 (1994)). For discussions of the termination policy, its history, and its impacts, see Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139 (1977) (assessing historical development of assimilation and policies), and Michael C. Walch, Note, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181 (1983) (discussing history and ramifications of termination policy and proposals for ending effects of termination).

[210] Pub. L. No. 90-284, §§ 201–203, 82 Stat. 73, 77–78 (1968) (codified as amended at 25 U.S.C. §§ 1301–1303) (1994)).

[211] *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62 (1978) (stating that one of Congress's goals in enacting ICRA was to strengthen tribal self-government and citing Morton v. Mancari, 417 U.S. 535, 551 (1974)). The ICRA also halted any further extension of Public Law 280's state jurisdiction provisions unless an Indian tribe affirmatively voted for state jurisdiction. 25 U.S.C. § 1321(a) (1994).

[212] Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 450–450n, 455–458e (1994 & Supp. III 1997)).

[213] 25 U.S.C. § 450f (1994 & Supp. III 1997).

[214] *See, e.g.*, Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified as amended at 18 U.S.C. § 1170 (1994) and 25 U.S.C. §§ 3001–3013 (1994 & Supp. III 1997)) (establishing mechanisms for tribal ownership, repatriation, and protection of human remains and funerary items); Indian Governmental Tax Status Act of 1982, Pub. L. No. 97-473, § 202(a), 96 Stat. 2608 (1983) (codified as amended at 26 U.S.C. §7871 (1994)) (providing for the recognition by the IRS of tribes as governments for tax and public finance purposes); American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978)

statutes[215] with the express purpose of strengthening tribal self-determination and the ability of tribal governments to act in their capacity as providers of social services and education, as regulatory and tax bodies, as courts, and as resource managers. As discussed below,[216] a number of these functions involved the exercise of tribal governmental authority outside reservation boundaries.

The executive branch also moved forward in this period to strengthen and protect Indian tribal sovereignty. President Nixon was a strong proponent of Indian self-determination and urged Congress to adopt legislation providing for greater tribal autonomy and control. His message to Congress affirmed the government-to-government relationship between the federal government and Indian tribes and explicitly acknowledged the ongoing vitality of tribal sovereignty.[217] President Reagan established the Presidential Commission on Indian Reservation Economies, the "underlying principles" of which included the government-to-government relationship between tribes and the United States, as well as the "established Federal policy of [tribal] self-determination," which was to consider the role of tribal governments in strengthening on-reservation economies.[218] The Clinton Administration has continued the process, issuing a series of executive orders recognizing tribal self-determination and requiring government-to-government consultation between the federal agencies and Indian tribal governments concerning a number of important topics.[219]

(codified as amended at 42 U.S.C. §1996 (1994)) (providing for the preservation and protection of Native American religious and cultural practices); Indian Child Welfare Act of 1978, Pub. L. 95-608, 92 Stat. 3069 (codified as amended at 25 U.S.C. §§ 1901–1963 (1994 & Supp. III 1997)) (implementing standards for the protection of tribal role in juvenile proceedings involving tribal children); Indian Financing Act of 1974, Pub. L. No. 93-262, 88 Stat. 77 (codified at 25 U.S.C. §§1451–1543 (1994)) (implementing a federal program for guaranteed loans to tribal governments for economic development purposes).

215 *See, e.g.*, Archaeological Resources Protection Act of 1979, Pub. L. No. 96-95, 93 Stat. 722 (amending 16 U.S.C. § 470cc(c) (1976)) (establishing mechanisms for tribal involvement in federal agency decision making and permitting regarding archaeological resources); Indian Self-Determination Act and Education Assistance Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285 (amending 25 U.S.C. § 450e (1982)) (requiring the Bureau of Indian Affairs (BIA) and Indian Health Service (IHS) to act more expeditiously and with greater latitude toward tribes in contracting governmental programs); Indian Civil Rights Act Amendments of 1990, Pub. L. No. 101-511, § 8077(b), 104 Stat. 1856, 1892 (amending 25 U.S.C. § 1301(2) (1988)) (recognizing tribal criminal jurisdiction over nonmember Indians on reservation). The 1990 amendment was adopted in response to the Supreme Court's decision in *Duro v. Reina*, 495 U.S. 676, 679 (1990), which held that tribes did not have criminal jurisdiction over nonmember Indians.

216 *See* discussion *infra* Part IV.B.

217 PRESIDENT NIXON'S MESSAGE TO CONGRESS TRANSMITTING RECOMMENDATIONS FOR INDIAN POLICY, H.R. DOC. NO. 91-363, at 3 (1970), *reprinted in* DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 226, 227 (4th ed. 1998).

218 Exec. Order No. 12,401, 48 Fed. Reg. 2309 (Jan. 14, 1983), *amended by* Exec. Order No. 12,442, 48 Fed. Reg. 43,283 (Sept. 21, 1983).

219 *See, e.g.*, Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998) (directing consultation and coordination with tribes in development of regulatory practices); Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1998) (requiring access to and protection of Native American sacred sites on federal land); Exec. Order No. 13,021, 61 Fed. Reg. 54,329 (Oct. 19, 1996) (establishing and outlining duties of the President's Board of Advisors on Tribal Colleges

The federal judiciary has also continued to recognize and protect tribal sovereignty in the modern era. The cases discussed in the next section demonstrate the ongoing vitality of tribal sovereignty as an essential component of Indian tribes' legal status and recognize the ability of tribes to exercise such authority off-reservation.

C. Tribal Sovereignty and the Federal Courts in the Modern Era

The Supreme Court's cases since 1959 have established some fundamental principles concerning the ongoing vitality of inherent tribal sovereignty as a doctrine of United States law. The courts have protected tribal jurisdiction, particularly in the civil context, in a number of cases raising and challenging tribal sovereignty.[220] In addition, the courts have issued a number of decisions limiting the ongoing impact of the 1950s termination era policies.[221] The court decisions have also been consistent in recognizing and protecting tribal sovereign immunity.[222] While in some cases the Court appeared to suggest that its analysis of tribal authority would focus on whether or not the federal government had delegated such authority to the tribe,[223] the general thrust of the case law has involved consideration of inherent tribal sovereignty as a source of authority for the exercise of tribal governmental powers.[224]

---

and Universities).

220 *See, e.g.*, Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195, 200–01 (1985) (upholding tribal civil regulatory authority over non-Indians on-reservation); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 132–56 (1982) (upholding tribal taxation authority over non-Indians on-reservation); Fisher v. District Court, 424 U.S. 382, 388 (1976) (holding that a tribal court has exclusive jurisdiction over an adoption proceeding involving tribal members on-reservation); Williams v. Lee, 358 U.S. 217, 222 (1959) (upholding tribal exclusive subject matter jurisdiction in on-reservation civil cases involving Indian defendants).

221 *See, e.g.*, California v. Cabazon Band of Mission Indians, 480 U.S. 202, 208 (1987) (holding that Public Law 280 did not extend state civil/regulatory laws onto the reservation); Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877, 891 (1986) (holding that Public Law 280 did not waive tribal sovereign immunity); Bryan v. Itasca County, 426 U.S. 373, 377 (1976) (holding that Public Law 280 did not extend state power to tax onto Indian lands); Menominee Tribe of Indians v. United States, 391 U.S. 404, 411 (1968) (holding that the termination of reservation did not terminate reserved hunting rights on those lands); Kimball v. Callahan, 493 F.2d 564, 569 (9th Cir. 1974) (same).

222 *See, e.g.*, Kiowa Tribe v. Manufacturing Techs., Inc., 523 U.S. 751, 760 (1998) (holding that the tribal sovereign immunity bar to lawsuits extends to off-reservation actions of tribes); Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe, 498 U.S. 505, 509–10 (1991) (upholding the doctrine that Indian tribes and tribal officials possess sovereign immunity from suit in state courts); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) ("Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers." (citations omitted)).

223 *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978) (striking down tribal criminal jurisdiction over non-Indians on reservation); United States v. Mazurie, 419 U.S. 544, 556–57 (1975) (upholding congressional authority to delegate regulatory authority over alcoholic beverage distribution to tribal governments); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172–73 (1973) (holding invalid state's attempt to tax income earned on-reservation by a reservation Indian).

224 *See, e.g.*, United States v. Wheeler, 435 U.S. 313, 330 (1978) (holding that successive

Tribal sovereignty, either as an inherent or a reserved power, remains one of the Court's touchstones. However, given the unique and anomalous relationship between tribes and the United States, and in particular the territorial situations created by the reservation of rights on ceded lands, as well as by allotment and termination,[225] the Court has not always used territoriality as a bright line marker in analyzing questions of tribal authority. *Williams v. Lee*,[226] the seminal case of the modern era of Indian law, often cited for its affirmation of tribal civil jurisdiction over non-Indians on-reservation, was decided not on the basis of a strict territorial analysis, but rather on the ground that the application of state jurisdiction in this instance would "infringe on the right of the Indians to govern themselves."[227]

The Court has articulated an analysis that first considers the full reservoir of inherent sovereign powers held by Indian tribes, then determines whether such powers had been diminished by subsequent actions, such as treaties or express congressional action. *Merrion v. Jicarilla Apache Tribe*,[228] for example, involved a challenge to the Jicarilla Apache Tribe's imposition of an oil and gas severance tax on non-Indian lessees operating on-reservation. The Court expressly determined that tribal authority over non-Indians on-reservation flows from the tribe's inherent sovereign authority[229]; the power to tax non-Indians "derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services."[230]

criminal prosecutions of a tribal member by the United States and the tribe is not double jeopardy because each is an independent sovereign authority). *Wheeler*, decided only two weeks after *Oliphant v. Suquamish Indian Tribe* (which appeared to discount, if not disregard altogether, the continuing relevance of the doctrine of inherent tribal sovereignty), held expressly that tribal criminal jurisdiction over tribal members flowed from the tribe's inherent sovereignty and not from a delegation of powers from the United States. *Id.* at 323. *See also* Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195, 200 (1985) (finding an inherent tribal sovereignty basis for tribal imposition of possessory interest and business activities taxes on mineral production within reservation); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 343–44 (1983) (finding exclusive tribal regulatory jurisdiction over on-reservation hunting and fishing a valid exercise of inherent tribal sovereignty).

225 *See supra* notes 202, 209.

226 358 U.S. 217 (1959).

227 *Id.* at 223. Fred Ragsdale described the *Williams* case as the basis for case law that involves what he refers to as the "deception of geography"—that is, the reliance by the courts on analysis based not on territorial sovereignty but rather on the political status of tribes. Fred Ragsdale, *The Deception of Geography*, *in* AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 63, 63–82 (Vine Deloria ed., 1985). Professor Ragsdale noted that the "infringement on self government" test is only vaguely defined and that the *Williams* opinion is based on a finding of a lack of subject matter jurisdiction in the state court over such cases. *Id.* at 70–73.

228 455 U.S. 130, 141 (1982) (holding that tribes' inherent authority to impose oil and gas severance taxes was not limited by congressional acts or the Commerce Clause).

229 *Id.* at 137.

230 The majority expressly rejected the contention in the dissent, *id.* at 171 (Stevens, J. dissenting), that tribal powers over non-Indians derives not from inherent sovereignty but merely from their ability, as landowners, to exclude. *Id.* at 144–48. *See also* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152 (1980) (upholding imposition of state sales tax to on-reservation sales of cigarettes to non-Indians). *But see* South Dakota v. Bourland, 508 U.S. 679, 688 (1983) (referring to tribal regulatory power over tribal

Even in those instances where the courts affirmed an action that infringed on tribal sovereignty, the opinions first looked at the reservoir of tribal sovereign powers and then determined that the tribes had subsequently been divested of such powers through treaty or statute, or through their dependent status.[231] Moreover, while land ownership has certainly been an important factor in the Court's consideration of the extent of tribal sovereign authority,[232] territoriality is not a necessarily dispositive factor in the decisions.[233] Instead, the Court's analysis involves a balancing test that looks at inherent sovereignty, the prerogatives of tribal self-government, and the particulars of the situation facing the various governing authorities.[234]

In *Montana v. United States*,[235] the Court held that the Crow Tribe could not exercise regulatory jurisdiction over non-Indian hunting and fishing on lands within the Crow reservation boundaries owned by non-Indians.[236] As a result of Indian tribes' dependent political status, there was a presumption against finding that tribal inherent sovereignty gave tribes jurisdiction over non-Indians on non-Indian lands.[237] However, the Court articulated two "exceptions," stating that the demonstration of the existence of either exception would rebut the presumption.[238] The first exception concerns situations where non-Indians have entered into consensual

lands as a "lesser included, incidental power" to the power to exclude).

231 *See, e.g.*, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 187 (1989) (holding that states may impose a royalty tax on minerals extracted by a non-Indian corporation on-reservation); Montana v. United States, 450 U.S. 544, 565 (1981) (finding presumption against tribal regulation of non-Indian hunting and fishing on lands within reservation borders that are owned by non-Indians or the state); Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. at 162 (holding that states may tax the tribal sale of cigarettes to non-Indians on-reservation); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211 (1978) (holding that tribes may not exercise criminal jurisdiction over non-Indians on-reservation because such authority is inconsistent with their dependent status).

232 *See* Montana v. United States, 450 U.S. at 563–67 (finding the presumption against tribal regulation of non-Indian hunting and fishing is based on whether tribe owns the lands on which such activities take place). As discussed *infra* notes 235–43 and accompanying text, *Montana v. United States* sets out a test based on inherent tribal sovereignty by which this ownership-based presumption can be overcome by a tribe.

233 *See* Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 443–44 (1989) (upholding Yakama Indian Nation's zoning authority over non-Indian owned lands within "closed" portion of reservation—an area where few non-Indians owned land and where the Tribe actually closed access to non-Indians).

234 *See* Strate v. A-1 Contractors, 520 U.S. 438, 441 (1997) (holding that the tribal court lacked jurisdiction over a traffic accident involving non-Indians on a state highway on-reservation); South Dakota v. Bourland, 508 U.S. 679, 689 (1993) (holding that the Cheyenne River Sioux Tribe was divested of regulatory jurisdiction over non-Indians on lands obtained by the U.S. government for a dam and reservoir project); Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. at 447–48 (holding that the Yakama Indian Nation lacked zoning authority over certain non-Indian lands on-reservation, but retained such authority over non-Indian lands in a "closed" area of the reservation); Montana v. United States, 450 U.S. at 565–66 (holding that inherent tribal sovereignty did not authorize a particular Crow regulation).

235 450 U.S. 544 (1981).

236 *Id.* at 565–66.

237 *Id.* at 563–65.

238 *Id.* at 565–66.

relationships with the tribe or its members.[239] The second exception is where the conduct that the tribe seeks to regulate "threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe."[240]

The second *Montana v. United States* exception requires courts to look carefully at the circumstances of the tribe, the conduct at issue, and the competing interest of the state involved. The *Montana v. United States* Court ultimately concluded that the Crow Tribe did not meet the exception and therefore was precluded from exercising regulatory jurisdiction over non-Indian hunting and fishing on non-Indian lands.[241] The Court noted, however, that the Tribe's complaint "did not allege that non-Indian hunting and fishing on fee lands imperil the subsistence or welfare of the Tribe," or that state regulatory efforts were insufficient to protect the fish and wildlife resources relied upon by the Tribe.[242] The Court suggests that given the appropriate showing of conduct threatening or having a direct effect on critical tribal interests, the presumption against tribal authority can be overcome and the tribe could exercise civil regulatory authority pursuant to its inherent sovereign powers over non-Indian activities on non-Indian lands.[243]

On the question of the exercise of tribal governmental authority off-reservation, the courts have concluded that tribal sovereignty may extend off-reservation in a number of situations. First, a tribal government's sovereign immunity extends to activities undertaken by the tribe outside its reservation boundaries.[244] Second, tribes may exercise adjudicatory jurisdiction under the Indian Child Welfare Act over Indian children domiciled off-reservation.[245] Third, tribes may exercise police powers of search and seizure off-reservation when carried out as part of the tribe's regulation of its members' reserved usufructuary rights.[246] Fourth, tribes have the right to regulate tribal members exercising fishing rights off-reservation.[247] Fifth, tribal air and water quality standards may be enforced

239 *Id.* at 565.

240 *Id.* at 566.

241 *Id.* at 567.

242 *Id.* at 566.

243 *See* Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 443–44 (1989) (upholding tribal zoning authority over non-Indian lands in "closed" part of reservation based on *Montana v. United States*'s second exception); Montana v. United States Envtl. Protection Agency (*Montana v. EPA*), 137 F.3d 1135 (9th Cir. 1998), *cert. denied*, 525 U.S. 921 (1998) (upholding EPA regulations authorizing enforcement of tribal standards against non-Indians); Albuquerque v. Browner, 97 F.3d 415, 419 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997) (upholding EPA's application of Isleta Pueblo's water quality standards against upstream municipality); *see also* discussion *infra* Part IV.C.

244 Kiowa Tribe v. Manufacturing Techs., Inc., 523 U.S. 751, 760 (1998).

245 Native Village of Venetie I.R.A. Council v. State of Alaska, 944 F.2d 548, 555–56 (9th Cir. 1991).

246 Settler v. Lameer, 507 F.2d 231, 239–40 (9th Cir. 1974) (affirming exercise of tribal police power off-reservation for search and seizure of tribal member's fishing gear). The implications of the *Settler* decision on tribal off-reservation participatory management right is discussed *infra* notes 339–44.

