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NEW MEXICO V. MESCALERO APACHE TRIBE: WHEN CAN A STATE CONCURRENTLY REGULATE HUNTING AND FISHING BY NONMEMBERS* ON RESERVATION LAND

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I. INTRODUCTION

Native Americans on reservations traditionally have struggled with economic plight. One way tribes recently have attempted to generate income is to create hunting and fishing preserves on reservation land. These preserves attract nonmembers who pay license fees to the tribe and who support Indian-owned businesses on the reservation. States almost universally have responded to hunting and fishing on tribal lands by requiring nonmembers to purchase state licenses as a prerequisite to utilizing reservation resources. The purpose of the state license requirement is to generate income for the state treasury. Additionally, states have enforced more restrictive bag limits and hunting seasons in order to conserve the amount of fish and game within the state. This dual regulation *Although the term “non-Indian” frequently is used in cases of state regulation of reservation land, what is meant is nonmembers of the tribe whose reservation is being regulated. Members of tribes often visit reservations other than their own. See Mescalero Apache Tribe v. New Mexico, 630 F.2d 724, 726 n.1 (10th Cir. 1980), vacated, 450 U.S. 1036 (1981), aff’d, 677 F.2d 55 (10th Cir. 1982), aff’d, 103 S. Ct. 2378 (1983).

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1. See Newsweek, Nov. 29, 1982, at 49, which stated: “Since 1980, average unemployment on the reservations has jumped from an already devastating 40 percent to fully 80 percent. And in some tribes, average income for a family of four has fallen to a paltry $900 a year”; Note, Balancing the Interests in Taxation of Non-Indian Activities on Indian Land, 64 Iowa L. Rev. 1459 (1979) (reporting that in 1978 the average income of a reservation family was $4,000, with unemployment as high as 40% on some reservations). The problem is particularly severe today because of the recent cuts in federal social programs. See, e.g., Address by John E. Echowhawk, Executive Director, Native American Rights Fund, Boulder, Colorado, University of Michigan Indian Law Day (April 8, 1983) (explaining the current federal policy as “termination by lack of appropriation; ‘Reaganomics’ doesn’t work on reservations because there is no private sector to pick up the slack.”)

2. In one case, the tribal revenue garnered from license fees, campground permits, and a resort complex was approximately $270,000 in both 1976 and 1977. See New Mexico v. Mescalero Apache Tribe, 103 S. Ct. 2378, 2382 n.4 (1983).

3. See, e.g., White Earth Band of Chippewa Indians v. Alexander, 683 F.2d 1129, 1137 n.8 (8th Cir.), cert. denied, 103 S. Ct. 489 (1982). (Minnesota has a nine day deer season, while the band has a six and one-half week season. The state prohibits the killing of antlerless deer, while the band has a limit of 150.) In Mescalero Apache Tribe v. New Mexico, 630 F.2d 724 (10th Cir. 1980), the court noted state conservation concerns: “The State suggests that, whatever the justification for exclusive tribal regulation under a traditional analysis, the seriousness of ecological problems creates an implied exception in this case.” Id. at 734.

4. The phrase “dual regulation,” as used in this article, refers to the state and tribe both attempting to regulate the hunting and fishing activities of nonmembers on the reservation.
impedes the incentive for nonmembers to hunt and fish on reservations and causes tribes to lose valuable income.5

Tribes have sought to invalidate state regulation on grounds of federal preemption and interference with traditional tribal sovereignty. These efforts have produced mixed results.6 This outcome has been caused partially by the factual differences among the cases; however, it is largely the result of a disagreement among the courts over which legal principles to apply to state regulation of nonmembers' activities on reservation land. Specifically, the disagreement has arisen over the following issues: how explicit congressional intent must be to establish preemption; what emphasis should be given to a tribe's interest in controlling activities on the reservation, especially when those activities generate needed tribal income; and, what weight should be given to state revenue and conservation interests.

On June 13, 1983, the United States Supreme Court announced its position on dual regulation in New Mexico v. Mescalero Apache Tribe.7 The Court held that New Mexico was preempted from regulating the Mescalero's commercial fish and game program. The Court reached this conclusion by examining the competing tribal, federal, and state interests at stake, rather than narrowly focusing on an express congressional intent to preempt state regulation.8 Using this approach, the Court first found the tribe had an historic interest in controlling the wildlife resources on the reservation, an interest which federal treaties and statutes confirmed.9 The Court also held the state's more restrictive regulation of bag limits

5. See, e.g. Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Comm'n, 588 F.2d 75, 77 (4th Cir. 1978), cert. dismissed, 446 U.S. 960 (1980). The court found that the imposition of a $5.50 state fishing license fee on nonmembers who also paid a $2.00 per day tribal license fee was a "substantial deterrent" to prospective visitors; the state license fee also prevented the tribe from increasing its own fee. Id.