247 United States v. Michigan, 471 F. Supp 192, 271–74 (W.D. Mich. 1979); *see also* Lac Courte

against non-Indians off-reservation.[248] Last, tribes can participate as comanagers in a complex regional fisheries harvest management plan for the Columbia River.[249] As Professor Wilkinson noted,

> in the cases of the modern era the exceptions have proved far less important than the remarkable and crucial premise—that tribal powers will be measured initially by the sovereign authority that a tribe exercised, or might theoretically have exercised, in a time so different from our own as to be beyond the power of most of us to articulate.[250]

These cases, along with this "remarkable and crucial premise," are discussed in detail in the following section. It is this premise that provides the foundation for recognizing that tribal participation in off-reservation decision making concerning reserved rights resources is an aspect of inherent tribal sovereignty that the tribes reserved through the same agreements that reserved such off-reservation usufructuary rights.

IV. THE TRIBAL RIGHT TO PARTICIPATE IN MANAGEMENT AND POLICY DETERMINATIONS AFFECTING OFF-RESERVATION USUFRUCTUARY RESOURCES

The tribal right to participate as comanaging decision makers over their reserved rights resources would have been understood by the tribal treaty negotiators as part of the reservation of such rights. Further, the assertion of comanagement authority over off-reservation resource decisions is consistent with the subject-matter-based determinations concerning inherent tribal sovereignty.

The exercise of such tribal authority off-reservation has been recognized, protected, and in certain instances encouraged, by both Congress and the executive branch. Further, recognition and implementation of such authority is consistent with case law concerning tribal sovereignty and natural resources management. Finally, the federal trust responsibility toward the tribes includes not only a federal obligation to protect and enhance tribal resources, but also the obligation to foster tribal sovereignty and self-determination. Fulfilling the trust obligation in the off-reservation reserved rights context requires recognition and implementation of tribal comanagement authority.

Oreilles Band of Lake Superior Chippewa v. Wisconsin, 668 F. Supp. 1233, 1241 (W.D. Wisc. 1987).

248 *See* Arizona v. United States Envtl. Protection Agency, 151 F.3d 1205, 1211 (9th Cir. 1998) (upholding EPA's enforcement of tribal air quality standards against non-Indians off-reservation), *amended by* 170 F.3d 870 (9th Cir. 1999); *Montana v. EPA*, 137 F.3d at 1141 (upholding EPA regulations authorizing enforcement of tribal standards against non-Indians); Albuquerque v. Browner, 97 F.3d at 419 (upholding EPA's application of Isleta Pueblo's water quality standards against upstream municipality).

249 *See* United States v. Oregon, 699 F. Supp. 1456, 1458 (D. Or. 1988) (approving an amended comprehensive plan), *aff'd*, 913 F.2d 576 (9th Cir. 1990); A PLAN FOR MANAGING FISHERIES ON STOCKS ORIGINATING FROM THE COLUMBIA RIVER AND ITS TRIBUTARIES ABOVE BONNEVILLE DAM (1977); COLUMBIA RIVER FISH MANAGEMENT PLAN (1988); Blumm & Swift, *supra* note 8, at 460–62.

250 WILKINSON, *supra* note 207, at 63.

A. Canons of Treaty Construction and the Reservation of a Tribal Right to Participate in Management of Off-Reservation Resources

As discussed above, numerous tribes across the United States, through a variety of legal mechanisms, reserved to themselves the continuing right to harvest fish, wildlife, plants, and other resources on lands otherwise ceded by the tribes.[251] In construing the nature and scope of such rights, the courts have consistently applied the liberal canons of construction concerning Indian treaties, agreements, and statutes. Those canons require giving effect to the intentions and understandings of the Indians who were parties to the treaties or agreements, or the subject of the particular statute.[252] Courts have found, for example, that language in treaties with the tribes of the Pacific Northwest stating that tribal members could fish "in common with" non-Indian citizens at their usual and accustomed sites reserved to the tribes 1) a right of access that superceded that of non-Indians,[253] 2) rights to fish at usual and accustomed sites on lands ceded by other tribes,[254] 3) a right not to pay fees to exercise the fishing right,[255] 4) a right to nondiscriminatory state conservation regulations,[256] and 5) a right to a fifty-percent allocation of the fish runs.[257]

In considering the scope of tribal comanagement authority concerning such reserved rights, the tribes' understanding and intention must also be the starting point for analysis. As described above, prior to European contact, many of these tribes had developed management systems and institutional arrangements aimed at protecting against depletion of the resources resulting from human activity.[258] Indian tribes exercised such regulatory mechanisms as a function of their sovereign governing authority. Moreover, many of these regulatory mechanisms were intercommunity in nature; that is, they reflected a practice and understanding among indigenous communities that participatory management over shared

---

251 *See* discussion *supra* notes 18–20 and accompanying text.

252 *See* Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970) (interpreting a treaty broadly, as the Indians at the time of treaty making would have done); Tulee v. Washington, 315 U.S. 681, 684–85 (1942) (interpreting treaty terms in accordance with the meaning understood by Native American representatives to the treaty council); United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938) (same); Carpenter v. Shaw, 280 U.S. 363, 367 (1930) (construing treaty terms "in the sense in which they would naturally be understood by the Indians" at the time the treaty was adopted); Winters v. United States, 207 U.S. 564, 576–77 (1908) (applying the rule of treaty construction that ambiguities be resolved in favor of the Indians); United States v. Winans, 198 U.S. 371, 380–81 (1905) (construing a treaty as it was understood by the Indians, as evidenced by surrounding circumstances).

253 *Winans*, 198 U.S. at 378.

254 Seufert Bros. Co. v. United States, 249 U.S. 194, 198 (1919) (holding that the Yakama Nation's reserved rights extend to all usual and accustomed fishing sites, even those located on lands outside the boundaries of the lands ceded by the Nation).

255 *Tulee*, 315 U.S. at 684.

256 Department of Game v. Puyallup Tribe, 414 U.S. 44, 48 (1973).

257 Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 685 (1979).

258 *See* discussion *supra* notes 177–81 and accompanying text.

usufruct resources was a well-established component of inherent sovereign authority.[259]

As sovereigns whose authority was undiminished prior to European/United States contact, the usufruct-based tribes would have understood their inherent sovereignty to embrace the regulation and management of human activity that would impact their usufructuary resources. Moreover, tribes would have understood that the cession of territory did not mean complete abrogation of any regulatory function to protect their resources. Instead, given both the long history and development of shared management systems among various indigenous communities and the centrality of such usufructuary rights to the tribes, the tribes could be presumed to have understood that they would have a continuing right to participate in determinations concerning human activities that might harm their ability to exercise that right despite the transfer of ownership of their lands.

This presumption is analogous to the fundamental presumption underlying the Supreme Court's analysis of the Yakama Nation's reserved off-reservation fishing rights in *Winans*: that in reserving a right to continue to fish at certain sites outside the reservation, the Yakama Indian Nation reserved the right to prevent non-Indians from taking actions that would completely usurp the ability of the tribe to take fish at such sites.[260] In *Winans*, the Supreme Court's focus was not on a technical reading of the language of the relevant treaty, but rather on the practices of the Tribes at the time of the treaty, the understandings of the Tribes (including both those expressed in the treaty minutes and correspondence as well as those inferred from the circumstances), and the general intention behind the agreements from the Tribes' perspective.[261]

Moreover, *Winans* and its progeny, particularly *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n* (*Passenger Fishing Vessel*), established the proposition that unforeseen changed circumstances should not work to the detriment of the tribes in

---

259 *See* discussion *supra* Part III.A.

260 United States v. Winans, 198 U.S. 371, 382 (1905) ("In the actual taking of fish white men may not be confined to a spear or crude net, but it does not follow that they may construct and use a device which gives them exclusive possession of the fishing places, as it is admitted a fish wheel does.").

261 *Id.* at 380–81. The court stated:

> [I]t was decided [by the court below] that the Indians acquired no rights but what any inhabitant of the Territory or State would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more, and give the word of the Nation for more. And we have said we will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right, without regard to technical rules.' How the treaty in question was understood may be gathered from the circumstances.

Id. (internal citations omitted).

implementing their understanding of the treaties.[262] While acknowledging the fact that no one in 1855 could have foreseen the depletion of plentiful salmon runs and the intense competition for the salmon resource from the development of a non-Indian commercial fishery, the Court concluded that the tribe's reservation of a right to fish "in common" guaranteed the tribes up to a fifty-percent allocation of the fishery resource in the current situation.[263]

The argument for reading the relevant agreements as reserving a tribal right to participate in management decisions is even stronger. The tribes expressly reserved such use rights because of the critical importance of continued tribal access to, and use of, such resources for economic and spiritual sustenance.[264] Tribes had developed systems for preventing human activity from depleting resources.[265] These systems were often embedded in the spiritual and cultural practices and knowledge of the tribes.[266] Further, as described above, in many instances such systems were interjurisdictional in nature: clans, bands, and tribelets who shared hunting and fishing grounds also shared authority for the implementation of such systems.[267] For the tribes to whom such rights were of critical importance—important enough to reserve by express agreement with the United States—it follows that the right to participate as comanagers was reserved as an essential component of the right.

The tribal understanding of tribal sovereignty serves to bolster this point. Unlike the European-defined conception of sovereignty, which contains an almost exclusive focus on dominion and territoriality,[268] the tribal understanding of sovereignty manifests itself in a broader, more textured way. Sovereignty, in Indian country, has taken on rich and complex meanings, particularly in light of the unique relationship between Indian tribes and the United States.[269] At least one scholar of Indian law has described tribal sovereignty as containing both a legal/political

---

[262] *See id.* at 381 (holding that the treaty rights to fish at usual and accustomed places survive the subsequent private acquisition of land bordering those places); *see also Passenger Fishing Vessel*, 443 U.S. at 668–70, 674–84.

[263] *Passenger Fishing Vessel*, 443 U.S. at 684–87.

[264] *See* Menominee Tribe v. United States, 391 U.S. 404, 405–06 (1968) (finding that the "essence" of the Menominee Treaty was to reserve ability to continue hunting lifestyle on lands known to be rich with game); *Winans*, 198 U.S. at 391 (explaining that fishing rights are "not much less necessary to the existence of the Indians than the atmosphere they breathed"); Kimball v. Callahan, 493 F.2d 564, 566 (9th Cir. 1974) (discussing "highly significant role" that hunting and trapping play in the lives of the Klamath tribal members and citing Klamath & Modoc Tribes v. Maison, 139 F. Supp. 634 (D. Or. 1956)).

[265] *See* discussion *supra* notes 166–81 and accompanying text.

[266] *See* Vecsey, *supra* note 177, at 1–37 (describing role of religious beliefs and practices in environmental protection regimes of various tribes).

[267] *See* discussion *supra* notes 177–81 and accompanying text.

[268] *See* FOWLER & BUNCK, *supra* note 161, at 33–62 (discussing the characteristics of a sovereign state).

[269] *See* United States v. Kagama, 118 U.S. 375, 381–82 (1886) (describing United States-Indian tribal relationship as "an anomalous one and of a complex character"); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831) (stating that the relationship between tribes and United States was "marked by peculiar and cardinal distinctions which exist no where else").

manifestation and a cultural/spiritual dimension.[270] Thus, while sovereignty still retains its force as a concept meaning inherent authority and dominion, in Indian country it has also come to embody a notion of cultural integrity—the means through which a tribal people organize to care for themselves, their traditions, their resources, and their legal and political rights.[271]

The practice of tribal sovereignty encompasses the spectrum of the affairs of an organized people and their territory: provision of education and health services, law development and enforcement, overseeing economic development, cultural resource protection, and on-reservation land and resource management. In addition, due to the complex relationship between Indian tribes and the United States, the exercise of tribal sovereignty in certain instances reaches outside the borders of the reservations, where the tribes provide governmental services to members living off-reservation, regulate the exercise of off-reservation hunting and fishing rights, exercise jurisdiction over child custody proceedings, and protect and control the disposition of Indian burials and burial goods.[272]

Moreover, this notion of sovereignty as involving caring for a people, and protecting the central economic, political, and cultural well being of that people, has begun to find currency in the writings of sovereignty theorists outside the tribal sovereignty context.[273] Seeing the exercise and practice of sovereignty as a matter of caring, reciprocity, and respect requires giving force and effect to tribal sovereignty in the off-reservation context: "Sovereignty . . . serves to remind states that when an issue arises touching upon another sovereign's territory or people the international community expects the sovereigns to deal with one another *rather than attempt to resolve the matter unilaterally*."[274]

It is this understanding of sovereignty that is at the heart of the tribes' assertion of comanagement authority off-reservation: that decisions of critical importance to the tribes should not be made unilaterally by the United States, but rather through a process of mutual consideration, analysis, and respect. It is an understanding that was manifest at the time the treaties and other agreements were negotiated and signed, and it is an understanding that continues through the present. The canons of Indian treaty interpretation require giving effect to such understanding.[275] As described in the sections below, existing United States law and policy have

---

270 WILKINS, *supra* note 162, at 20–21.

271 *See* Deloria, Jr., *supra* note 161, at 121–23; *see also* GERALD R. ALFRED, HEEDING THE VOICES OF OUR ANCESTORS: KAHNAWAKE MOHAWK POLITICS AND THE RISE OF NATIVE NATIONALISM 102–03 (1995). Professor Alfred describes the "indigenous reformulation" of sovereignty as follows: "It is based . . . upon a mutual respect among communities for the political and cultural imperatives of nationhood—a flexible sharing of resources and responsibilities in the act of maintaining the distinctiveness of each community." *Id.* at 102.

272 *See* discussion *infra* Part IV.B.

273 *See, e.g.*, LESLIE L. BLAKE, SOVEREIGNTY: POWER BEYOND POLITICS 6 (1988) ("Sovereignty connotes a degree of care over people, in their spiritual, cultural and physical lives."); FOWLER & BUNCK, *supra* note 161, at 12–13 (discussing the international impacts of present-day assertions of sovereignty).

274 FOWLER & BUNCK, *supra* note 161, at 14 (emphasis added).

275 *See* discussion *supra* notes 48–56 and accompanying text.

given effect to this understanding of tribal sovereignty in a number of contexts, and they support the assertion and exercise of a tribal comanagement right for critical off-reservation resources.

B. Congressional and Executive Policy of Self-Determination

Tribal participation in management of its off-reservation and transboundary resources is consistent with the federal policy of tribal self-determination, which was initiated in the early 1970s and has continued as federal policy through numerous changes in administrations and congressional leadership.[276] The cornerstone of this policy is the Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA),[277] which authorized tribes to contract with the Indian Health Service and the Bureau of Indian Affairs to assume the operation of federal programs—from health care and education to employment counseling and social services—for the benefit of tribal members.[278] The policy behind the ISDEAA demonstrated a commitment to tribal sovereign governing authority according to tribal norms and practices even for programs operated off-reservation.[279] The central provisions of the ISDEAA embody this conceptual framework, implementing *tribal* authority in areas of critical importance to the tribes where only the federal government had previously exercised such authority or provided such services.[280] Because, as a result of allotment, termination, and relocation, many tribal members live off-reservation,[281] a number of such programs operated and served tribal populations outside reservation

[276] *See* discussion *supra* notes 209–19 and accompanying text.

[277] Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 450–450n, 455–458e (1994 & Supp. III 1997)).

[278] *Id*.; *see* 25 U.S.C. § 450f (1994 & Supp. III 1997) (setting out requirements and procedures for tribes to take over federal programs operated for the benefit of Indians pursuant to "self-determination" contracts).

[279] The stated goals of the ISDEAA include strengthening tribal governments and enhancing their ability to provide services to their people in their capacity as sovereign, self-determining governments. 25 U.S.C. § 450 (1994 & Supp. III 1997).

[280] While this system is not full, independent nationhood, the policy trend continues toward greater, rather than lesser, tribal autonomy. Congress amended the ISDEAA in 1988 with provisions aimed at curtailing agency discretion in turning programs over to tribes. Indian Self-Determination Amendment of 1988, Pub. L. No. 100-472, 102 Stat. 2285 (codified as amended at 5 U.S.C. § 3372 (1994 & Supp. III 1997) and 25 U.S.C. §§ 450j–1, 450m–1 (1994 & Supp. III 1997)). More recently, the federal government has been moving forward with a program called "tribal self-governance," which authorizes tribes to develop their own priorities and institutions for the expenditure of contract funds. Indian Self-Determination Act Amendment of 1994, Pub. L. No. 103-413, 198 Stat. 4250 (codified at 25 U.S.C. § 458aa–hh (1994)) (requiring the Department of the Interior to establish and carry out self-governance program); Tribal Self-Governance Demonstration Project Act of 1991, Pub. L. No. 102-184, 105 Stat. 1278 (codified at 25 U.S.C. § 450f (1994)) (extending the ISDEAA program for three years).