8. Id. at 2386.

and hunting seasons would interfere with the tribe’s ability to conduct a carefully planned wildlife management program designed to curb excessive population growth.\textsuperscript{10} Addressing the federal interests, the Court found an intent to preempt New Mexico when the federal government heavily financed and managed the tribal program.\textsuperscript{11} The Court also identified the existence of a federal statute which arguably excludes states from regulating tribal resources.\textsuperscript{12} Moreover, the Court stated Congress’ objective of encouraging tribal independence and economic development would be thwarted by concurrent regulation.\textsuperscript{13} Finally, the Court held the state had no conservation interest justifying the assertion of more restrictive bag limits and hunting seasons because most fish and game do not migrate off the reservation, and the few animals that do migrate are not in scarce supply in the state.\textsuperscript{14} The Court also noted New Mexico had not significantly contributed to the development or maintenance of the tribe’s program.\textsuperscript{15} Furthermore, the Court found the following: the loss of license revenue to the state would be insubstantial; the license fee would not be returned to the nonmember taxpayer in the form of state services; and, the revenue interest was insufficient to justify state regulation of reservation activities.\textsuperscript{16}

New Mexico Attorney General Paul Bardacke responded to the Supreme Court’s decision by stating that New Mexico is preempted only from regulating the Mescalero reservation because the opinion emphasized that a different result would ensue if the facts were different.\textsuperscript{17} Bardacke’s comment would find support in the Ninth and Eighth Circuits where the courts approved dual regulation in cases with sharply different facts from the \textit{Mescalero} decision.\textsuperscript{18} Some factors these courts considered included the following: whether there is little, or no, federal assistance to the tribe’s program; whether the tribe receives an insubstantial amount of revenue from its program; whether the tribe’s revenue interest would not be significantly affected by state regulation; whether the tribe has no

\begin{itemize}
\item[10.] 103 S. Ct. at 2388-89 (1983).
\item[11.] \textit{Id.} at 2389.
\item[12.] \textit{Id.} at 2389 n.25.
\item[13.] \textit{Id.} at 2390.
\item[14.] \textit{Id.} at 2390-91.
\item[15.] \textit{Id.} at 2390.
\item[16.] \textit{Id.} at 2390-91.
\item[17.] Bardacke stated, "We don’t know how the next case will be decided based on this case. . . . This case is precedent for nothing other than the holding in this particular factual setting." \textit{Albuquerque Journal}, June 14, 1983, at A-6, col. 1.
\end{itemize}
carefully conceived wildlife management program; whether the state gives substantial assistance to the tribal preserve; and, most importantly, whether the state has a legitimate interest in conservation.

This article agrees with Bardacke and sets forth a comprehensive standard which courts, attorneys general, and tribal counsel should follow in deciding whether the state is preempted from regulating a particular reservation. First, the article explains why the Fourth and Ninth Circuits, the first courts that tried to resolve the question of concurrent regulation of hunting and fishing on tribal lands, reached opposite results. Second, this article examines two conflicting 1980 Supreme Court decisions on the general issue of state regulation of nonmember activities on reservation land. Both decisions had a significant influence on the Ninth and Tenth (Mescalero I) Circuits, which announced different methods for analyzing the question of state regulation of hunting and fishing on tribal lands. Third, this article demonstrates how other recent conflicting Supreme Court decisions motivated the Eighth and Tenth (Mescalero II) Circuits to reach differing results. Finally, this article assesses the conflicting circuit decisions, as well as the Supreme Court’s decision (Mescalero III), and defines the standard of analysis practitioners and judges should use to resolve dual regulation cases. This standard essentially asserts that state regulation is invalid absent a strong state interest in conservation.

II. EARLY CASE LAW: AN ILLUSTRATION OF CONTROVERSY

The first two courts to decide the question of whether a state could restrict a tribe’s regulation of nonmember hunting and fishing on the reservation reached opposite results. A discussion of these opinions is useful because many of the conflicting legal principles and factual patterns identified by these courts were used by other courts to uphold or strike down state regulation.

The Fourth Circuit prohibited state regulation of nonmember fishing in Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Commission. The court held that North Carolina could not require nonmembers to purchase a state fishing license, in addition to the fishing permit required by the Indian band, as a prerequisite to trout fishing on the Cherokee reservation. The court based this decision on the independent grounds of preemption and frustration of tribal self-government.

In its preemption analysis, the court found the Department of Interior, a federal agency, regularly supplied fish and personnel to stock reservation streams. This activity is consistent with the federal trust obligation of

20. Id. at 77-78. The Department of Interior supplied 200,000 fish per year immediately preceding the lawsuit. Id. at 77.
assisting Indian tribes. On the other hand, North Carolina rendered no assistance and had no interest in conserving fish spawn for commercial purposes, especially when those fish did not migrate off the reservation. Therefore, the court concluded that the federal involvement, which furthered a general federal policy of assisting tribes, was sufficient to preempt the state, even though the federal agency acted under no statute expressly authorizing support of tribal commercial wildlife programs.

The court in *Eastern Band* also found that requiring nonmembers to purchase a state license would frustrate the band’s ability to manage its own affairs because the band would lose “substantial economic benefits,” which contribute to its attempt to achieve “financial self-sufficiency.” The additional fee would deter many prospective fishermen from purchasing band permits, and Indian-owned shops and restaurants would be deprived of income from nonmembers.

In contrast to the Fourth Circuit, the Ninth Circuit upheld Montana’s regulation of nonmember fishing and hunting on the Crow reservation in *United States v. Montana.* The state not only was allowed to require prospective sportsmen to purchase state licenses, but it also was permitted to impose more restrictive regulations than those of the tribe on bag limits and hunting seasons. The court reached this conclusion by rejecting preemption and tribal self-government arguments.

The Ninth Circuit held that the state was not preempted because there was no “‘clear manifestation’ of a congressional intent to preempt” in any statute or by delegated authority, given by Congress to tribes under the 1934 Indian Reorganization Act, to adopt laws pertaining to reservation activity. On the other hand, the state possessed a “great interest” in preserving the migratory game, which pass over reservation boundaries

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21. Id. at 78.
22. Id. at 78-79.
23. Id. at 78.
25. 588 F.2d at 78-79 (4th Cir. 1978).
26. Id. at 77-78.
27. 604 F.2d 1162 (9th Cir. 1979), rev’d on other grounds, 450 U.S. 544 (1981). The Supreme Court’s ruling did not disturb the Ninth Circuit’s holding because the Supreme Court made a threshold determination that the land being regulated was owned by nonmembers, not the tribe. See *United States v. Montana*, 450 U.S. 544, 556-57 (1980).
29. *Montana*, 604 F.2d at 1172. See also *United States v. Sanford*, 547 F.2d 1085 (9th Cir. 1976). The *Sanford* court found a federal trespass statute was not “an attempt by Congress to enter the field of fish and game regulation.” Id. at 1089 (quoting *State v. Danielson*, 427 P.2d 689, 691 (Mont. 1967)).
and would be protected by the state’s more restrictive bag limits and hunting seasons.\textsuperscript{30}

The court also found the tribe’s authority to govern would not be impeded because the state was not trying to authorize nonmember activity on the reservation that is prohibited by the tribe.\textsuperscript{31} Rather, the state’s regulations were more restrictive than tribal rules. The court ignored the issue of whether the more restrictive state laws would hurt the tribe financially.

Both the \textit{Eastern Band} and \textit{Montana} courts focused on the effect state regulation would have on furthering the competing interests of federal, state, and tribal governments. Yet, there were several important differences between the two opinions. First, the \textit{Eastern Band} court found preemption by determining that a federal agency’s tribal assistance constituted sufficient implied authority from Congress to preempt the state. The \textit{Montana} court, however, rejected an implied authority standard by requiring an express congressional intent to preempt state regulation. Second, the cases differed factually because a state conservation interest was present in \textit{Montana}, but not in \textit{Eastern Band}. Third, the \textit{Eastern Band} court considered a reduction of tribal revenue paramount in determining whether state action interferes with tribal self-government. The \textit{Montana} court, however, ignored a tribal revenue interest and only examined whether the tribe’s authority to make laws had been obstructed.

These different legal and factual bases provided the groundwork for later courts to reach contrasting results. Moreover, the Supreme Court is divided on these and other related issues.

\section*{III. INTERLUDE: CONFLICTING SIGNALS FROM THE SUPREME COURT}

In 1980, the Supreme Court rendered two important decisions on the general power of a state to regulate nonmember activity on reservation land. An examination of these somewhat conflicting opinions is necessary because every court subsequently adjudicating the question of state power to regulate nonmember hunting and fishing on reservations relies heavily on these decisions.

The Court discussed extensively the issue of state power to regulate nonmember activity on reservation land in \textit{Washington v. Confederated Tribes of Colville}.\textsuperscript{32} The Court held Washington could impose cigarette excise and retail sales taxes upon Indian retailers for cigarette sales to

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\item \textsuperscript{30} \textit{Montana} at 1172 n.15. The court used this conservation interest to distinguish \textit{Eastern Band of Cherokee Indians}. Id.
\item \textsuperscript{31} Id. at 1171 (quoting \textit{Confederated Tribes of Colville v. Washington}, 591 F.2d 89, 92 (9th Cir. 1979)).
\item \textsuperscript{32} 447 U.S. 134 (1980).
\end{itemize}
\end{footnotesize}
nonmembers on the reservation. The Court made this decision acknowledging that the state taxes "seriously disadvantage[d] or eliminate[d] the Indian retailer’s business..." because nonmembers came to the reservation only to purchase untaxed cigarettes. The destruction of the tribal business would make poor tribes even poorer. The Court reached this seemingly harsh decision by rejecting the tribe’s preemption and tribal self-government arguments.

In the preemption inquiry, the Colville Court first examined federal statutes including the Indian Reorganization Act of 1934 and the Indian Financing Act of 1974. The Court determined that these statutes only evidenced a general congressional concern for "fostering tribal self-government and economic development...," but did not express a desire to give tribes "an artificial competitive advantage over all other business in a State." The Court also interpreted the Washington Enabling Act, the statute that admitted the state to the union, to be designed in part to prevent state taxation of income generated from reservation land. In this instance, however, the Court found the state cigarette taxes were imposed upon the sale of imported cigarettes, which obviously have "no substantial connection" to reservation reality. In addition, the tax was paid by nonmembers. The Court observed that although the tribe was empowered to enact federally approved Indian taxing ordinances under the Indian