[281] The termination of tribal reservations left many tribes without a land base. Many tribal members moved away from the tribes' ancestral homelands. During this same period, the federal government also engaged in a policy of relocation, through which reservation Indians were moved into various urban centers away from their reservations and homelands. COHEN, *supra* note 18, at 169–70.

boundaries. Therefore, many Indian tribes operate ISDEAA contracted programs and facilities outside reservation boundaries.[282]

Some of the federal programs taken over by tribes involve the oversight and management of tribal natural resources.[283] These resources are part and parcel of the rights reserved to tribes through the various government-to-government agreements establishing tribal reservations. It is the rights to these same resources, established through the same legal mechanisms and subject to the same level of legal protection, that are at issue in the protection of off-reservation reserved rights. The ISDEAA thus recognizes tribal ability and competence in critical government decision making and scientific management of natural resources. The ISDEAA authorizes the tribal assumption of a once exclusive federal role in the protection and management of natural resources, even though many of these on-reservation resources are transboundary resources and, therefore, will affect non-Indian use of resources off-reservation. Moreover, as discussed above, the ISDEAA itself recognizes and authorizes the exercise of tribal sovereign authority outside reservation boundaries.[284] The ISDEAA's policy of empowering, enhancing, and protecting tribal institutions, tribal authority, and tribal decision making—displacing the exercise of federal authority and provision of services—does not stop at the reservation borders when the issues involved are of critical importance to the tribes.

The Indian Child Welfare Act of 1978 (ICWA),[285] which addressed the well-documented problem of the unwarranted removal of Indian children from their families by non-Indian state courts and child welfare agencies, continued the self-determination policy of recognizing the necessity of tribal

---

[282] In the case of terminated and subsequently "restored" tribes whose land base was lost completely, Congress provided for the operation of ISDEAA programs off-reservation by the designation of "service areas" for such tribes, that would operate in lieu of a reservation for determining tribal eligibility for federal services. *See, e.g.*, Coquille Indian Tribe Restoration Act, Pub. L. No. 101-42, 103 Stat. 91 (1989) (codified at 25 U.S.C. §§ 715(5), 715a (1994)). For the purposes of federal services to Indians who lived on or near a reservation, residing within such service areas would be deemed to be residing on a reservation. *Id.* The federally run programs that provide such services and benefits are those programs that the tribes can administer themselves under the ISDEAA. 25 U.S.C. §§ 450b(j), 450f (1994).

[283] For example, the Klamath Tribes operate a Department of Natural Resources that has the responsibility for monitoring and protecting the off-reservation reserved rights resources of the Klamath Tribes. The program is operated under an ISDEAA contract with the United States Department of the Interior. Email Interview with Bud Ullman, Klamath Tribes Attorney (July 29, 1999). The Coquille Indian Tribe, located on the southern coast of Oregon, recently acquired 5,000 acres of timberland, the management of which is now undertaken by the Tribe via an ISDEAA contract with the Bureau of Indian Affairs. Email Interview with Brett Kenney, Coquille Indian Tribe Attorney (July 29, 1999). The Columbia River Inter-Tribal Fish Commission (CRITFC) is a consortium of four tribes who have reserved rights to fish on the Columbia River; CRITFC carries out various governmental responsibilities for regulating and protecting the exercise of these rights. *See generally* Columbia River Inter-Tribal Fish Comm'n, *Columbia River Inter-Tribal Fish Commission* (visited Mar. 11, 2000), <http://www.critfc.org> (detailing the group's current projects and studies, as well as listing its headquarters as located in Portland, Oregon and its fisheries enforcement offices located in Hood River, Oregon; both sites are off-reservation).

[284] *See* discussion *supra* notes 277–82 and accompanying text.

[285] 25 U.S.C. §§ 1901–1963 (1994 & Supp. IV 1998).

sovereign authority.[286] The ICWA commits funds for the development of tribal child welfare institutions, so that, wherever possible, tribes can assume responsibility over matters involving Indian children.[287] Moreover, the ICWA expressly commits funds to *off-reservation* tribal child welfare programs.[288]

The jurisdictional provisions of the ICWA, however, are perhaps the most powerful example of the insertion of tribal government and tribal institutions into the critical decision-making role concerning Indian children, even where those children are found off-reservation. Like the ISDEAA, the ICWA provides for the displacement of existing governing institutions—in this case state child welfare agencies and state courts—by tribal institutions.[289] By adopting these provisions, Congress expressly restricted the exercise of state jurisdiction over certain child custody matters, displacing the states from their traditional role as parens patriae for juveniles in need of court supervision.[290]

First, the ICWA provides for *exclusive* tribal court jurisdiction over child custody matters involving Indian children when the children are domiciled on-reservation.[291] The Supreme Court subsequently held that since the ICWA was a broad, remedial act, the definition of "domicile" under the Act would not be subject to state law, but instead would be a matter of federal common law, further displacing state authority.[292] Second, for those cases in which the Indian children involved are domiciled *off-reservation*, the ICWA establishes a presumption in favor of tribal jurisdiction.[293] This provision authorizes tribes to assume jurisdiction over juvenile dependency cases arising off-reservation in the absence of "good cause to the

286 In addition to the provisions supporting the exercise of tribal authority (discussed below), the ICWA also incorporated a number of specific restrictions on the process by which state agencies and state courts could remove Indian children from their homes, and it set out specific preferences for placement of children that are removed. *See id.* § 1912(e), (f) (establishing higher burdens on states for, respectively, placing Indian children in foster care and in terminating parental rights of parents of Indian children); *id.* § 1915(a)–(b) (establishing placement preferences for Indian children in, respectively, adoptions and foster care placements).

287 *Id.* §§ 1931–1934.

288 *Id.* § 1932.

289 *See id.* § 1911 (recognizing tribal court forums and tribal involvement in Indian child custody proceedings).

290 *See* In re Sayeh R., 693 N.E.2d 724, 726 (N.Y. 1997) (describing duty imposed on state by doctrine of parens patriae); In re Roger S., 5 Cal. Rptr. 2d 208, 211 (Cal. Ct. App. 1992) (holding state juvenile court to special responsibility to look at totality of child's circumstances in exercising its duty as parens patriae).

291 25 U.S.C. § 1911(a) (1994).

292 Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 43–47 (1989). In *Holyfield*, the Court granted jurisdiction to the Choctaw Tribe over an adoption involving a Choctaw child, even though the parents had moved off the reservation in a deliberate attempt to avoid tribal jurisdiction. *Id.* at 39. The Court emphasized the importance of tribal jurisdiction in the ICWA framework and expressed faith in the competence of tribal decision makers, noting that the ICWA requires the Court to "'defer to the experience, wisdom, and compassion of the [Choctaw] tribal courts to fashion an appropriate remedy.'" *Id.* at 54 (quoting In the Matter of the Adoption of Halloway, 732 P.2d 962, 972 (Utah 1986)).

293 25 U.S.C. § 1911(b) (1994).

contrary."[294] State courts therefore lose the presumption of jurisdiction even over cases that occur within the state's territory and involve state citizens. Third, even where state courts retain jurisdiction, tribes have an unconditional right to intervene and participate as full parties in such proceedings.[295]

Tribal self-determination policy has also resulted in the recognition of an off-reservation tribal comanagement role over resources of cultural and spiritual significance to Indian tribes. The Archaeological Resources Protection Act of 1979 (ARPA)[296] requires notice to and consultation with tribes concerning permits issued on federal lands for the excavation of archaeological sites that may be of cultural or religious significance to an Indian tribe.[297] The implementing regulations for ARPA contain specific provisions requiring substantial tribal participation in granting permits and imposing conditions on such permits.[298] The regulations require federal land managers to notify an Indian tribe when an application is submitted for a permit to excavate or otherwise disturb archaeological resources that have cultural or religious significance to that tribe.[299] The regulations also authorize the federal land manager, upon the request of the tribe, to meet with tribal representatives in order to develop avoidance and mitigation measures for the protection of the resource.[300] Underscoring the importance of the tribal role, the regulations state that any such measures developed during these meetings must be included in the terms and conditions of any permit issued.[301]

The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA)[302] provides even greater tribal authority over off-reservation resources.[303] NAGPRA expressly affirms the role of tribes as sovereigns in

294 *Id.*

295 *Id.* § 1911(c); *see* Lane County Juvenile Dep't v. Shuey, 850 P.2d 378, 381 (Or. Ct. App. 1993) (explaining a state court requirement that parties be represented by counsel does not prevent tribe from appearing through its social services director, because state court procedural requirements should not act as a bar to full right of tribal intervention under the ICWA).

296 16 U.S.C. §§ 470aa–470mm (1994).

297 *Id.* § 470cc(c).

298 Uniform implementing regulations were adopted by the Secretary of the Interior, 43 C.F.R. §§ 7.1–7.21 (1999), the United States Forest Service, 36 C.F.R. §§ 296.1–296.21 (1999), the Secretary of Defense, 32 C.F.R. §§ 229.1–229.21 (1999), and the Tennessee Valley Authority, 18 C.F.R. §§ 1312.1–1312.21 (1999).

299 43 C.F.R. § 7.7(a) (1999). Federal land managers are required to determine which tribes have historic or aboriginal ties to the land under their jurisdiction, so that appropriate contact can be made regarding the cultural or religious significance of a particular site. *Id.* § 7.7(b).

300 *Id.* §§ 7.7(a)(3), 7.9(c).

301 *Id.*

302 25 U.S.C. §§ 3001–3013 (1994).

303 NAGPRA grew out of a concerted effort by Indian tribes to recover the human remains of hundreds of thousands of dead Native Americans that had come into the possession of various governmental agencies, museums, and educational institutions, as well as to implement safeguards to prevent the continued removal of Native dead, associated funerary objects, Native sacred objects, and other items of cultural patrimony. *See* Jack F. Trope & Walter R. Echo-hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 39–41 (1992).

making determinations concerning the ownership and disposition of the human remains and other culturally and spiritually significant objects covered by the Act.[304]

In addition to extensive provisions that provide for the return of human remains and other covered objects to the tribes,[305] NAGPRA expressly requires a substantive tribal role in decision making that affects off-reservation resources of significance to Indian tribes. This requirement recognizes and protects the overriding tribal concern in such resources as well as the right to a participatory tribal role in their management and protection.[306]

The ISDEAA, the ICWA, ARPA, and NAGPRA demonstrate Congress's commitment to ensuring a tribal role in management and decision making concerning resources of critical importance to the tribes. These statutes and the policies that underlay them indicate strong congressional support for the

---

[304] 25 U.S.C. § 3002(a) (1994) (containing tribal ownership and disposition provisions); *id.* § 3003(b) (requiring federal agencies and museums to consult with tribes when doing required inventory of holdings). Trope and Echo-hawk note that the legal authority for the "decision-making" and ownership authority set out in NAGPRA is derived, in significant part, from existing federal Indian law doctrine, including inherent tribal sovereignty and the canons of Indian treaty construction. Trope & Echo-hawk, *supra* note 303, at 50–52.

[305] NAGPRA requires that federal agencies, museums, state and local governments, and educational institutions return Indian human remains and associated funerary objects to the culturally affiliated Indian tribe (or to direct lineal descendants) upon request. 25 U.S.C. §§ 3001(7)–(8), 3005(a) (1994); *see* S. REP. NO. 101-473, at 17 (1990) (discussing a repatriation provision of the Senate bill that did not pass), H.R. REP. NO. 101-877, at 14 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4367, 4373 (defining cultural affiliation and sacred objects). Trope & Echo-hawk state:

> [I]t may be extremely difficult, in many instances, for claimants to trace an item from modern Indian tribes to prehistoric remains without some reasonable gaps in the historic or prehistoric record. In such instances, a finding of cultural affiliation should be based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the connection between the claimant and the material being claimed and should not be precluded solely because of some gaps in the record.

Trope & Echo-hawk, *supra* note 303, at 63. NAGPRA also recognizes continued tribal ownership and control of covered items that remain on federal lands. 25 U.S.C. § 3002(a) (1994). The tribal role in protecting such items is set out expressly: when any land-disturbing activity results in the inadvertent discovery of such items, the activity must temporarily cease while tribes are notified and consulted in order to determine how to protect and deal with such items. 25 U.S.C. § 3002(d) (1994). Senator John McCain (R-Ariz.), one of the chief sponsors of the legislation, noted that it was Congress's intent in enacting this provision to "provide a process whereby Indian tribes and Native Hawaiian organizations have an opportunity *to intervene in development activity on Federal or tribal lands* . . . to safeguard Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony." S. REP. NO. 101-473, at 21.

[306] In addition, many states have recognized tribal interests in such resources and have adopted statutes addressing many of the same issues addressed by NAGPRA. The State of Oregon, for example, has enacted legislation requiring notification to and consultation with tribes prior to any disturbance of an Indian burial, as well as providing for repatriation of human remains and associated objects to the appropriate tribe. OR. REV. STAT. §§ 97.740–97.760, 358.940 (1999); *see generally* Catherine Bergin Yalung & Laurel I. Wala, *A Survey of State Repatriation and Burial Protection Statutes*, 24 ARIZ. ST. L.J. 419 (1992) (discussing Native American burial protection statutes from sixteen different states).

exercise of such sovereign authority concerning matters, persons, and property outside tribal reservation boundaries. As discussed in the next section, Congress and the executive branch have expressly provided for a tribal decision-making role concerning transboundary natural resources.

C. The Clean Air Act and the Clean Water Act: Tribal Sovereignty and Transboundary Resources

Section 7601 of the Clean Air Act[307] and section 1377 of the Clean Water Act (CWA)[308] both contain provisions recognizing and implementing the role of tribal sovereign authority in the management of two transboundary natural resources of fundamental importance to tribes. The exercise of such authority and its effect outside the reservation was contemplated by Congress, implemented by EPA, and upheld by the federal courts.

In 1972, and then with substantial amendments in 1977, Congress adopted a comprehensive statutory scheme for dealing with water pollution that has become known as the Clean Water Act.[309] To meet its stated goal of "restor[ing] and maintain[ing] the chemical, physical and biological integrity of the nation's waters,"[310] the CWA established a system of shared responsibility between the federal government (acting through EPA) and the states. Under the CWA, EPA establishes "effluent limitations" that restrict the quantities, rates, and concentrations of specified substances that are discharged from point sources.[311] States are responsible for establishing the desired condition for each waterway by designating "water quality standards" for the waterways within their jurisdiction.[312]

The means of enforcing these standards and limitations is the National Pollution Discharge Elimination System (NPDES), a permit system for point source pollution.[313] The NPDES program is set up specifically to deal with transboundary movement of water and water pollutants: NPDES permit programs and the issuance of permits in upstream states must meet certain procedural and substantive protections for downstream states.[314] EPA has

---

307 42 U.S.C. § 7601(d)(1) (1994 & Supp. III 1997).

308 33 U.S.C. §1377(e) (1994 & Supp. III 1997).

309 *See* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1387 (1994 & Supp. III 1997)); Federal Water Pollution Control Act Amendments of 1977, Pub. L. No. 95-217, 91 Stat. 1566–1611 (codified at 33 U.S.C. §§ 1251–1387 (1994 & Supp. III 1997)).

310 33 U.S.C. § 1251(a) (1994).

311 *See id.* §§ 1311, 1314 (providing information and guidelines for EPA establishment of effluent limitations).

312 *Id.* § 1313. State water quality standards supplement the effluent limitations; in certain instances, discharges permitted under federal effluent limitations may be restricted if necessary to protect the state-designated water quality for the waterway at issue. *See* Arkansas v. Oklahoma, 503 U.S. 91, 101 (1992) (citing Environmental Protection Act v. California *ex rel.* State Water Resources Control Bd., 426 U.S. 200, 205 (1976)).

313 33 U.S.C. §§ 1311(a), 1342 (1994). The Act authorizes two types of NPDES permitting systems: a federal program administered by EPA and state permit programs approved by EPA.

314 *Id.* § 1342(b)(3), (5) (establishing that a downstream state whose water quality standards may be adversely impacted by the issuance of an NPDES permit by an upstream state has a

the authority under the CWA to prohibit discharges authorized by an upstream state permit if EPA determines that such discharges would not comply with the downstream state standards.[315]

In 1984 EPA adopted a policy recognizing tribal governments—not the states—as the appropriate authorities for implementing federal environmental laws on Indian reservations, including the Clean Water Act.[316] In 1987 Congress amended the Clean Water Act specifically to authorize EPA to "treat an Indian tribe as a State" ("treatment as state" or TAS status) for certain specified CWA purposes,[317] and EPA subsequently adopted implementing regulations.[318]

The regulations allow for the exercise of tribal authority in two critical aspects of the CWA scheme. First, tribes can implement their own on-reservation NPDES permitting system.[319] EPA made the determination that water quality is an issue that is significant to the health and welfare of an Indian tribe under the *Montana v. United States* exceptions,[320] and therefore that tribal permitting authority extends to non-Indians on non-Indian lands within the reservation boundaries.[321] Second, tribes can establish water quality standards for reservation waterways.[322] As with states in the CWA scheme, the establishment of tribal standards gives tribes certain procedural and substantive rights—enforced by EPA—against upstream discharges that will impact water quality in tribal waterways. This aspect of the CWA scheme permits the exercise of tribal authority to regulate non-Indians—including state and municipal governments—outside the reservation boundaries. Both aspects of tribal authority under the CWA have been upheld under court challenge.[323]

---

right to notice and comment in the permitting process); *id.* § 1342(d)(4) (establishing that EPA may prohibit the upstream state from issuing the permit if it would fall outside "the guidelines and requirements" of the CWA).