33. Id. at 151.
34. The Court stated, "All parties agree that if the State were able to tax sales by Indian smokeshops and eliminate that $1 saving, the stream of non-Indian bargain hunters would dry up." Id. at 145.
35. The district court found the Colville reservation isolated and underdeveloped, with two tribes "plagued by unemployment of 33 percent and 60 percent." Confederated Tribes of the Colville Reservation v. Washington, 446 F. Supp. 1339, 1346 (E.D. Wash. 1978). The Supreme Court found that the loss of cigarette revenue would make the Colville Indians even poorer. In 1975, the Yakima Tribe got $278,000 from its cigarette business. Tribal taxes produced the following revenue between 1972 and 1976: Colville: $266,000; Lummi: $54,000; and, Makah: $13,000. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 144-45 (1980). See also Chen, What About Colville?, 8 Am. Ind. L. Rev. 161, 168, 170-71 (1980) (statistically showing the economic impact of the loss of cigarette sales on each tribe).
36. The Indian Reorganization Act of 1934 is contained in 25 U.S.C. §§461-92 (1976). The policy underlying the act is to "rehabilitate the Indian’s economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73d Cong. 2d Sess., 6 (1934)). The Indian Financing Act of 1974 is contained in 25 U.S.C. §§1451-1543 (1976). The purpose of this Act is "to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities." Id. at §1451. Both purposes were recognized by the Supreme Court in New Mexico v. Mescalero Apache Tribe, 103 S. Ct. 2378, 2386 n.17 (1983).
37. 447 U.S. at 155.
38. 25 Stat. 676 (1889).
39. 447 U.S. at 156.
40. Id.
41. Id.
Reorganization Act of 1934, this authority could not be construed as evidence of congressional intent to preempt otherwise valid state taxes imposed upon nonmembers.  

The Colville Court also found there would be no interference with tribal self-government by a reduction in revenue to the tribe from the loss of cigarette sales. The Court reached this conclusion by applying the following test:

While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

In this case, the cigarettes were not made on the reservation, but were imported onto the reservation for sale. Furthermore, the nonmember cigarette purchaser received no Indian services, like schooling or fire protection. On the other hand, the nonmember purchaser received a variety of state services and the cigarettes were produced off the reservation. This analysis suggests a court is more inclined to approve state taxation when a tribe is not engaged in management of its own resources.

The Colville opinion enunciates principles which often would support state regulation of nonmember hunting and fishing on reservations. In the preemption inquiry, the court indicated that only a federal statute which came close to expressly preempting state regulation would suffice. Therefore, the statutes which arguably gave the federal agencies in Eastern Band the implied authority to assist the tribes would not be enough to preempt the state because they do not relate to giving aid to a tribe’s commercial hunting and fishing program. The Montana court took a better approach by searching for a statute that directly preempts state regulation.

Assuming no federal preemption is found, the Colville opinion asks courts to balance the competing tribal and state interests according to its express formula. The tribe usually would have a revenue interest in

42. Id.
43. Id.
44. Id. at 156-57.
45. The Court stated, “Washington’s taxes are reasonably designed to prevent the Tribes from marketing their tax exemption to nonmembers who do not receive significant tribal services and who would otherwise purchase their cigarettes outside the reservation.” Id. at 157.
46. See supra note 24 and accompanying text.
47. See supra notes 28-29 and accompanying text.
exclusively regulating nonmember sportsmen because wildlife management has some relation to reservation land. Moreover, nonmember sportsmen receive a modest amount of tribal services, like police protection, because they are on the reservation longer than cigarette purchasers. The state also would have a strong conservation interest in regulating wildlife when animals migrate across state boundaries or when the state contributes to the tribal program. Therefore, the Montana court properly emphasized the state’s conservation interest. These competing tribal and state interests must be balanced in each case. The state most likely would prevail when a conservation interest is present and when the tribe does not lose a substantial amount of revenue through dual regulation.

In contrast to Colville, the Court, in White Mountain Apache Tribe v. Bracker, took a hostile approach toward claims for state regulation of nonmembers on reservations. The Court held that Arizona was preempted from imposing motor carrier license and fuel use taxes on a nonmember timber contractor working on the reservation. It reached this decision even though the state taxes would take only one percent of the contractor’s annual profit. In reaching this decision, the Court collapsed the preemption and tribal self-government tests to form a new preemption standard.

The essence of the new preemption standard is that the competing federal, state, and tribal interests are balanced in order to determine whether a state could regulate nonmembers on reservations. In examining federal enactments, the Court stated that it did not require an express congressional intent to preempt. Rather, preemption can be found with an ambiguous federal statute based on the federal policy of encouraging tribal self-government and economic self-sufficiency. Furthermore, in assessing the tribe’s interest, the Court will consider the “geographical component to tribal sovereignty,” which is “highly relevant” to the preemption inquiry. The Court also stated that any economic burden to the tribe is a relevant factor.

Applying the preemption standard to the Arizona taxes, the Bracker

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48. See supra note 30 and accompanying text.
50. Id. at 138.
51. This finding of the effect on the contractor’s profit was made by the dissent. Id. at 158-59 (Stevens, J., dissenting).
52. The Court asserted that the interference with tribal self-government test is an independent barrier to state regulation. Id. at 142-43. What the Court actually did, however, was to merge the two tests into its preemption analysis. See also infra notes 121-23 and accompanying text.
53. The Bracker court stated, “This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake. . . .” 448 U.S. at 145.
54. Id. at 143-44. See also supra note 36.
55. Id. at 151.
56. Id.
Court found the federal regulatory scheme over harvesting Indian timber so pervasive that Arizona was preempted from imposing any taxes. The Bureau of Indian Affairs regulated on a daily basis almost all phases of the production and marketing of Indian timber. Moreover, the Court held the state taxes would thwart the federal objective of giving the tribes all of the profit from their foresting activities. Turning to the state interests, the Court apparently applied the Colville test to find that the Arizona taxes would not be returned to the contractor in services. This finding was based on the fact that all of the taxpayer's business is on the reservation and the reservation roads are owned by the tribe and the federal government. In addition, the Court held the state could not show how the taxpayer's on-reservation activities affected the state off the reservation. Although Arizona possessed a recognizable interest in obtaining revenue, the Court ruled this interest insufficient to justify the taxing scheme.

Bracker suggests, contrary to Colville, that state restrictions on a tribe's regulation of hunting and fishing by nonmembers rarely would be valid because tribal and federal interests almost always outweigh the competing state interests. Any federal statute or activity arguably supporting tribal wildlife programs would be given great weight because of the federal policy of furthering the tribe's economic independence. Therefore, under Bracker, the Eastern Band court properly emphasized federal agency involvement in the tribe's program, while the Montana court erred in looking for an express statement of Congress to authorize preemption. Moreover, Bracker suggests that the tribe has a strong interest in exclusive regulation because the sportsmen programs take place on tribal lands and state regulation usually would affect tribal income. Consequently, a state would prevail only if it could show an overwhelming conservation interest, like protecting a scarce resource necessary for human survival.

Colville and Bracker present different views on how to evaluate state claims to regulate nonmembers on reservation land. Not surprisingly, the two subsequent courts deciding the hunting and fishing concurrent regulation issue chose to take different approaches.

57. See also Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980) (finding federal Indian trader statutes so comprehensive that they preempt the imposition of a state transaction privilege tax on the sale of farm machinery to an Indian tribe).
58. 448 U.S. at 147.
59. 448 U.S. at 149. The court stated, "The taxes would threaten the overriding federal objective of guaranteeing Indians that they will receive . . . the benefit of whatever profit [the forest] is capable of yielding. . . ." 448 U.S. at 149 (quoting 25 C.F.R. § 141.3(a)(3) (1979)).
60. 448 U.S. at 150.
61. Id.
62. Id.
63. See supra notes 20-24 and accompanying text.
64. See supra notes 28-29 and accompanying text.
IV. THE CIRCUITS FOLLOW THE SUPREME COURT'S SPLIT: WHITE MOUNTAIN AND MECALERO I

Shortly after the Supreme Court announced the two landmark dual regulation decisions, the Ninth and Tenth Circuits rendered incompatible opinions on the same issue. The Ninth Circuit followed the approach of Colville, while the Tenth Circuit paralleled the Bracker analysis. These differing opinions need to be scrutinized, not only because they are the most comprehensive lower court statements on the issue of state regulation of nonmember hunting and fishing on reservations, but also because the Tenth Circuit's opinion was appealed twice to the Supreme Court.

The Ninth Circuit addressed the question of state regulation of nonmember sportsmen on reservation land in White Mountain Apache Tribe v. Arizona. The court held that Washington and Arizona could not impose state licensing requirements and more restrictive bag limits and hunting seasons on nonmember hunting and fishing on the Colville and Apache reservations. In reaching this conclusion, however, the court utilized the Colville approach.

Like the Colville court, the White Mountain court first conducted a separate preemption inquiry. The court found no federal statute specifically relating to hunting and fishing by nonmembers on reservation land. The court further held that Public Law 280, which gave certain states limited civil and criminal jurisdiction over reservations, gave Washington the power to regulate nonmembers on reservation land. Additionally, the court held that although Arizona did not have any power under Public Law 280, it retained its regulatory authority over the reservation by the Arizona Enabling Act. The court supported this contention by referring to the Colville proposition that the state Enabling Act allows state regulation of reservation activity involving nonmembers, even though that activity concerns reservation realty. The court then noted that the federal policies of encouraging tribal political and economic independence were given little weight in Colville. Similarly, the court did not place much

66. 649 F.2d 1274 (9th Cir. 1981).
67. The court affirmed a preliminary injunction against Washington, and vacated the denial of the Apache's summary judgment action against Arizona, remanding the case for further findings. Id. at 1285-86.
68. Id. at 1279-80.
69. Id. at 1279.
70. Id. at 1279-80. The Enabling Act provides Arizona shall: "[F]orever disclaim all right and title to . . . all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States." 36 Stat. 557, 569 (1910).
71. White Mountain, 649 F.2d at 1280.
72. Id.
emphasis on those federal policies. Finally, the court concluded, as had the Colville court, that the authority by which tribes are empowered to adopt ordinances concerning reservation activity, delegated to the tribes under the Indian Reorganization Act of 1934, does not manifest a congressional intent to preempt state regulation of nonmember hunting and fishing on the reservation. The court ignored the significance of the federal government’s assistance given to the tribe in developing wildlife programs.