315 *See* Arkansas v. Oklahoma, 503 U.S. at 104–07 (discussing 40 C.F.R. § 122.4(d) (1991), regarding conditions for NPDES permits).

316 U.S. ENVTL. PROTECTION AGENCY, POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS (1984) (available online at <http://www.epa.gov/indian/1984>); *see* James M. Grijalva, *Tribal Governmental Regulation of Non-Indian Polluters of Reservation Waters*, 71 N.D. L. REV. 433, 435–38 (1995) (discussing EPA policy toward tribal environmental enforcement).

317 Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 76 (codified at 33 U.S.C. § 1377 (1994)).

318 *See* 40 C.F.R. § 131.8(a) (1999) (Clean Water Act "treatment as state" (TAS) provisions). For a detailed discussion of the background and application of these regulations, see Grijalva, *supra* note 316, at 438–55.

319 33 U.S.C. § 1377(e) (1994).

320 *See* discussion *supra* notes 235–43 and accompanying text.

321 *See* Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,878 (Dec. 12, 1991). As Professor Grijalva describes, EPA determined that Congress had not delegated wholesale federal authority to tribes via the TAS provision, but rather required a case-by-case analysis in light of controlling Supreme Court precedent regarding civil regulatory authority of tribal governments. Grijalva, *supra* note 316, at 444–45.

322 33 U.S.C. § 1377(e) (1994).

323 *See infra* notes 324–29 and accompanying texts.

In New Mexico, EPA granted CWA regulatory status to the Isleta Pueblo, an Indian tribe downstream from the City of Albuquerque, and the Tribe subsequently adopted water quality standards more stringent than those of the State of New Mexico.[324] EPA implemented the Isleta Pueblo's water quality standards and required Albuquerque's waste water treatment facility to comply by revising the facility's NPDES permit. Albuquerque challenged the authority of EPA to implement more stringent tribal standards against non-Indian entities off-reservation.[325] The court upheld EPA's approval of the Tribe's standards, expressly affirming EPA's determination that the Isleta Pueblo's right to adopt water quality standards more stringent than those of an upstream state—and to have those standards applied to non-Indians off-reservation—was rooted in the tribe's "inherent sovereignty."[326]

In a similar case, the Ninth Circuit upheld EPA's determination to implement the water quality standards adopted by the Salish and Kootenai Tribes on the Flathead Indian Reservation in Montana.[327] In this case, the state and private landowners (both on- and off-reservation) directly attacked EPA regulations—which contain strong presumptions in favor of an EPA finding of tribal authority—on the grounds that EPA's regulations and its decision were inconsistent with the doctrine of inherent tribal sovereignty set out in *Montana v. United States*.[328] The court rejected the challenge, upholding EPA's general determination that protection of the quality of on-reservation water supplies presumptively met the second *Montana v. United States* exception concerning the health and welfare of Indian tribes.[329]

The Clean Air Act contains analogous provisions for the exercise of tribal authority over on-reservation air quality[330]—authority that in many instances will affect off-reservation activities. These provisions of the Clean Air Act have been applied in a similar manner as the analogous provisions of the Clean Water Act and have survived a similar legal challenge in *Arizona v. United States Environmental Protection Agency* (*Arizona v. EPA*).[331] EPA granted the Yavapai-Apache Tribe, located near Phoenix, regulatory status under the Clean Air Act, and the Tribe adopted air quality standards more stringent than Arizona's. EPA's implementation of those standards

---

[324] Albuquerque v. Browner, 97 F.3d 415, 419 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997).

[325] *Id.*

[326] *Id.* at 423. The court, however, also noted that such a situation did not involve the Tribe regulating the City of Albuquerque, but rather that EPA was "exercising its own authority in issuing NPDES permits in compliance with downstream state and tribal water quality standards." *Id.*

[327] Montana v. Environmental Protection Agency, 137 F.3d 1135 (9th Cir.), *cert. denied*, 525 U.S. 921 (1998).

[328] *Id.* at 1140 (citing Montana v. United States, 450 U.S. 544 (1981)). The *Montana v. United States* test is discussed *supra* at notes 235–43 and accompanying text.

[329] *Id.* at 1140–41.

[330] 42 U.S.C. § 7601(d)(1) (1994); *see generally* William H. Gelles, *Tribal Regulatory Authority Under the Clean Air Act*, 3 ENVTL. LAW. 363 (1997) (examining tribal regulatory jurisdiction under the CAA and EPA's proposed rule regarding tribal air quality management).

[331] 151 F.3d 1205 (9th Cir. 1998), *as amended*, 170 F.3d 870 (9th Cir. 1999).

would require significant changes in certain of Phoenix's industries, which had been permitted to operate under the less stringent standards. EPA's decision to implement those standards against the City of Phoenix was upheld by the Ninth Circuit.[332]

The Ninth Circuit's opinion in *Arizona v. EPA* relied heavily on its earlier decision in *Nance v. Environmental Protection Agency*,[333] in which the court upheld EPA's enforcement of the Northern Cheyenne Tribe's redesignation of its air quality standards. In *Nance*, certain plaintiffs challenged EPA's authority under the Clean Air Act to treat tribes as states, and, in addition, asserted that if the court found that the CAA contained provisions recognizing TAS authority, then the court should strike down such provisions as unconstitutional delegations of authority to Indian tribes to affect lands used by non-Indians off-reservation.[334] *Nance* involved a number of plaintiffs and intervenors whose off-reservation interests would potentially be affected by EPA's enforcement of the Northern Cheyenne redesignation, including the neighboring Crow Indian Tribe, which was concerned about potential restrictions to its own reservation mining operations.[335] The court rejected these arguments, expressly relying on the doctrine of inherent tribal sovereignty as sufficient grounds to support such delegation of authority.[336]

As with the self-determination legislation, the Clean Water Act and the Clean Air Act demonstrate congressional and executive branch commitment to tribal sovereignty and decision-making capacity concerning resources critical to the tribes, even where this capacity would affect non-Indians off-reservation. Moreover, the courts have repeatedly upheld this recognition and implementation of such tribal decision-making authority. As discussed in the next section, the courts have also affirmed the exercise of off-reservation sovereign authority where such authority is an incident of, or otherwise necessary to, the exercise and protection of tribal reserved rights.

D. Judicial Recognition of Off-Reservation Authority and Comanagement

There is substantial support in the case law for the exercise of tribal sovereignty in an off-reservation decision-making context when the decisions made would have an affect on the tribes' reserved rights. This section first analyzes the cases dealing with off-reservation authority as an

---

[332] *Id.* at 1213. The court in fact noted that the regulatory framework established by the Clean Air Act gives even greater deference to tribal governmental standard setting than the Clean Water Act, in that EPA's discretion to reject or not apply tribal standards is rigorously circumscribed. *Id.* at 1211.

[333] 645 F.2d 701 (9th Cir. 1981).

[334] *Id.* at 712–15. *Nance* was decided prior to the Clean Air Act amendments expressly providing for treating tribes as states.

[335] *Id.* at 705–06. Not all plaintiffs or plaintiff-intervenors raised all the same issues. *Id.* at 712.

[336] *Id.* at 713–14.

incident of reserved rights and then discusses those cases addressing tribal comanagement authority off-reservation.

1. Extra-Territorial Tribal Authority as a Reserved Right

As discussed above,[337] the courts have repeatedly recognized the validity of the exercise of tribal governmental authority off-reservation.[338] The courts have also recognized the exercise of tribal sovereign authority off-reservation in matters involving the continuing use and protection of natural resources tied to their reserved rights as an incident of such reserved rights. The Ninth Circuit upheld the exercise of regulatory jurisdiction of off-reservation fishing as a part of the Yakama Indian Nation's reserved rights to fish outside their reservation boundaries in *Settler v. Lameer*.[339] That case involved a challenge to the authority of Yakama tribal police to exercise governmental police powers—the right to arrest persons and to seize property—at off-reservation locations along the Columbia River where tribal members exercised reserved treaty rights.[340] The Ninth Circuit held that the Tribe's reservation of fishing rights off-reservation included, by implication, the right to regulate the exercise of such rights by tribal members, and it expressly rejected the Settlers' contention that the Treaty of 1855 had "relinquished" any and all tribal authority off-reservation.[341] The court also rejected the state's argument that the state possessed exclusive authority to regulate fishing outside reservation boundaries, basing its holding on the tribal signatories' likely understanding of the Treaty:

> The Treaty expressly reserved to the confederated tribes and bands of Indians 'the right of taking fish at all usual and accustomed places, in common with

337 *See* discussion *supra* Part IV.B, C.

338 In a decision in early 1998, the Supreme Court held that a tribe's sovereign immunity from suit—an aspect of the tribe's inherent sovereignty and an essential recognition of its governmental status—follows the tribal government *even where that government is being sued for actions taken outside its reservation boundaries.* Kiowa Tribe v. Mfg. Tech., Inc., 523 U.S. 751, 760 (1998). *Kiowa Tribe*'s recognition of extraterritorial tribal sovereign immunity supports the understanding that tribal actions within and without their territory are actions of a sovereign government—an extraterritoriality that is an attribute of sovereignty the individual states do not possess. *See* Nevada v. Hall, 440 U.S. 410, 414 (1979) (holding that Nevada's sovereign immunity from suit does not shield it from suit in California's courts for a cause of action arising within California's borders).

339 507 F.2d 231, 238 (9th Cir. 1974).

340 Alvin and Mary Settler were both members of the Yakama Indian Nation who were convicted by the tribal court for violating the Nation's regulations governing reserved rights fishing at the Nation's "usual and accustomed" sites along the Columbia River. *Id.* at 233–34. Citations had been issued to the Settlers by tribal police patrolling the sites, which are located outside the Yakama Nation's reservation boundaries. *Id.* In addition, some of Mary Settler's fishing equipment was seized by tribal police during her arrest at the off-reservation fishing site. *Id.* The Settlers challenged their conviction in the tribal court by filing habeas corpus petitions with the United States federal district court. *Id.* The State of Washington filed an amicus curiae brief to argue its position that the "'state possesses the sole and exclusive authority to regulate fishing activities in off-reservation waters.'" *Id.* at 234 n.9 (quoting the State's brief).

341 *Id.* at 236–38.

> citizens of the Territory'. It would be unreasonable to conclude that in reserving these vital rights, the Indians intended to divest themselves of all control over the exercise of those rights. *Prior to the Treaty the regulations for fishing had been established by the Tribe through its customs and tradition. The Indians must surely have understood that Tribal control would continue after the Treaty*.[342]

The court also upheld the incidental authority of tribal police, in carrying out their regulatory responsibilities, to arrest and to seize property at the off-reservation fishing site.[343] Again, the court found that the tribe's intent and understanding in reserving such rights must be given full force and effect:

> Having determined that the Yakima Nation by the Treaty of 1855 intended to retain not only their ancient fishing rights but also the power to regulate the exercise of those rights regardless of location, it would be inconsistent to narrowly limit the enforcement of those rights to arrest and seizure on the reservation. The power to regulate is only meaningful when combined with the power to enforce.[344]

The exercise of tribal regulatory authority over off-reservation reserved rights also survived a challenge by the State of Michigan, which asserted the exclusive right to regulate fishing—both tribal and nontribal—in the waters of the Great Lakes.[345] The Federal Western District Court of Michigan held that the Chippewa Tribes, who reserved fishing rights on the Great Lakes, also reserved the *exclusive* right to regulate tribal members exercising those fishing rights.[346] The court also held that the exercise of tribal regulatory power over tribal members' exercise of reserved rights, even off the reservation, preempts state authority to regulate tribal members.[347]

The Klamath Tribes successfully sued to enjoin the State of Oregon from regulating the exercise of the Tribes' reserved hunting and fishing rights in *Kimball v. Callahan*.[348] The lands at issue in *Kimball* were former tribal reservation lands, which had been transferred out of tribal ownership through the congressional termination of the Tribes.[349] The court held that the Tribes' reserved rights had survived termination and that one of the key components of such rights was the ability of tribal members to hunt and fish under tribal, rather than state, regulation.[350]

---

342 *Id.* at 236 (emphasis added) (citations omitted).

343 *Id. at* 238–40.

344 *Id.* at 238.

345 United States v. Michigan, 471 F. Supp. 192, 256–58 (W.D. Mich. 1979).

346 *Id.* at 265–70.

347 *Id.* at 270–74.

348 Kimball v. Callahan, 493 F.2d 564, 565 (9th Cir. 1974).

349 *Id.* at 565.

350 *Id.* at 566–68. The Ninth Circuit based its decision largely on the Supreme Court's opinion in *Menominee Tribe v. United States*, 391 U.S. 404, 406 (1968), which held that the termination of the Menominee Tribe and the sale of their reservation lands did not divest the Tribe of its hunting and fishing rights on those lands, and did not give the state the authority to regulate tribal exercise of those rights.

The Lac Courte Oreilles Band of Chippewas also successfully asserted their right to exclusive regulation of the exercise of off-reservation reserved rights by tribal members.[351] The court held the Lac Courte Oreilles Band had reserved extensive rights to harvest resources on the public lands of the northern one third of Wisconsin and had also reserved the exclusive right to regulate tribal hunting and fishing on those lands.[352] The Supreme Court has recently affirmed the similar reserved rights of the Chippewa Tribes and Bands in Minnesota.[353]

A number of tribes in the Pacific Northwest have succeeded in asserting rights to water that would protect habitat for on-reservation fisheries.[354] Although the reservation of these rights involved on-reservation fisheries, the rights successfully asserted by the various tribes affected water rights off the reservation.[355] Thus, even though the reserved rights could be exercised only on-reservation, the courts recognized the need to preserve water flows off the reservation to preserve habitat on reservation.

Although *Montana v. United States* and its progeny established certain presumptions against tribal authority over non-Indians on non-Indian land, these cases provide further support for the exercise of comanagement authority.[356] First, *Montana v. United States* recognizes that inherent tribal sovereignty is an independent source of authority for the exercise of tribal governmental power.[357] Second, while setting out the presumptions against such authority in certain contexts, *Montana v. United States* still recognizes that tribes can exercise authority over non-Indians even on non-Indian land, thus displacing state authority in such areas.[358]

---

351 Lac Courte Oreilles Band of Lake Superior Chippewa v. Wisconsin, 668 F. Supp. 1233, 1241–42 (W.D. Wisc. 1987).

352 *Id.*

353 Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 188–208 (1999).

354 *See* United States v. Anderson, 736 F.2d 1358, 1366–67 (9th Cir. 1984) (holding that the Spokane Tribe's reservation was intended to ensure tribal access to fish for food and maintenance of creek for tribal fishing, and amount of water reserved by Tribe was that amount sufficient to preserve such fishery); United States v. Adair, 723 F.2d 1394, 1397 (9th Cir. 1983) (holding that the Klamath Tribes reserved rights to water survived termination of their reservation and burdened waters no longer within reservation boundaries); Colville Confederated Tribes v. Walton, 647 F.2d 42, 98 (9th Cir. 1981) (holding that the Colville Tribes possessed reserve water rights for the "development and maintenance" of fishing grounds developed by the Tribes to replace the fisheries lost due to the Grand Coulee Dam). These and other water rights cases are discussed in detail in Blumm & Swift, *supra* note 8, at 470–78.

355 *See, e.g.*, United States v. Anderson, 736 F.2d at 1361 (finding that tribal water rights burden off-reservation users upstream of the reservation); *see also* Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252, 256 (D.D.C. 1972) (holding that the Secretary of the Interior was prohibited from authorizing diversion of instream flow upriver from reservation because water was needed to protect tribal fish habitat).

356 *See* Montana v. United States, 450 U.S. at 565–66 ("Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations."); *see also* Brendale v. Confederated Yakima Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 443–44 (1989) (upholding power of tribes to zone lands to ensure consistency with important tribal interests).

357 Montana v. United States, 450 U.S. at 565–66.

358 *Id.*; *see Brendale*, 492 U.S. at 443–44 (upholding tribal authority to zone non-Indian lands within closed area of reservation).

Third, the *Montana v. United States* exception—matters involving the "political integrity, the economic security, or the health or welfare of the tribe"[359]—applies to the protection of reserved rights resources. Healthy and abundant populations of fish, plants, and wildlife are critical to the ability of tribes to continue to exercise these reserved rights. The rights to hunt, fish, trap, and gather have long been recognized as central to the tribes politically, culturally, and economically.[360] At least one court has recognized that the protection of natural resources used by tribal members falls within the second *Montana v. United States* exception, thus authorizing the direct exercise of tribal authority over non-Indians on non-Indian lands whose activities impact such resources.[361]

Finally, the assertion of comanagement authority on public lands off-reservation does not involve the direct regulation by the tribes of non-Indian activity. Comanagement involves shared decision-making responsibility with federal and state governments and agencies where the exercise of such agency authority would affect tribal rights.[362] While incorporating the tribes as participatory decision makers will influence and shape the decisions by those agencies, the actual implementation of such decisions and their enforcement would be carried out by the agencies with such enforcement authority. To the extent that such decisions would be enforced against non-Indians, that enforcement would continue to take place via agencies with jurisdiction and authority to do so under their existing mandates. The framework involved in comanagement is analogous to the air and water quality standard setting authority contained in the Clean Air and Clean Water Act TAS provisions, which is ultimately enforced against non-Indians by EPA[363]—a framework that has withstood repeated court challenge.[364]

2. Judicial Analysis of Off-Reservation Comanagement

Courts have already begun to recognize the validity of a tribal comanagement role as an incident of off-reservation reserved rights. In

---

359 *Montana*, 450 U.S. at 566.