Finding no preemption, the court engaged in the second test outlined in Colville: balancing the tribal and state interests in dual regulation. The court briefly noted the tribe has an interest in political and economic independence, and the tribe historically has exercised control over its wildlife resources. Nevertheless, the court cited Colville for the principle that nondiscriminatory state taxes on nonmembers on reservations are valid, even if they impair valuable tribal revenue. The court cautioned, however, that the tribal revenue interest is entitled to some weight because, unlike Colville, the value of the sportsmen program is generated from reservation land. With this holding, the Ninth Circuit in White Mountain shifted from the position it took in Montana that the economic effect upon the tribe of state regulation on nonmembers is irrelevant.

Moving to the state’s interests, the White Mountain court applied the Colville test to hold that the state’s conservation interest becomes “quite powerful” when fish and game migrate across reservation boundaries. Additionally, the court found the state’s revenue interest can best be supported by showing that state game migrates onto the reservation or that the state performs fish and game services for the tribe. The court held against state regulation only because the states showed no conservation interest or services performed for the tribe, while the tribe proved it would lose revenue through state regulation. Yet, the tone of the opinion favors state regulation in many cases because the court takes a

73. Id.
74. Id. at 1281.
75. This analysis is in stark contrast to the emphasis the Fourth Circuit gave this factor. See supra notes 20-24 and accompanying text. See also infra note 87 and accompanying text.
76. See supra note 44 and accompanying text.
77. White Mountain, 649 F.2d at 1281.
78. Id. at 1282.
79. Id.
80. See supra note 31 and accompanying text.
81. The court noted, “States have an obvious interest in conserving animals which, if protected, would move off reservations onto state lands; moreover, states have an interest in animals that migrate from state lands, where they survive by virtue of the states’ conservation efforts, onto reservations.” 649 F.2d at 1283.
82. Id. at 1283-84 n.10.
83. Id at 1283, 1285-86.
strict view of federal preemption. Moreover, if federal preemption is not found, the federal interests are ignored and state and tribal revenue interests are balanced according to the Colville formula.

In contrast to White Mountain, the Tenth Circuit, in Mescalero Apache Tribe v. New Mexico (Mescalero I), took the more restrictive approach toward state regulation outlined in Bracker. The court invalidated New Mexico's asserted right to regulate nonmember hunting and fishing on the Mescalero reservation by balancing the federal, tribal, and state interests.

The Mescalero I court found the federal government has a tremendous interest in excluding state regulation. The Apache treaty was interpreted to give the tribe substantial power over wildlife resources. Moreover, the tribal constitution, which was adopted pursuant to the delegated authority of the Indian Reorganization Act of 1934, provided for the tribe's control of wildlife resources. The court next referred to the extensive federal participation in developing and maintaining the tribal programs. Finally, the court held that although New Mexico is not a state with reservation regulatory authority under Public Law 280, even if the state had such power, Public Law 280 specifically excludes states from exercising authority over tribal regulation of tribal wildlife resources.

In assessing the tribal interests, the Mescalero I court gave an elaborate exposition of the "significant interest" tribes have in preserving their historic power over wildlife management. The court also noted that the federal policy of encouraging tribal economic self-sufficiency is a factor to be considered. Finally, the court explained that this case is different from Colville because the Mescalero tribe generated the value of its program from the reservation.

The Mescalero I court finally found the state had no interest in preserving wildlife within reservation borders because the tribe was handling wildlife management successfully. The state also did not contribute to

85. Id. at 731.
86. Id. This constitution gives the tribe the power "[t]o protect and preserve the property, wildlife and natural resources of the tribe, and to regulate the conduct of trade and the use and disposition of tribal property upon the reservation. . . ." Mescalero Apache Tribe Revised Const. art. 11, § 1(c).
87. 630 F.2d at 732. See supra notes 20-24 and accompanying text.
88. Id. The Mescalero I court noted that Public Law 280 protects Indian tribes against deprivation of "any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing or regulating thereof." Id. (quoting 25 U.S.C. § 1321(b) (1976)).
89. 630 F.2d at 728-30.
90. Id. at 734.
91. Id. at 730.
92. Id. at 734-35.
the tribal program. Therefore, the state possessed an insufficient interest in regulating tribal fish and game programs.

There are numerous differences between the approaches taken by the White Mountain and Mescalero I courts. Most importantly, the White Mountain court applied the Colville directive that preemption and frustration of tribal self-government are separate inquiries. The effect of the White Mountain approach is that if no clear congressional statement indicates Congress intended to preempt state regulation, the court will not consider the federal interests and will balance only the state and tribal interests. In contrast, the Mescalero I court still considers the federal interests relevant in balancing the federal, tribal, and state interests. This difference explains why Mescalero I, in contrast to White Mountain, treated the delegated authority to the tribes under the Indian Reorganization Act of 1934 as relevant. The Mescalero I court also deemed any federal assistance pertinent because it demonstrates a federal interest, even though Congress may have made no express declaration that the assistance was meant to exclude state regulation.