360 *See* Menominee Tribe v. United States, 391 U.S. 404, 405–06 (1968) (explaining that the "essence" of Menominee Treaty was to reserve ability to continue hunting lifestyle on lands known to be rich with game); United States v. Winans, 198 U.S. 371, 381 (1905) (stating that the fishing rights are "not much less necessary to the existence of the Indians than the atmosphere they breathed"); Kimball v. Callahan, 493 F.2d 564, 566 (9th Cir. 1974) (discussing "highly significant role" that hunting and trapping play in the lives of the Klamath tribal members and citing Klamath & Modoc Tribes v. Maison, 139 F. Supp. 634 (D. Or. 1956)).

361 Montana v. United States Envtl. Protection Agency, 137 F.3d 1135, 1140–41 (9th Cir. 1998) (upholding EPA regulations that create presumption of tribal jurisdiction over on-reservation water resources based on second *Montana v. United States* exception).

362 *See infra* Part V (discussing various potential comanagement approaches).

363 *See infra* Part IV.C.

364 *See Montana v. EPA*, 137 F.3d at 1140–41 (challenge to Clean Water Act TAS scheme); Arizona v. United States Envtl. Protection Agency, 151 F.3d 1205, 1211–12 (9th Cir. 1998) (challenge to Clean Air Act TAS scheme); Albuquerque v. Browner, 97 F.3d 415, 419 (10th Cir. 1996) (challenge to Clean Water Act TAS scheme).

Klamath Tribes v. United States,[365] a case involving a challenge by the Klamath Tribes to a proposed timber harvest by the United States Forest Service, the Federal District Court of Oregon enjoined seven timber sales on the Klamath's former reservation lands, on which the Klamath Tribes retained hunting and fishing rights.[366] The court held that the Forest Service had failed to adequately incorporate the Tribes' input into the decisions authorizing these sales and prohibited the agency from proceeding with logging that affects the "wildlife resources within the Tribes' former reservation, without ensuring, *in consultation with the Klamath Tribes on a government-to-government basis*, that the resources on which the Tribes' treaty rights depend will be protected."[367] While the court left the specifics of such consultation to the parties, the opinion emphasized that such consultation was part of the Tribes' reserved rights, as well as a fundamental component of the United States's trust responsibility.[368]

In a recent decision, *Okanogan Highlands Alliance v. Williams*,[369] the District Court of Oregon rejected a challenge by the Confederated Colville Tribes to the development of a gold mine on lands where the Tribes exercised reserved rights.[370] The court's decision in that case, however, was based on a finding that the Forest Service had met its procedural obligations by undertaking extensive contact and consultation with the Tribes throughout the planning process, as well as developing mitigation measures aimed at addressing the concerns raised by the Tribes through such consultation.[371] While the *Okanagon Highlands Alliance* decision recognized some degree of federal agency discretion, it cited with approval the *Klamath Tribes v. United States* language.[372] Its holding strongly suggests that the extensive government-to-government consultation conducted by the Forest Service and the agency's subsequent development of mitigation measures were measures necessary to meet the obligations of the reserved right.[373]

The Oregon District Court also upheld a challenge by the states of Oregon and Idaho and several Indian tribes to a biological opinion by the National Marine Fisheries Service (NMFS) concerning salmon stocks on the Columbia River that were listed under the Endangered Species Act.[374] Plaintiffs challenged the NMFS opinion as arbitrary and capricious, in significant part for failing to rely on the best scientific information concerning the condition of the salmon runs and the effects of proposed

365 No. 96-381-HA, 1996 WL 924509 (D. Or. Oct. 2, 1996).
366 *Id.* at *1.
367 *Id.* at *9 (emphasis added).
368 *Id.*
369 Civ. No. 97-806-JE, 1999 WL 1029106 (D. Or. Jan. 12, 1999).
370 *Id.* at *22.
371 *Id.* at *15–21.
372 *Id.* at *15.
373 *See id.* at *15–21.
374 Idaho Dep't of Fish & Game v. National Marine Fisheries Serv., 850 F. Supp. 886 (D. Or. 1994).

hydroelectric operations on the continued existence of the listed runs.[375] The court granted summary judgment in favor of the plaintiffs, finding that NMFS' opinion was indeed "arbitrary and capricious," in part for failing to consider the opinions of "well-qualified" state and tribal fisheries biologists.[376] The court concluded that the "best available science" standards of the Endangered Species Act required NMFS to consider and incorporate the tribal experts' analysis and data and ordered NMFS to consult with the tribes.[377]

Finally, the Ninth Circuit has affirmed a broad fisheries comanagement plan as a means of mediating the dispute between the states of Oregon and Washington and the fishing tribes of the Columbia River.[378] The Columbia River Fish Management Plan (CRFMP) implements an intergovernmental comanagement regime regarding the harvest of the Columbia River fisheries, including procedures for coordinated management, harvest management parameters for the various fisheries, provisions dealing with artificial and natural production of fish, and procedures for ongoing court jurisdiction and judicial resolution of disputes.[379] While the CRFMP may fall short of fully integrating tribes as comanagers of the Columbia River fisheries (because it focuses only on harvests and does not address habitat issues),[380] the plan recognizes and implements a significant tribal comanagerial role in an area that had long been assumed the exclusive province of the states.

E. Comanagement and the United States's Trust Obligation

While the cases discussed above address comanagement as a reserved right, the trust responsibility owed to Indian tribes by the United States provides further basis for the recognition and protection of tribal comanagement authority.[381] The Supreme Court has described the trust obligation as analogous to that of a traditional fiduciary responsibility.[382] The

[375] *Id.* at 888. The four Indian tribes with reserved fishing rights on the mainstem Columbia River—Warm Springs, Yakama, Umatilla, and Nez Perce—each filed amicus briefs in support of the challenge to NMFS. *Id.* at 887.

[376] *Id.* at 900.

[377] *Id.* at 900–01.

[378] *See* United States v. Oregon, 699 F. Supp. 1456 (D. Or. 1988), *aff'd*, 913 F.2d 576 (9th Cir. 1990) (amending and approving the Columbia River Fish Management Plan).

[379] The CRFMP is discussed in detail below, *infra* Part V.B.

[380] *See, e.g.*, Blumm & Swift, *supra* note 8, at 461 n.260 (conveying comments of tribal attorney pointing out that tribes do not have regulatory authority over significant aspects of the Columbia River system that impact fish mortality, including land and water management decisions that impact fish habitat and populations).

[381] *See* Wood, *Trust Doctrine Revisited*, *supra* note 47, at 1495–1507. Professor Wood sees the trust obligation as growing from the initial cessions of land by tribes to the United States, asserting that at first the trust obligation involved a "sovereign trusteeship," by which the United States agreed to protect the sovereignty and separatism of Indian tribes. *Id.* at 1495–1500. After this initial period, Professor Wood argues, the United States reneged on the sovereignty trusteeship and relied upon a paternalistic, "guardian-ward" paradigm that more or less remained in place until the modern era. *Id.* at 1501–07.

[382] Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942). *But see* Nevada v. United States, 463 U.S. 110, 128 (1983) (stating that the government should not be held to the

United States, as trustee, is obliged to protect tribal resources under its control, must act in order to maximize the value of such resources, and must not take actions that would degrade or destroy the value of the resources.[383] Further, the United States's failure to act in accordance with these standards of fiduciary responsibility can, in certain circumstances, result in financial liability to the tribes.[384]

This traditional, substantive fiduciary role, however, is only one component of the trust obligation. There is an additional component of the trust responsibility that flows from the tribes' inherent sovereignty and the unique government-to-government relationship between Indian tribes and the United States. Professor Wood persuasively describes a trust obligation to the tribes to protect and enhance their ability to be self-determining sovereigns, which she traces to the "sovereign trusteeship" embodied in early congressional statutes and Supreme Court decisions protecting tribal lands and the tribal reserved right to a measured separatism.[385] Professor Wood and others outline a trust obligation—contemporary in application, but deeply historical in its foundation—that imposes a responsibility upon the United States to assist the tribes in developing institutions and the capacity to exercise the full scope of political, cultural, and resource sovereignty.[386]

This sovereignty component of the trust obligation has significant application in the tribal assertion of comanagement authority off-reservation. While the courts have generally recognized a substantive trust obligation to protect and enhance resources,[387] the sovereignty protection component requires the United States to facilitate a tribal participatory role—as governments—in decision making concerning such resources. This requirement goes beyond the mere unilateral protection of resources and avoidance of harm to those resources; it includes a responsibility that the

"fastidious standards" of a private fiduciary); Wood, *supra* note 4, at 115–17 (arguing that private fiduciary standards are not always appropriate).

383 *See* Cramer v. United States, 261 U.S. 219, 232–33 (1923) (voiding federal land patent that conveyed Indian lands to railroad); Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 113–14 (1919) (enjoining the Secretary of the Interior from disposing of tribal lands under general public land laws); Navajo Tribe v. United States, 364 F.2d 320, 322–26 (Ct. Cl. 1966) (holding government liable for mismanaging lease of tribal resources); Edwardsen v. Morton, 369 F. Supp. 1359, 1371 (D.D.C. 1973) (holding that government has fiduciary duty to prevent trespassing on Indian land). These cases and others relating to the development of the contemporary trust doctrine are discussed in Wood, *Trust Doctrine Revisited*, *supra* note 47, at 1499–1500.

384 *See* United States v. Mitchell, 463 U.S. 206, 228 (1983) (holding the United States potentially liable for damages for failure to manage Indian timber resources in accordance with fiduciary standards); Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238, 1243–48 (N.D. Cal. 1973) (allowing recovery against federal government for mismanagement of trust funds).

385 Wood, *Trust Doctrine Revisited*, *supra* note 47, at 1495–1500; Wood, *supra* note 4, at 128–33, 177–78.

386 Wood, *supra* note 4 at 174–92; *see also* Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979 (1981) (discussing the history of past assimilation efforts and arguing for continuing the federal policy of tribal self-determination and autonomy).

387 *See* discussion *supra* notes 47, 106–17, 381–84 and accompanying text.

United States protect and enhance the ability of tribes to act in their capacity as sovereign governments in relation to such resources.[388]

Courts dealing with the issue of off-reservation tribal reserved rights resources have begun to recognize the applicability of this tribal sovereignty aspect of the trust obligation. In *Klamath Tribes v. United States*, a federal district court expressly noted that the United States Forest Service had both a "substantive" and a "procedural" obligation to the Klamath Tribes.[389] The substantive obligation is the straightforward fiduciary obligation to protect and avoid actions that would harm the resources themselves.[390] The procedural obligation is a requirement that the Forest Service incorporate the tribes, as governments, into the land and resource decision-making process.[391]

Incorporating the tribes as sovereign governmental authorities into the federal land and resource decision-making process is necessary not only to protect tribal sovereignty vis-a-vis the federal government, but also to protect the tribal prerogative of self-determination vis-a-vis the state governments. As discussed above, courts have long recognized that the tribes' right "to make their own laws and be ruled by them"[392] includes the authority for tribes to adopt and enforce their own regulations concerning the exercise of reserved rights by tribal members.[393] This doctrine generally precludes individual states from interfering with tribal self-regulation, even concerning off-reservation exercise of such regulation.[394]

Facilitating a tribal comanagement role over decisions that adversely affect reserved rights resources is a significant means by which the federal government can assist the tribes in preventing states from usurping tribal

388 *See* Wood, *supra* note 4, at 177–92 (describing legal foundation for assertion of a trust obligation to protect tribal self-government).

389 No. 96-381-HA, 1996 WL 924509, at *7–8 (D. Or. Oct. 2, 1996).

390 *Id.* at *8–9 ("[T]he federal government has a substantive duty to protect 'to the fullest extent possible' the tribes treaty rights, and the resources on which those rights depend.").

391 *Id.* at *8 ("[A] procedural duty has arisen from the trust relationship such that the federal government must consult with an Indian tribe in the decision-making process to avoid adverse effects on treaty resources."); *id.* at *9 (ordering a "preliminary injunction prohibiting the federal defendants from proceeding with 'salvage' logging that will effect wildlife resources within the Tribes' former reservation, without ensuring, *in consultation with the Klamath Tribes on a government-to-government basis*, that the resources on which the Tribes' treaty rights depend will be protected") (emphasis added); *see also* Okanagon Highlands Alliance v. Williams, Civ. No. 97-806-JE, 1999 WL 1029106, at *16 n.7 (distinguishing between substantive and procedural trust obligation and ruling on procedural trust issue while finding substantive trust issue not ripe for review).

392 Williams v. Lee, 358 U.S. 217, 220 (1959).

393 *See* Kimball v. Callahan, 493 F.2d 564, 564 (9th Cir. 1974) (holding that tribal members still retained the rights to hunt, fish, and trap free from state regulations); Settler v. Lameer, 507 F.2d 231, 231 (9th Cir. 1974) (determining that tribal fishing regulations were within the scope of the rights retained by the Yakama Nation); United States v. Michigan, 471 F. Supp. 192, 265–68 (W.D. Mich. 1975) (holding that the state could not regulate fishing protected by treaty).

394 Menominee Tribe v. United States, 391 U.S. 404, 405–06 (1960) (finding that reserved hunting and fishing rights survived the Termination Act of 1954); *Kimball*, 493 F.2d at 564 (prohibiting state from regulating an Indian's right to fish); *Settler*, 507 F.2d at 231 (same); *Michigan*, 471 F. Supp. at 265–68 (same).

self-regulation. The well established doctrine precluding state interference with tribal self-regulation of off-reservation reserved rights contains a significant and particularly relevant exception, known as the "conservation necessity" exception.[395] The "conservation necessity" exception permits states to directly regulate the exercise of tribal reserved rights if the resources at issue are in jeopardy and it is necessary in the interests of conservation for states to regulate tribal rights.[396]

Where management activities such as timber harvest, road building, dam construction and operation, mining, or grazing on federal lands adversely affect fish and wildlife species that tribes have reserved rights to hunt and fish, the impact may go well beyond deprivation of subsistence rights to tribal members. Adverse effects to resources could potentially trigger the type of conservation necessity that could justify the imposition of state regulations on the exercise of tribal reserved rights. Consequently, such federal actions could thus have the double impact of reducing resources and undermining the tribal right to self-government and self-determination. Through federal actions that degrade fish and wildlife populations, a tribe may find its fundamental power to govern its members and their access to tribal resources undermined and eroded by the incursion of state authority.

The environmental conditions that would lead to a state's invocation of the conservation necessity exception—in other words, that have led to the depredation of the relevant species—are conditions that are often beyond tribal control or even tribal influence.[397] Timber harvest, grazing allotments,

---

395 The "conservation necessity" exception had its origin in Justice William O. Douglas's oft-quoted admonition in the Puyallup Tribe's fishing rights litigation: "The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets." Washington Game Dep't v. Puyallup Tribe, 414 U.S. 44, 49 (1973). In order to meet this standard, the state must demonstrate that its imposition of regulations onto tribal members is essential for conservation purposes. Hoh Indian Tribe v. Baldridge, 522 F. Supp. 683, 691–92 & n.1 (W.D. Wash. 1981); United States v. Washington, 384 F. Supp. 312, 402 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975). Such demonstration must meet the following specific criteria: 1) the state must show that the regulation is both "reasonable and necessary for the conservation of fish" and that it is the "least restrictive which can be imposed consistent with assuring the necessary escapement of fish for conservation purposes," United States v. Oregon, 699 F. Supp. 1456, 1462 (D. Or. 1988); 2) state regulation must treat tribal rights as an objective that is "coequal" with the conservation of fish runs for other purposes, *id.*; 3) the regulations must accord tribes an equitable opportunity to take their share of the resources, *id.* at 1463; 4) the state must demonstrate that it has taken all other steps necessary to protect the resource and such steps have proven insufficient, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 682 (1979); and finally, 5) a state may impose its regulations on the exercise of tribal reserved rights only after it has shown that it is unable to preserve the resource by prohibiting the non-Indian harvest, *Hoh Indian Tribe*, 522 F. Supp. at 691.

396 United States v. Washington, 384 F. Supp. at 342.

397 *See* Blumm & Swift, *supra* note 8, at 461 n.260 (conveying comments of tribal attorney regarding limits of tribal regulatory authority over activities impacting fish mortality off-reservation); Robert A. Williams, Jr., *Large Binocular Telescopes, Red Squirrel Pinatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World*, 96 W. VA. L. REV. 1133, 1153–64 (1994) (describing shortcomings of federal agencies and federal

and mining activities on federal lands, along with dam construction and operations, are the proximate causes of much of the declines in habitat quality and fish and wildlife populations. While these are activities over which tribes currently exercise little or no control, the effect of these activities on habitat and populations can lead directly to the erosion of tribal sovereignty and the practical negation of the exercise of tribal usufructuary rights. Where such activities are undertaken by the federal government, their two-fold impacts on the tribes—loss of resources and loss of self-determination through state regulation—implicate the federal trust responsibility. In such circumstances, the United States can best fulfill that responsibility by providing the tribes with the ability to participate in such decision making. The United States is under a trust obligation to the tribes, not only to protect their resources, but also to protect their remaining inherent sovereignty. If that sovereignty can be directly infringed by the states through the conservation necessity exception, and if that necessity is triggered by the actions of the federal government, then the federal agencies undertaking the management activities must provide for an increased tribal role. If the agencies are unwilling to act under their own discretion, then an increased role could be ordered by the courts or mandated by Congress.

V. HOW IT MIGHT LOOK: TRIBAL COMANAGEMENT IN PRACTICE

The assertion of a tribal right to comanagement as an element of off-reservation reserved rights is based on a sound legal foundation. The exercise of such tribal governmental authority over critical resources is consistent with the policy of self-determination that Congress authorized and the Executive Branch implemented. The protection of such sovereign authority is a requirement of the United States trust responsibility. The question that remains, however, is what would comanagement look like? It is a question that has many potential answers, because each Indian tribe with off-reservation reserved rights is unique in many aspects critical to the scope and implementation of comanagement.[398] However, based on the legal and policy principles set out above, it is possible to set out some fundamental principles that ought to inform any comanagement approach. This Part will begin by articulating some principles, and it will conclude with a discussion of three possible comanagement approaches.

environmental laws in protecting native values); Wood, *Trust Doctrine Revisited*, *supra* note 47, at 1488–95 (describing how federal land and resource decision making, without tribal control or influence, can adversely affect tribal rights).

[398] For example, the types of resources and rights involved differ significantly from tribe to tribe. Some tribes have broad off-reservation use rights to hunt, fish, trap, and gather; other tribes are limited to certain resources and locations. In addition, the number of other agencies involved may create significant differences. For some tribes, the comanagement question may involve only one federal agency; for other tribes, a number of federal agencies with cross-jurisdictional issues of their own may be involved. Moreover, each tribe is culturally and politically unique, with its own traditions, its own institutions, its own human and financial resources, and its own priorities for allocation of such resources.

A. Fundamental Principles of a Tribal Comanagement Approach

The principles below are based on the legal and policy principles examined in the previous sections—the canons of construction concerning the reservation of rights, including the reservation of a comanagement right, the doctrine of inherent tribal sovereignty, the United States trust responsibility toward tribes, the importance of a meaningful tribal role in decision making concerning reserved rights resources, the recognition and protection of tribal governmental authority off-reservation, and the court's reluctance to permit direct tribal regulation of non-Indians on non-Indian lands.

The key to any comanagement approach is that it incorporates shared, participatory management between the governmental entities involved. Comanagement is not, as some may fear, the assertion of a tribal right to veto federal actions with which a tribe disagrees. Unilateral assertion of ultimate authority—as embodied by a veto—is unfortunately the present state of affairs, since the *federal agencies* exercise an exclusive, unilateral right to veto tribal proposals for modification, mitigation, or amelioration of projects that will impact tribal rights. Thus, the principles set out below, as well as the suggested approaches, seek to clarify a process of shared management and decision-making authority that fully incorporates the input and expertise of both parties into a mutual and participatory framework.

1. Recognition of Tribes as Sovereign Governments

The basis for a tribal comanagement approach lies in the long-established doctrine recognizing Indian tribes as sovereign governmental entities. The role that tribes play in a comanagement regime ought to be developed in recognition of the tribes' status as sovereigns.[399] As discussed in detail above, the Indian Self-Determination Act, the Indian Child Welfare Act, and the Native American Graves Protection and Repatriation Act recognize a tribal governmental role in decision making over matters of critical importance to Indian tribes and the well-being of their people.[400] The treatment as state provisions of the Clean Air and Clean Water Acts also recognize the authority of tribal governments to create enforceable standards that can affect activities outside reservation boundaries.[401] In each instance, Congress has recognized and protected the governmental component of Indian tribal decision-making authority, treating tribes not as

399 As Justice Thurgood Marshall wrote for a unanimous Supreme Court, "[i]t must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government." McClanahan v. State Tax Comm'n, 411 U.S. 164, 172 (1973); *see also* United States v. Mazurie, 419 U.S. 544, 557 (1975) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory."); *id.* ("Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations.'") (citations omitted).

400 *See supra* Part IV.B.

401 *See supra* Part IV.C.

members of the public or as private "stakeholders," but instead as governing entities who have a role, sometimes the primary role, in such decision making.

What non-Indians apparently fear about comanagement is being put in the position in which Indians have long found themselves—a position in which decisions over critical resources are made unilaterally by a governmental entity that is not responsive, and in many instances represents antithetical interests.[402] The emphasis in comanagement, however, is not to regulate non-Indian activities by tribal governments, but rather to bring together the various government entities who have authority over a particular resource as equal sovereigns, with each protecting and respecting the interests of their respective constituents.

2. Incorporation of United States Trust Responsibility

As discussed above,[403] the procedural component of the trust responsibility—in addition to the substantive component—requires that the United States ensure that tribes are an integral part of the decision-making process concerning reserved rights resources.[404] This component requires a federal commitment of resources not only for tribal participation, but for tribal institution building and strengthening. As described in detail by Professor Wood, the trust obligation includes a duty to assist tribes in the development and rebuilding of institutional capacity and framework.[405] Congress has recognized the financial component of this commitment. The Indian Child Welfare Act recognizes tribal jurisdiction and provides appropriations for developing tribal child welfare institutions.[406] The Indian Self-Determination and Education Assistance Act provides not only for the transfer of the federal program funds to tribes who contract for the operation of such programs, it also provides grants for "the strengthening or improvement of tribal government."[407]

A comanagement regime thus ought to incorporate a federal commitment to institution building within tribes where necessary to ensure that tribal participation as comanagers is effective. Congress must appropriate sufficient funds for the development of tribal institutional capacity. Federal agencies must protect the tribes' role as self-determining sovereigns by incorporating tribes into the decision-making process; where

---

402 *See* Comment, *Treating Tribes as States Under the Federal Clean Air Act: Congressional Grant of Authority—Federal Preemption—Inherent Tribal Authority*, 26 N.M. L. REV. 323, 329–32 (1996) (describing fears articulated by opponents of tribal authority to set air quality standards under Clean Air Act).

403 *See supra* Part IV.E.

404 *See* Klamath Tribes v. United States, No. 96-381-HA, 1996 WL 924509, at *9 (D. Or. Oct. 2, 1996) (prohibiting the Forest Service from proceeding with "salvage" logging that would affect wildlife resources within Tribe's former reservation without first consulting with the Tribe).

405 *See* Wood, *supra* note 4, at 174–92 (discussing tribal ability of self-government).

406 25 U.S.C. §§ 1931–1934 (1994).

407 25 U.S.C. § 450h(a)(1) (1994).

the agencies are reluctant, the courts or Congress must require them to do so.

3. Legitimation Structures for Tribal Involvement

Incorporation of tribes into the agency decision-making process in a substantive manner is likely to be controversial among certain sectors of the public.[408] In addition to the concerns that Indians will be controlling the lives and property of non-Indians, various stakeholders in the resources at issue will likely assert that the provision of a decision-making role for tribes means that all stakeholders should be granted such a role. Effective implementation of intergovernmental participatory decision making will require that the various stakeholders in United States public lands management understand the basis for and the operation of the tribal role. The federal agencies, and the tribes they partner with, must make community education concerning the tribal governmental role in decision making an integral part of the comanagement process.

Community education, however, will be only a part of the process for public legitimation of such a role. The federal agencies—and, to the extent necessary, Congress—must ensure that the institutional arrangements for such participatory management are structured in a manner that addresses non-Indian concerns, particularly the fear that tribal governments will be making decisions affecting non-Indian resource use. The comanagement process should facilitate public participation, public involvement, and public access to information. Further, the lines of authority of federal institutions over non-Indian off-reservation interests should remain clear. Congress and EPA for example, have negotiated this delicate balance in the provisions for tribal development of air and water quality standards that may impact non-Indians off-reservation. While the provisions recognize inherent tribal sovereignty to develop such standards, EPA is the entity that ultimately adopts and enforces the standards that apply to non-Indians, and the process involves opportunity for public comment and challenge of the tribal proposals.[409]

4. Integration of Tribes Early in the Decision-Making Process

For the tribes to participate meaningfully in the federal decision-making process, the agencies must integrate the tribes into the earliest phases of such decision making. A participatory management role would involve tribal participation in the initial discussions of a resource area, when the federal agency first considers the very concepts of management activities. Such a role would facilitate meaningful tribal input, which could guide agency

408 *See* discussion *supra* note 402 and accompanying text; *see also Treating Tribes as States Under the Federal Clean Air Act*, *supra* note 402, at 329–32 (describing fears articulated by opponents of tribal authority to set air quality standards under Clean Air Act).

409 *See supra* Part IV.C.

decision making, including resource use, over a wider area, taking into account a broader perspective on resource conditions and on impacts of various activities on those conditions. Early integration into the process puts tribes in a position to influence the shape and direction of management activities, rather than simply providing comments on projects already developed by an agency (as in the public comment provisions of NEPA).[410] Federal agencies have the discretion to incorporate tribes into their decision-making process at an early stage, but if agencies are reluctant to act, Congress should make the procedural mandate clear.

5. *Recognition and Incorporation of Tribal Expertise*

Federal agencies should accord the input provided by tribes the role of expert information and should give such information a significant degree of deference. Courts have recognized the importance of incorporating tribal expert information when federal decision making will impact reserved tribal rights.[411] In the comanagement context, there ought to be no monopoly on scientific competence, no automatic default in favor of federal agency expertise. While agencies often have technical staff for dealing with resource issues, it is often the tribes that have the most particularized and local information concerning the state of the resources and the reliance upon such resources by tribal members.

Recognition of tribal expertise is also based on the concept of traditional ecological knowledge: the data, information, and analysis that has grown from centuries, even millennia, of on-site use and observation of the relevant resources.[412] One scholar in the field of management of common pool resources has noted that "uncertainties resulting from lack of

410 The public comment opportunity set out in statutes like NEPA and the National Historic Preservation Act, 16 U.S.C. §§ 470–470x-6 (1994 & Supp. IV 1998), is insufficient for a comanager of the resource. First, while these statutes permit public comment on proposed projects and the analyses that undergird them, the ultimate discretion still remains with the agency. Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227–28 (1980). Second, such comment often comes at a stage when the general outlines of the proposed action have already been drawn up—a specific timber sale, a road, or a dam are already proposed. *See* 40 C.F.R. § 1503 (1999) (describing implementation of National Environmental Policy Act and its public notice and comment provisions). Third, the approach embodied in these and other statutes does not specifically allow for articulation and protection of tribal rights and prerogatives. *See* Wood, *supra* note 4, at 118–21 (explaining that protection under the ESA, which does not begin until a species is threatened with extinction, is insufficient to assure animal resource populations required by the tribes).

411 *See* Klamath Tribes v. United States, No. 96-381-HA, 1996 WL 924509, at *8 (D. Or. Oct. 2, 1996) (holding that the Forest Service must consult with tribes to ensure that tribal reserved rights resources are protected); Idaho Dep't of Fish & Game v. National Marine Fisheries Serv., 850 F. Supp. 886, 900 (D. Or. 1994) (requiring National Marine Fisheries Service to consider tribal input when making decisions concerning threatened and endangered fish in Columbia River system), *remanded with instructions to vacate as moot*, 56 F.3d 1071 (9th Cir. 1995).

412 For a general overview of the concept of "traditional ecological knowledge," its sources and its contemporary applicability, see TRADITIONAL ECOLOGICAL KNOWLEDGE: A COLLECTION OF ESSAYS (Robert E. Johannes ed., 1989); TRADITIONAL ECOLOGICAL KNOWLEDGE: WISDOM FOR SUSTAINABLE DEVELOPMENT (Nancy M. Williams & Graham Baines eds., 1993).

knowledge may be reduced over time as a result of skillful pooling and blending of scientific knowledge and local time-and-place knowledge."[413] There is a growing body of literature recognizing the critical importance of such traditional ecological knowledge and the need to incorporate such knowledge into land and resource management planning.[414] Many tribes are taking substantial steps toward incorporating such knowledge into their own environmental regulatory practices.[415]

Such an approach, of course, requires a change in the privileged position in which federal agencies generally find themselves, where their experts and their opinions are given a great deal of judicial deference when there are disputes between federal experts and other scientists.[416] Judicial deference in such contexts, however, is based on statutory delegation of authority and recognition of expertise in the delegated subject matter;[417] in the tribal reserved rights context, federal agencies are neither delegated such authority nor are they experts in tribal resource use and management. While the agencies can recognize and give deference to tribal expertise, the federal courts can play a significant role by refusing to grant deference to agency experts when there is a dispute with tribal natural resource experts.

In the absence of either agency or judicial action on deference, Congress may be required to take action to require deference to tribal expertise in certain critical resource matters, as it has done in both the Indian Child Welfare Act[418] and in the Native American Graves Protection

---

413 ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 34 (1990).

414 *See, e.g.*, BERKES, *supra* note 176 (containing a series of case studies of traditional management techniques and practices); BIODIVERSITY: CULTURE, CONSERVATION, AND ECODEVELOPMENT (Margery L. Oldfield & Janis Alcorn eds., 1991) (examining the methods traditional cultures used in managing biological diversity and assessing the value of those teachings to "developed" countries); TRADITIONAL KNOWLEDGE AND RENEWABLE RESOURCE MANAGEMENT (Milton M. R. Freeman & Ludwig N. Carbyn eds., 1988).

415 For example, the hunting and fishing regulations of the Klamath Tribes are set by the Klamath Indian Game Commission, a body comprised of Tribal hunters and fishers. The Commission develops its regulations in part based on the scientific data developed by its natural resources staff, but also in significant part on the information provided by Tribal elders and subsistence hunters and fishers concerning the nature and condition of the habitat and the resources. Telephone interview with Bud Ullman, Klamath Tribes Attorney, March 20, 2000. On a national scale, the Institute for Tribal Environmental Professionals (ITEP) is hosting a conference scheduled for Summer 2000 on how to integrate traditional ecological knowledge into tribal natural resource conservation practices. Institute for Tribal Environmental Professionals, *Traditional Ecological Knowledge (TEK)* (last update Apr. 3, 1999) <http://jan.ucc.nau.edu/~man5/tek>; *see also* Alaska Native Knowledge Network, *Welcome to Traditional Ecological Knowledge* (visited Mar. 23, 2000) <http://www.ankn.uaf.edu/tek.html> (providing links to numerous examples of the use of traditional ecological knowledge by Alaskan Native communities in natural resource management).

416 *See* Mt. Graham Red Squirrel v. Espy, 986 F.2d 1568, 1571 (9th Cir. 1993) (giving agency expertise deference in judicial review); United States v. Alpine Land & Reservoir Co., 887 F.2d 207, 213 (9th Cir. 1989) ("Deference to an agency's technical expertise and experience is particularly warranted with respect to questions involving . . . scientific matters.").

417 *Mt. Graham Red Squirrel*, 986 F.2d at 1571.

418 *See* discussion *supra* notes 285–95 and accompanying text.

and Repatriation Act.[419] The ICWA, for example, establishes strong presumptions in favor of tribal court jurisdiction, even for Indian children living off-reservation, in recognition of the expertise of Indian tribes in Indian child custody matters.[420] Further, the ICWA authorizes tribes to unilaterally establish placement preferences for adoptive and foster care placements in those Indian child custody cases that remain in the state courts—preferences that supercede those set out in the ICWA itself.[421] NAGPRA also contains provisions that expressly give deference to tribal expertise in the treatment and disposition of Native American remains and burial objects.[422]

6. Dispute Resolution Mechanisms

A comanagement regime should incorporate mechanisms for resolving disputes and differences in opinion and approaches among the comanaging parties. Given the uncertainties of science, it is unlikely that comanaging parties will always agree on the impacts of various proposals. Further, in representing various stakeholders with interests and perspectives that might be at odds, the parties to a comanagement regime may bring significantly different approaches and valuations to the table.

In order to sustain its legitimacy for all the parties involved, a participatory management regime must develop methods and mechanisms to deal with disputes. Unilateral decision making by one party when parties cannot agree means that, among supposed equals, some are more equal than others. It is critical that the arbiter of such disputes be considered fair and neutral by the parties and that the methodology the arbiter applies in resolving such disputes be developed and agreed to by the various parties. Dispute resolution mechanisms are critical to avoiding unilateralism or veto power. Developing a clear and objective process for resolving disputes, among scientists or among policy makers, will go far toward ensuring a fully participatory management framework.