Another major discrepancy between the approaches of White Mountain and Mescalero I is the courts’ treatment of tribal interests. The White Mountain court strictly adhered to the Colville standard of linking any tribal revenue interest to the land and the services afforded to nonmembers. On the other hand, the Mescalero I court, like Bracker, stated that the tribe has a revenue interest because the activity occurs on reservation territory and furthers the goal of economic independence, even though the Mescalero I court later applied the Colville test.

The contrasting approaches taken by these two courts echo differences within the Supreme Court. These differences were carried over in the Supreme Court’s next two decisions involving tribal authority over nonmembers.

V. A DIVIDED SUPREME COURT SPEAKS AGAIN AND THE CIRCUITS RESPOND IN DISARRAY

In the 1981 term, the Supreme Court twice had the opportunity to explain its position on the nature of the tribe’s authority to regulate

93. Id. at 733.
94. In this case, the state only claimed two interests to justify dual regulation: 1) the need to maintain wildlife resources at a state-defined ecologically optimum level; and 2) the need for the state to assert criminal jurisdiction over nonmembers on the reservation, because the Supreme Court held that tribes lacked this power in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). The court ruled that the tribe’s civil authority over nonmembers, however, coupled with the criminal authority afforded tribes under a federal trespass statute, see 18 U.S.C. § 1165 (1976), was sufficient to enforce tribal laws. 630 F.2d at 736. The Supreme Court agreed that two federal trespass statutes, 18 U.S.C. § 1165 (1976) and 16 U.S.C. §§ 3371-78 (1981), gave the tribe sufficient enforcement power. See New Mexico v. Mescalero Apache Tribe, 103 S. Ct. 2378, 2391 n.27 (1983).
nonmember activity on reservation land. The decisions were markedly different. In fact, after the Eighth Circuit responded to the Court’s apparent message in *Montana v. United States*, the Court changed its message. This change allowed the Tenth Circuit to reach a result different from the Eighth Circuit.

In *Montana v. United States*, the Court held that Montana had exclusive jurisdiction to regulate nonmember hunting and fishing on Crow reservation land owned in fee by nonmembers. This conclusion was reached in part on the finding that state regulation did not interfere with tribal sovereignty. The Court reasoned that tribal power exists only to protect self-government or control internal regulations. This power normally does not "extend to the activities of nonmembers," unless those nonmembers enter into consensual relations with the tribe or nonmember activities directly affect the political integrity, economic security, or health and welfare of the tribe. This rationale is based largely on the fact that these nonmembers do not participate in tribal government.

The *Montana v. United States* holding that the state can exclusively regulate hunting and fishing by nonmembers on nonmember-owned reservation land has been enforced by lower courts. In addition, the message conveyed by the Court to lower courts on the dual regulation issue was that although the tribe could regulate nonmember sportsmen, because these visitors entered into consensual relations with the tribe, tribes could not exclusively regulate these nonmember state citizens. Therefore, in *White Earth Band of Chippewa Indians v. Alexander*, the district court of Minnesota held that state efforts to regulate nonmember hunting, fishing, and wild rice gathering were not preempted and the state did not interfere with tribal self-government. In its preemption analysis, the *White Earth* court noted the band’s historic interest in regulating wildlife, the federal assistance to the band’s wildlife management program, and federal statutes evincing a policy of encouraging tribal economic self-sufficiency. Yet, the court failed to hold the state was preempted from

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96. Justice Stewart wrote for a majority of six. Blackmun, Brennan, and Marshall dissented on the grounds that the tribe owned the land in question.
97. *Id.* at 564.
98. *Id.* at 565.
99. *Id.* at 565-66.
103. *Id.* at 536.
regulating because no federal statute provided any "direct evidence of a federal intent to preempt." Moreover, the state had a strong interest in preventing the tribe from disrupting the state's wildlife management efforts through more permissive bag limits and sporting seasons because the small amount of tribal land is scattered within a much larger state conservation area.

The White Earth court also found tribal self-government would not be obstructed because there was no evidence the band would suffer economically from requiring nonmembers to purchase state licenses before engaging in reservation sporting activities. The reason is twofold: nonmember sportsmen might buy tribal permits while on state land to ensure against mistakenly being on tribal land, and nonmember tribal patrons probably already have purchased a state license because of the extensive resources in Minnesota.

The Eighth Circuit affirmed White Earth on appeal. Although the court of appeals acknowledged the Bracker principle that an express congressional statement is not necessary to preempt state action in Indian cases, the court affirmed the district court's opinion. The court responded that there is no federal statute preempting the state, the state had a strong historic interest in wildlife management, and there is no showing the tribe would lose revenue by state regulation.