The three approaches outlined in the sections below attempt to incorporate these principles into workable, effective approaches to participatory management. Further, these approaches are all based on models already established in other statutes or court decisions dealing with natural resource management, and they would not involve a significant departure from current approaches to such issues. Implementation of each

419 *See* discussion *supra* notes 302–06 and accompanying text.

420 25 U.S.C. § 1911(a)–(b) (1994). The Supreme Court has noted that the presumptions in favor of tribal jurisdiction evidenced Congress's intent that the Court "defer to the experience, wisdom, and compassion of the [Choctaw] tribal courts to fashion an appropriate remedy." Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 54 (1989) (citations omitted).

421 *See* 25 U.S.C. § 1915 (1994).

422 25 U.S.C. § 3002(a) (1994) (establishing tribal control and disposition over human remains and associated objects on federal lands); *id.* § 3002(d)(1) (requiring action on federal lands to cease when Native American human remains are inadvertently discovered until consultation with the appropriate tribe has taken place concerning their treatment and disposition).

of these models is within the authority of the federal agencies who are responsible for the reserved rights resources at issue. Again, if agencies are reluctant, the authorization for implementing such approaches should be undertaken by Congress. However, if Congress were to act, the authorization it issues should be in general terms, leaving the specific arrangements to be worked out between the particular tribes and agencies involved.

B. The United States v. Oregon *Fisheries Management Plan: Court Sanctioned Consent Decree with Continuing Judicial Oversight*

The Columbia River Fisheries Management Plan (CRFMP), an outgrowth of the *United States v. Oregon* fishing rights litigation, is an ongoing, complex comanagement arrangement for the allocation and protection of tribal reserved rights fisheries on the Columbia River that involves four Indian tribes, three states, and two federal agencies.[423] The CRFMP provides a useful model for shared management responsibilities between multiple sovereigns and could be applied to broader issues of habitat protection.

The CRFMP was developed jointly by the parties in settlement negotiations overseen by district court Judge Robert Belloni.[424] In 1977 the parties entered into a consent decree that established a five year trial plan for joint management.[425] In 1983, after two tribes gave notice of their intent to withdraw from the initial five year plan or renegotiate, the court found that changed circumstances of law and fact required the original plan to be modified and ordered the parties to attempt to develop a revised or modified agreement.[426] The parties ultimately presented a new plan, the CRFMP, to the court in 1988.[427] The lengthy, court-supervised negotiation process lead to the development of detailed standards for fisheries harvest management.[428] These provisions identify the Indian fisheries and define fishing seasons species by species, set out management goals for the

---

[423] *See* A PLAN FOR MANAGING FISHERIES ON STOCKS ORIGINATING FROM THE COLUMBIA RIVER AND ITS TRIBUTARIES ABOVE BONNEVILLE DAM, *supra* note 249; COLUMBIA RIVER FISH MANAGEMENT PLAN, *supra* note 249; *see also* United States v. Oregon, 699 F. Supp. 1456, 1458 (D. Or. 1988), *aff'd*, 913 F.2d 576 (9th Cir. 1990) (approving amended comprehensive plan); Blumm & Swift, *supra* note 8, at 460–62.

[424] Judge Belloni authored the initial decision in the *United States v. Oregon* litigation, which recognized the rights of the Columbia River treaty tribes to a "fair share" of the Columbia River fishery. Sohappy v. Smith, 302 F. Supp. 899, 911 (D. Or. 1969). For a discussion of Judge Belloni's influential role in the development of what eventually emerged as the CRFMP, see COHEN, *supra* note 18, at 77–80, 121–23.

[425] A PLAN FOR MANAGING FISHERIES ON STOCKS ORIGINATING FROM THE COLUMBIA RIVER TO ITS TRIBUTARIES ABOVE THE BONNEVILLE DAM (1977) (enforced by United States v. Oregon, No. 68 Civ. 513 (D. Or. Feb. 28, 1977)).

[426] United States v. Oregon, No. 68 Civ. 513 (D. Or. Aug. 24, 1983); United States v. Oregon, No. 68 Civ. 513 (D. Or. Sept. 26, 1983). *See* United States v. Oregon, 745 F.2d 550, 552 (9th Cir. 1984) (detailing the events of 1983).

[427] *See* United States v. Oregon, 699 F. Supp. at 1458.

[428] COLUMBIA RIVER FISH MANAGEMENT PLAN, *supra* note 249, at 17–40. The CRFMP currently in effect was approved in 1988.

fisheries, and set out the requirements for harvest sharing and stock rebuilding.[429] The parties also negotiated specific standards, plans, and reporting requirements that govern artificial and natural production of fish, dividing the Columbia River into six sub-basins, each with its own harvest and production management plan.[430] These detailed provisions (which comprise parts II and III of the CRFMP) demonstrate the substantial effort by the parties to develop an agreement that would resolve as many potential disputes as possible in advance.[431]

However, the court and the parties to the CRFMP recognized that not all issues could be resolved in advance and that unforeseen situations could arise that would significantly affect the fisheries and require remedial action.[432] The CRFMP contains detailed procedures for addressing issues that develop and change over time. There are specific provisions for annual and periodic review of the implementation of the plan and the species that it covers,[433] for changing certain interim management goals as new information develops,[434] and for emergency modifications.[435]

In addition, the CRFMP establishes comanagement decision-making mechanisms for dealing with changing situations and circumstances. The CRFMP establishes three separate committees, comprised of representatives of each of the parties to the plan, to work out the various issues involved in the management of fisheries on the Columbia.[436] The Technical Advisory Committee (TAC) is comprised of "qualified fisheries scientists," with each party having the right to appoint one scientist to the TAC.[437] The TAC is to meet periodically throughout the year to track and estimate fish harvest data, review proposed fishery regulations from the states and the tribes, and attempt to develop consensus recommendations in response to the proposed regulations and on other fisheries harvest issues for the various entities involved in managing the Columbia's fisheries.[438] If the TAC cannot reach

429 *Id.*

430 *Id.* at 40–47.

431 Part II of the CRFMP addresses harvest management, containing provisions identifying the tribal fisheries, setting seasons, establishing mutual management goals for each of the fish species covered, and dealing with imbalance, further review, and adjustment in management. *Id.* at 17–40. Part III contains provisions for dealing with artificial and natural fish production, management of conservation, rebuilding and enhancement of the fish runs, requiring sharing of technical information, and division of the entire Columbia system into subbasins with their own harvest and production management plan. *Id.* at 40–48.

432 The CRFMP also avoids altogether one of the most contentious issues between the parties: protection and enhancement of fisheries habitat. *See* Blumm & Swift, *supra* note 8, at 461 n.260 (conveying comments of tribal attorney regarding the CRFMP and its shortcomings concerning full integration of tribes into the decision-making process).

433 *Id.* at 13–15.

434 *Id.* at 21 (management goals for spring chinook).

435 *Id.* at 31 (emergency modification provision for fall chinook).

436 *Id.* at 48–54. The plan, recognizing that each tribe involved is a separate sovereign with its own political structure and specific issues, allows each tribe to have its own representative on these various committees, rather than having one representative for the five various tribes.

437 *Id.* at 48. Washington reserved the right to appoint one separate representative from each of its Departments of Fisheries and Game. *Id.*

438 *Id.* at 49–50.

consensus, it can request the assistance of the district court's technical advisor to act as a facilitator in attempting to reach consensus.[439] The Production Advisory Committee (PAC) is made of up fisheries scientists from each of the parties (the same makeup as the TAC) who are familiar with artificial and natural fish production.[440] The PAC's meeting, reporting, and consensus requirements mirror that of the TAC and focus on issues relevant to fish production.[441] Finally, the CRFMP establishes a Policy Committee, which is composed of one policy representative from each party.[442] The role of the Policy Committee is to "facilitate cooperative action" and coordinate management activities among the various entities involved in the plan.[443]

The Policy Committee plays a significant role in the other major comanagement function detailed by the CRFMP: resolution of disputes. In the absence of consensus among the members of either the TAC or the PAC on recommendations concerning scientific issues, the chairman of the relevant committee is to forward the issue for review and consideration by the Policy Committee.[444] The plan sets out procedures for the Policy Committee's resolution of disputes that require that the Policy Committee be forwarded all relevant information, including a consensus description of the unresolved issues, statements of the differing parties views, and the supporting data.[445] The CRFMP also requires that the Policy Committee resolve disputes by consensus, and if there is a lack of consensus, each party may provide its own statement in support of its position on the relevant management issue.[446] If disputes cannot be resolved at this level, the disputed matter can be taken to a special magistrate of the federal district court, which retains jurisdiction over the plan.[447]

The CRFMP's approach could be used for tribal-federal habitat comanagement. Tribes and the relevant agencies could negotiate a detailed agreement that seeks to resolve up front as many issues as possible with clear, measurable standards. Such agreements could also include mechanisms for dealing with changing circumstances and establishing, where possible, the approaches to take when certain types of habitat changes occur (through fire, flood, weather, or other unforeseen circumstances). However, the development of analogous comanagement institutions that have, like the committees in the CRFMP, substantial tribal representation and consensus requirements for decision making would be critical in dealing with potential ongoing disputes. Further, agreements would need to include dispute resolution procedures that would facilitate a full discussion and consideration of the positions of all parties when

439 *Id.*
440 *Id.* at 51–52.
441 *Id.* at 52–53.
442 *Id.* at 54.
443 *Id.* at 54–56.
444 *Id.* at 55–57.
445 *Id.*
446 *Id.* at 57.
447 *Id.* at 7, 56.

consensus cannot be reached at the level of the technical staff. This would include an opportunity for each party to clearly articulate its position along with the information supporting that position.

The CRFMP was developed in response to and as a part of ongoing litigation concerning the scope and exercise of tribal reserved rights. It has binding force because it was entered as a consent decree in that litigation, and it remains under the ongoing jurisdiction of a federal district court. The court's jurisdiction gives the parties an ultimate third-party decision maker to whom unresolved issues are submitted and resolved. Obviously, such an approach—with its ultimate arbiter and built-in enforceability—would be most amenable to resolving habitat management disputes that have resulted in litigation. However, the fundamental components of a CRFMP-like approach—a detailed agreement worked out in advance, addressing specific management issues in as much detail as possible, while incorporating flexibility for dealing with changing situations and providing mechanisms for coordinated and cooperative management—could be developed outside of litigation.[448]

C. Endangered Species Act Model: Consult with Tribes as an Expert Agency

Another approach to comanagement is to establish a mechanism for tribal involvement that would mirror the interagency consultation process established by the Endangered Species Act (ESA).[449] The ESA process requires that agencies undertaking action that may potentially impact populations or habitat of listed species consult with either the United States Fish and Wildlife Service (USFWS) or the National Marine Fisheries Service (NMFS), in order to determine how to best protect such species and their habitat.[450] The determinations made by these expert agencies in this consultation process must be given substantial weight by the action agency.[451] Under an ESA model, federal agencies would consult with Indian tribes whenever a project might impact populations or habitat of reserved

[448] The Administrative Dispute Resolution Act (ADRA) expressly authorizes federal agencies to enter into alternative dispute resolution, including submitting matters to a mediator or arbitrator. 5 U.S.C. §§ 571–584 (Supp. IV 1998). Congress has provided for tribes to have decision-making authority over resources on federal lands in the Native American Graves Protection Act. Comanagement agreements can include, under the authority of the ADRA, reference of disputes to a mediator or arbitrator. Thus, in the absence of litigation, in which a court can maintain jurisdiction, dispute resolution authority can be built into an agreement 1) by referring disputes under the agreement to federal courts for resolution; 2) by referring disputes to mediation or arbitration, citing the ADRA as authority; or 3) by express congressional direction for the resolution of disputes by a party other than the agency.

[449] Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1543 (1994).

[450] *Id.* § 1536 (ESA section 7). The ESA gives responsibility to NMFS for actions concerning marine species; all other organisms are the responsibility of USFWS. *Id.* § 1533(a).

[451] *See* Village of False Pass v. Watt, 565 F. Supp. 1123, 1160 (D. Alaska 1983) (holding that if the action agency adopts alternatives suggested in a biological opinion it fulfills its obligation under section 7 of the ESA), *aff'd sub nom*, Village of False Pass v. Clark, 733 F.2d 605 (9th Cir. 1984).

rights species and would incorporate the tribal position as an expert opinion regarding impacts to reserved rights resources. The ESA contains a number of procedures and mechanisms that could be incorporated into such a tribal expert role. A brief description of the ESA process is useful to map out the analogous tribal comanagement approach.[452]

First, under the ESA, NMFS, and USFWS are responsible for listing the species of concern, a process which can be initiated by petition or sua sponte by the agency.[453] Listing is the trigger for the entire ESA process: once a species is listed as either "threatened" or "endangered" by the appropriate agency, the protection and consultation requirements become applicable.[454] The agencies must also designate the "critical habitat" for a listed species.[455] The ESA defines "critical habitat" as those geographic areas that are "essential to the conservation of the species," both within and outside of the species's currently occupied range.[456] The full definition for "critical habitat" reads as follows:

> (i) the specific areas within the geographic area occupied by the species, at the time it is listed . . . , on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and,
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species.[457]

USFWS and NMFS are required to develop "recovery plans" for listed species, setting forth the steps necessary to bring the populations of such species to healthy levels.[458] Section 7 of the ESA requires that each federal agency consult with USFWS and NMFS to insure that any action an agency carries out or authorizes "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species."[459] The initial stages of such consultation are informal and are aimed at determining if a listed species is present anywhere within an area that will be impacted by a federal action.[460]

---

452 For a thorough analysis of the provisions of the ESA, their history, and their application, see DANIEL J. ROHLF, THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION (1989), upon which much of the following discussion is based.

453 16 U.S.C. § 1533 (1994).

454 *Id.* § 1533(a)(3).

455 *Id.* § 1533(a)(3).

456 *Id.* § 1532(5)(A).

457 *Id.* § 1533(a)(3).

458 *Id.* § 1533(f).

459 *Id.* § 1536(a)(2). This consultation requirement is immediately preceded by a requirement that each federal agency carry out programs aimed at protecting listed species. *Id.* § 1536(a)(1). The Supreme Court has emphasized the mandatory character of this provision. *See* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 173 (1978) (enjoining construction of Tellico Dam because it would impact an endangered species of minnow—the snail darter—and noting that the ESA contains no exception based on the perceived significance of the listed species).

460 50 C.F.R. § 402.13 (1999) (USFWS regulations); *see* RAY VAUGHN, ENDANGERED SPECIES

If a listed species is located within the project area, the agency undertaking the action must make a formal interagency request to USFWS or NMFS for a full scientific review of the project. In this review, the expert agency must determine whether the project will jeopardize the listed species or adversely impact its critical habitat.[461] The agency may not take an "irreversible or irretrievable" action while it conducts its scientific review.[462]

The consultation process culminates in the issuance of a biological opinion by the expert agency, which must state whether or not the proposed action will affect a listed species or critical habitat and include a summary of information relied upon in making its determination.[463] If the expert agency determines that the project will have an adverse impact, the biological opinion must suggest "reasonable and prudent" alternatives that would allow the project to proceed without harming the species or its habitat.[464] The biological opinion of the expert agency, and its suggested alternatives, carries substantial weight in the ESA process. A failure by the lead agency to follow the biological opinion may be struck down as arbitrary and capricious and in violation of the ESA.[465]

The consultation procedures and the no irreversible action requirement are part of what has been called the ESA's "recurring theme"—the resolution of conflicts at the earliest possible time.[466] It is just such a theme that makes the ESA framework an appealing one to transfer to the tribal comanagement context.

Structuring a comanagement arrangement that mirrors the ESA would, first, involve federal agency recognition of tribes as the expert agencies in assessing reserved rights resources. This expertise would include determining the "list" of species that the tribe relies upon in the exercise of its reserved rights. In most instances, reservation of hunting and fishing rights did not involve the reservation of rights to take particular species, but rather to continue certain usufructuary activities on ceded lands.[467] Tribes, through their elders, their subsistence hunters and fishers, and their fish and game departments, have the most reliable and site-specific information as to

ACT HANDBOOK 52 (1994). If NMFS or USFWS determines that a listed species may be present in the project area, the action agency must conduct a biological assessment within 180 days to determine whether any listed species are in fact in the project area. 16 U.S.C. § 1536(c) (1994).

461 16 U.S.C. § 1536(b) (1994).

462 *Id.* § 1536(d).

463 *Id.* § 1536(b)(3)(A).

464 *Id.*

465 *See* Village of False Pass v. Watt, 565 F. Supp. 1123, 1165 (D. Alaska 1983) (enjoining Secretary of the Interior from issuing oil and gas exploration leases on part of Alaska's outer continental shelf because the Department of the Interior failed to carry out certain of the "reasonable and prudent alternatives" suggested in NMFS's biological opinion concerning the impacts of the project on listed populations of gray and white whales), *aff'd sub nom*, Village of False Pass v. Clark, 733 F.2d 605 (9th Cir. 1984).

466 ROHLF, *supra* note 452, at 54. *But see* D.S. Wilcove et al., *What Exactly is an Endangered Species? An Analysis of the Endangered Species List*, 7 CONSERVATION BIOLOGY 87, 91–92 (1993) (stating ESA process has not provided for the kind of early intervention that is "critical to the success of endangered species recovery efforts").

467 *See supra* Part II (discussing reserved rights).

what species are actually relied upon by tribal members in the exercise of such rights.

The tribes would also determine critical habitat for such species. The focus of such a determination would not be on the habitat necessary for species survival, but rather for the survival of specific subpopulations upon which the tribe's members rely. Further, the tribe would be in the position to develop information relating populations and habitat to the needs of tribal members. A tribal reserved right is generally a right to harvest species in certain areas for subsistence and commercial needs, and protection of such species requires more than simply protecting populations from "jeopardy" (the ESA standard).[468] Instead, any analysis of a species's subpopulation health must include an analysis of the population levels necessary to provide for subsistence and/or commercial needs, not merely to protect the species from extinction.[469]

A comanagement arrangement would require consultation early on regarding any action proposed in a reserved rights area, and could include, like the USFWS ESA regulations, early "informal" consultation to determine the presence of reserved rights species in any area proposed for activity. Measures similar to the ESA's early consultation forcing mechanisms would be critical here. If the tribe determines that reserved rights species are in a proposed project area, the arrangement would require the action agency to undertake formal consultation with the tribe and could not undertake any irretrievable or irreversible commitment of resources until consultation was complete.[470]

Consultation would, under this approach, result in a product analogous to the ESA's biological opinion—a determination by the tribe, based on the best scientific and commercial data available, with its reasoning explicit, whether the proposed activity would adversely impact populations or critical habitat of reserved rights species. Again, the tribe's determination would not focus on whether the action puts the species in jeopardy of extinction, but whether or not the activity adversely impacts the tribe's ability to exercise its reserved right to take such species for subsistence and/or commercial purposes. As with the expert agency under the ESA, the tribe would also suggest "reasonable and prudent" alternatives that the agency could undertake to protect the species and habitat at issue.

The enforceability of the tribe's "biological opinion" would be critical to such a framework.[471] If such an opinion were given the legal weight that

---

468 16 U.S.C. § 1536(a)(2) (1994).

469 *See* Wood, *supra* note 4, at 119–20.

470 It should also be reiterated that, like the substantive obligation placed on each federal agency to protect and preserve endangered species, 16 U.S.C. § 1536(a)(1) (1994), the trust responsibility, as well as the treaty or other operative legal document, places a direct obligation on each agency to protect and preserve tribal reserved rights resources. *See* Nance v. Environmental Protection Agency, 645 F.2d 701, 711 (9th Cir. 1981) (holding that the trust obligation applies to all federal agencies, not only the Bureau of Indian Affairs).

471 Biological opinions are not technically binding on the action agencies under the ESA. *See* 16 U.S.C. § 1536(b)(3)(A) (1994) (stating that biological opinion "suggests" reasonable and prudent alternatives for the action agency to go forward with project without violating

expert agency opinions are given under the ESA—if it were presumed that an action agency's disavowal of such an opinion would be arbitrary and a violation of law[472]—the consultation process would have significant meaning and would require the federal agencies to give serious consideration to the tribe's opinions on such matters. The courts would provide the necessary dispute resolution process applying specific and enforceable standards. The action agency could challenge a tribe's determination as failing to incorporate best available science, or otherwise challenge the determination as arbitrary. The tribe's "biological opinion" would focus specifically on protecting the tribe's resources and would give the tribes a significant and clear role in the process.

Federal agencies would appear to have the discretion to incorporate tribes as ESA-like experts into their decision-making process; in fact this approach is consistent with the admonitions of courts requiring government-to-government consultation.[473] The federal trust responsibility toward tribes would likely be a sufficient defense to any challenge to agency reliance on such tribal opinions. The federal courts would also be required to make tribal opinions enforceable by finding that an agency's refusal to follow a tribal opinion is arbitrary and capricious and in violation of law. This finding would be consistent with the case law.[474] Again, if agencies and the courts are reluctant to adopt such an approach, implementation would require congressional action establishing the standard of deference to be granted to tribal expert opinions.

The ESA approach recognizes, protects, and facilitates the use of tribal expertise in areas where the tribes are the experts. It provides a system with relatively clear, enforceable standards and baselines, which are critical for

section 7); *see also* Tribal Village of Akutan v. Hodel, 869 F.2d 1185, 1193 (9th Cir. 1988). Courts, however, give great deference to the expert agency on these issues, and an agency that proceeds with an action contrary to the conclusions of a biological opinion will likely be found to have acted arbitrarily and capriciously and contrary to law. *See* Hill v. Tennessee Valley Auth., 549 F.2d 1064, 1070 (6th Cir. 1977), *aff'd*, 437 U.S. 153 (1978) (using expert agency's compliance standards to find dam project in violation of section 7); Lone Rock Timber Co. v. United States Dep't of Interior, 842 F. Supp. 433, 437 (D. Or. 1994) ("[A]ction in the face of a critical [USFWS] biological opinion will almost certainly be found to [have been taken] arbitrarily and capriciously and contrary to law."). In *Bennett v. Spear*, 520 U.S. 154, 178 (1997) the Supreme Court made it clear that expert agency biological opinions are virtually binding, in that they exert "a powerful coercive effect on the action agency." *Id.* at 169 (stating that biological opinions may be challenged independent of the subsequent action because they have "direct and appreciable legal consequences").

472 *See Hill*, 549 F.2d at 1070; *Lone Rock Timber Co.*, 842 F. Supp. at 437.

473 *See* Idaho Dep't of Fish & Game v. National Marine Fisheries Serv., 850 F. Supp. 886, 900 (D. Or. 1994) (requiring NMFS to consider tribal input when making decisions concerning threatened and endangered fish in Columbia River system). In addition, the court's decision in *Klamath Tribes v. United States* prohibited the United States Forest Service from proceeding with logging "that affects the wildlife resources within the Tribes' former reservation, without ensuring, in consultation with the Klamath Tribes on a government-to-government basis, that the resources on which the Tribes' treaty rights depend will be protected." No. 96-381-HA, 1996 WL 924509, at *9 (D. Or. Oct. 2, 1996).

474 *See Idaho Dept. of Fish & Game*, 850 F. Supp. at 900; *Klamath Tribes*, 1996 WL 924509, at *9.

the resolution of disputes by the courts. Further, the approach contains a possible proactive element in the idea of "recovery plans," providing tribes with the opportunity to map out, in an authoritative and substantive manner, those steps that would be necessary to bring the species at issue back to the levels needed to protect and sustain the exercise of tribal reserved rights.

D. Tribal Contracting and Operation of Land and Resource Management Institutions

Another option for tribal comanagement is for tribes to contract with the appropriate federal agencies to operate certain land management functions. This institutionalization of the tribal role would follow the approach for tribal self-determination set out in the Indian Self-Determination and Education Assistance Act.[475]

The basic structure of the ISDEAA involves tribal contracting with federal agencies to assume the responsibilities for programs operated for the benefit of tribal people. The programs that tribes can contract for are clearly defined under the ISDEAA: programs operated by the Bureau of Indian Affairs and the Indian Health Service.[476] The ISDEAA provides a mechanism for tribes to operate such programs via contracts with the appropriate agency and includes provisions for agency funding of program operations as well as administrative ("indirect") costs.[477] Tribal operation of such programs are to be carried out pursuant to tribal control and regulation, subject to certain statutory and regulatory parameters within which the program must operate, as well as some continuing oversight by the agency with whom the contract is entered.[478]

A comanagement approach following the ISDEAA model would involve tribal contracting of programs or components of certain programs, within those federal land and resource management agencies having responsibility over the habitat and resources upon which tribal reserved rights depend.[479] The initial step in such a process would be the identification of such programs or the components of those programs. Tribal expertise and interest would probably be most relevant, and hence a stronger candidate for tribal contracting, in areas such as fish and wildlife management and cultural resource protection.

While the details of each management contract could and should be worked out tribe by tribe, it will require congressional action to establish

---

475 *See* discussion *supra* notes 277–82 and accompanying text.

476 25 U.S.C. §§ 450–458hh (1994).

477 *Id*. § 450j-1 (indirect costs provision).

478 *Id*. § 450m (rescission authority).

479 The Confederated Tribes of the Grande Ronde Community of Oregon have undertaken such a contracting project with the BLM and the Forest Service to provide certain management services on federal lands adjacent to the Tribes' reservation. *See* Coutenay Thompson, *Northwest Tribes Taking on New Role in Managing Public Lands*, THE OREGONIAN, June 15, 1999, at A1. The agreement with the Forest Service authorizes the Tribes to write a ten-year management plan for 6600 acres of National Forest land upstream from the Tribes' current reservation—lands which comprised the Tribes' former reservation. *Id.*

certain necessary parameters. First, Congress should establish certain limitations on agency discretion to refuse tribal contracting, much as it was ultimately forced to do with the ISDEAA.[480] The legislation should clearly establish the criteria a tribe would need to meet in order to contract a program (including administrative capability requirements and demonstration of the connection and relevance of the proposed contracted program with the tribe's reserved rights). The legislation should also carefully limit the agency's ability to reject a tribal application once the tribe met such requirements. Second, the legislation ought to include provisions that would ensure that the work produced by the tribal-run program was incorporated into the agency decision-making process. Third, as with ISDEAA programs, the legislation should provide for tort liability coverage for tribal programs under the Federal Tort Claims Act.[481]

The contracting approach puts tribes into the decision-making apparatus for issues that affect reserved rights. Through the ISDEAA, Congress has already provided for tribal operation of certain federal programs, reflecting the tribal understanding that the operation of such programs is part of the self-determination process. Through such integration, tribal participation is built directly into the system; the contracting process itself can also ensure that such participation is effectively and efficiently built into the agency's existing decision-making structure.

VI. CONCLUSION

The call for tribal comanagement of off-reservation resources issues rises from at least three interrelated sources. Taken together, these sources suggest a course of action that would move both the tribes and the United States forward upon a strong legal foundation, with compelling morality, informed by a powerful underlying wisdom. First, tribes are motivated to demand such a role out of concern for the state of the resources upon which they depend for the exercise of their reserved rights. These rights are fundamental components of tribal economic, cultural, and political well-being. Decades of top-down management by the federal government has produced situations where many of these resources are at risk. The tribal demand is nothing more than the common sense call to participate, and participate meaningfully, in the decision making that affects these rights.

Second, the tribal demand is grounded in longstanding legal doctrine—in fact, nothing less than the foundational principle of Indian law—that tribes are inherent sovereigns with both the governmental authority and responsibility to protect the health and welfare, the political integrity, and the economic security of their people. In the reserved rights context, the

480 Congress amended the ISDEAA in 1988, in significant part to curb the discretion of the BIA and IHS to deny tribal requests to contract programs. Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub.L. 100-472, 102 Stat. 2285 (codified at 25 U.S.C. §§ 450j–1, 450m–1 (1994)).

481 *See* 25 U.S.C. § 450f(c) (1994) (ISDEAA provision providing such coverage).

right to exercise such sovereign governmental authority over off-reservation resources would have been understood by the tribes as an integral component of the rights they reserved. As sovereign entities holding rights in such resources for the benefit of tribal people, both those present and the generations to come, they seek to assert their authority to participate as governments in such critical decision making.

Third, tribes have been reinvigorated and inspired by the movement for tribal self-determination. Self-determination, the policy of Congress and the executive branch for three decades, recognizes the fundamental principle that tribes should define and control their own destiny. Where that destiny is tied so closely to the reserved rights and the resources upon which such rights depend, the ability of tribes to participate meaningfully in the decision-making process is crucial. Top-down, unilateral decision making by the federal government over resources of such significant concern to the tribes echoes the paternalism now disavowed by the United States and long ago repudiated by the tribes.

Indian tribes across the United States are ready and willing to assume the role as comanaging sovereigns over their resources. Many tribes have stepped into such roles over matters critical to their health and welfare. Increasingly, tribes continue to step forward to exercise jurisdiction over Indian children, burials and artifacts, and complex environmental matters. Increasingly, tribes continue to take over the operation of programs formerly run by the federal government for their benefit. Tribes are also increasingly taking on certain comanagement responsibilities for transboundary natural resources.

Many tribes already possess the necessary expertise to participate as comanagers. The sophistication and resources of the growing number of tribal fish and game departments is testimony to the expertise that exists in Indian country—expertise that the federal agencies marginalize at their peril. Moreover, in many instances this expertise incorporates traditional ecological knowledge—practices, observations, and analyses developed through centuries upon centuries of local use and understanding of natural resources, landscapes, and environments. The power of this knowledge is only beginning to be understood by non-Indian scientists, but has long been recognized as fundamental to Indian peoples' relation to their time-immemorial homelands.

In addition, the United States has a trust obligation to protect the resources upon which the tribes depend. That obligation goes further, however, and encompasses a responsibility to assist tribes in developing the capability to exercise their authority as sovereigns in such a critical area. This involves a requirement to facilitate tribal participation as well as a responsibility to assist—financially and technically—with the development of the necessary tribal infrastructure for such participation.

While there is no one-size-fits-all approach to comanagement, there are a number of principles that should inform the development and implementation of comanagement approaches. This Article suggests a number of approaches that would incorporate these principles; no doubt

there are others. Those approaches that the tribes have a significant role in developing likely will be most successful.

This Article discusses at length the legal foundation for such a tribal comanagement role. The legal doctrines that undergird the call for comanagement—off-reservation reserved rights, inherent tribal sovereignty, extraterritorial sovereign authority, and the United States trust responsibility—provide a sufficient basis for the on-the-ground implementation of such institutions and arrangements, and do not appear to require further legislative action on the part of the United States to authorize such arrangements. The Columbia River fisheries comanagement agreement, for example, which involves three federal agencies and three states, was implemented by way of a consent decree in federal court. However, it is likely that congressional and executive action may be a political, if not a legal, necessity for implementation, for a number of related reasons.

First, congressional authorization of such arrangements would provide a necessary legitimation structure for the implementation of such agreements. Such legitimation is critical for the implementation of a policy for which there may be significant resistance. The jurisdictional provisions of the Indian Child Welfare Act, an example of broad, remedial legislation supporting tribal sovereignty and self-determination, were in fact somewhat redundant with existing case law,[482] but nonetheless played a significant role in moving such cases out of state courts and into the tribal courts.

Second, congressional authorization would provide critical moral leadership. Statutes do not simply enact legal provisions; they often also include findings and policy statements that set out the historical and policy foundation for what the statute is attempting to accomplish. Such statements are often cited by courts and policy makers when dealing with the issues raised in the statute, helping to guide interpretation and motivate compliance. Such statements from the nation's highest legislative body would provide significant impetus for carrying forward with such a policy.

Third, while the legal foundation supporting tribal comanagement is based on existing legal precedent and longstanding policy, specific statutory authorization would definitively resolve the jurisdiction and delegation questions that would likely be raised by agency decision makers and line officers. A legal position based on a clearly and directly worded statute provides an easier mandate for implementation and enforcement than does interpretation based on case law and difficult doctrinal concepts.

Successful implementation, therefore, likely will require action by Congress to set out the necessary authorities and framework. Such authorization ought to be mandatory enough to push potentially reluctant agencies forward, but preserve enough flexibility to enable the agencies and the tribes to work out the best local, on-the-ground approach. The ISDEAA's

[482] For example, 25 U.S.C. § 1911(a) (1994) purported to grant tribes exclusive jurisdiction over on-reservation Indian child custody matters—jurisdiction that had been previously affirmed by the Supreme Court as inherent in tribal sovereign authority. *See* Fisher v. District Court, 424 U.S. 382, 389 (1976) (upholding exclusive tribal jurisdiction over on-reservation adoption proceeding).

provisions regarding tribal contracting of Bureau of Indian Affairs and Indian Health Service programs provide one existing legislative example for accomplishing this balance between mandating certain actions and preserving flexibility.

Successful implementation will require the active involvement and encouragement of the executive branch as well. The agencies that will be doing work with the tribes on the ground are all nested within the executive branch. The tribal-supportive, government-to-government policies of the various presidents from Nixon through Clinton have provided a strong impetus, both to their agencies and to Congress, for the forward movement in recognizing tribal self-determination. The executive branch has, in many ways, been the policy leader in the "modern era" of Indian law, and it would be both encouraging and necessary for it to continue that role.

Finally, it will be up to the federal courts to protect the tribal rights. Over the long course of United States-Indian relations, the federal courts have been the most consistent defender of Indian tribal rights. While the courts have far from a sterling record with regard to Indian issues, the federal judiciary is more independent than the other branches of the majoritarian politics that have often trampled the interests of the small minority of Indian people. The recognition and implementation of a tribal comanagement role off-reservation, with its intersection with non-Indian concerns, will likely raise significant challenges. In fact, the provisions of the Clean Water Act and Clean Air Act, which build tribes into the national systems for air and water quality management, have come under repeated fire in federal court. The courts, recognizing the longstanding doctrinal foundation on which such management integration is built, have consistently protected the institutional arrangements built into these statutes.

The future is far from clear. The ultimate fate of such critical resources, in light of powerful competing interests, is still very much a contested field. It is a contested field that tribes long to enter. The legal foundation for such change is sound. The momentum for such change already exists. The tribal expertise and institutional capability is prepared. It is time to take that next step forward.