In Merrion v. Jicarilla Apache Tribe, the Court altered the message given in Montana v. United States. The Court held that the tribe had the authority to impose a severance tax on oil and gas removed from reservation land by nonmembers after the nonmembers had entered into a lease agreement with the tribe. The Court reasoned that the tribe had the right to "control economic activity within its jurisdiction and defray the cost of providing governmental services by requiring contributions

104. Id.
105. The amount of reservation land owned by nonmembers was 653,500 of 709,500 acres (92%). Id. at 534.
106. Id. at 537.
107. Id.
109. Id. at 1137-38.
110. Id.
111. 455 U.S. 130 (1982).
112. Justice Marshall, the author of the Bracker opinion, wrote for a majority of six. Stevens, Burger, and Rehnquist dissented on the grounds that once an agreement is reached allowing nonmembers to enter reservation land, the tribe cannot unilaterally impose extra conditions upon that entry. This author believes the differences between the Montana v. United States and Merrion opinions, like the difference between the Colville and Bracker opinions, see supra note 52, is due to the particular faction of the court that is writing the majority opinion. This conclusion is supported by observing that the dissenters in Merrion were in the majority in Montana v. United States, and the dissenters in Montana v. United States were in the majority in Merrion. See supra note 96.
from persons . . . engaged in economic activities” on the reservation.113 This view of tribal power differs from Montana v. United States, as the dissent noted, because the Court treated the nonmember as a quasi-tribal citizen, even though the nonmember did not participate in tribal government.114

The Merrion message was received by the Tenth Circuit whose Mescalero I decision was vacated by the Supreme Court in light of Montana v. United States115 The Tenth Circuit, in a terse opinion (Mescalero II),116 first maintained that Merrion, rather than Montana v. United States, should be the controlling precedent because Merrion concerned the power of a tribe to “regulate tribal resources on tribal land.”117 The Mescalero II court held that the Mescalero Apache tribe has the power to exclusively regulate nonmember sportsmen on reservation land because the tribe, without New Mexico’s assistance, has managed tribal resources for economic return.118

The Supreme Court quickly granted review of Mescalero II.119 The next section of this article discusses the Court’s decision, reconciles the conflicting Supreme Court and lower court decisions, and provides the practitioner with a comprehensive standard of analysis.

VI. MESCALERO III AND A PROPOSED STANDARD OF ANALYSIS

In New Mexico v. Mescalero Apache Tribe (Mescalero III),120 the Supreme Court affirmed the Tenth Circuit’s holding that New Mexico was preempted from restricting the Mescalero Apache tribe’s regulation of nonmember hunting and fishing on reservation land. The decision was unanimous, thus raising the possibility that the Court had reconciled its dispute over whether to apply the Colville or the Bracker standard in dual regulation cases.

In Mescalero III, the Court employed the Bracker preemption test of probing the competing federal, tribal, and state interests at stake in state regulation.121 Even though the Court now seemingly agreed on this mod-

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113. 455 U.S. at 137.
114. Id. at 171-73 (Stevens, J., dissenting).
117. Id. at 57.
118. Id. at 56-57.
120. 103 S. Ct. 2378 (1983).
121. The Court maintained, in a footnote, that it was still treating the interference with tribal self-government test as an independent test. Id. at 2386 n.16.
ified preemption standard, the Court is divided on the emphasis that should be given to the federal policies of encouraging tribal political and economic independence and preserving traditional tribal authority when a federal enactment is ambiguous. A majority of the Court probably would not find preemption based solely on a modest amount of federal assistance coupled with the federal policy of encouraging Indian autonomy. The Eighth Circuit in White Earth reached precisely that conclusion. If the Court were presented with a federal statute which arguably gives tribes the exclusive authority over its wildlife resources, however, this statute, along with the general federal policies of encouraging tribal independence, would provide compelling evidence of a federal interest for preempting state regulation. The Court in Mescalero III suggested, in a footnote, that Public Law 280 might be that statute. Yet, the Court relied on it as a secondary point to its main argument concerning federal agency activity.

The Court's major contention that the federal government opposes state regulation rested on massive federal agency efforts to create and manage the Mescalero tribe's commercial wildlife programs. Federal agencies financed the tribal program, donated elk to build a herd, regularly stocked the streams, and assisted in writing the bag limit ordinances to ensure maximum herd population. Although this degree of federal assistance is not alone sufficient to preempt state regulation, because it does not


123. See, e.g., Rice v. Rehner, 103 S. Ct. 3291, 3295 (1983), where the court stated, "We have employed a preemption analysis that is informed by historical notions of tribal sovereignty, rather than determined by them"; Ramah Navajo School Bd. v. Bureau of Revenue of N.M., 102 S. Ct. 3394, 3404 (1982), where Justice Rehnquist stated in a dissenting opinion, "I believe the dominant trend of our cases is towards treating the scope of reservation immunity from nondiscriminatory state taxation as a question of preemption, ultimately dependent on congressional intent. In such a framework, the tradition of Indian sovereignty stands as an independent barrier to discriminatory taxes, and otherwise serves only as a guide to the ascertainment of the congressional will."

124. See supra notes 102-10 and accompanying text.


126. The provision of Public Law 280 prohibiting state regulation of hunting and fishing on reservations only applies to a handful of states who were forbidden to regulate prior to the 1953 adoption of the statute. Whether a state had the right to regulate before 1953 remains the central issue. Public Law 280 becomes irrelevant when the bulk of the analysis is focused on this question. See, e.g., White Mountain Apache Tribe v. Arizona, 649 F.2d 1274, 1279 n.4, in which the court stated, "[U]nder Public Law 280, States retain the civil regulatory jurisdiction over the on-reservation activities of non-Indians that they enjoyed prior to the Law"; Metlakatla Indian Community v. Egan, 369 U.S. 45, 47 (1962), which found the purpose of this provision was "to preserve federally granted fishing rights," not to create new rights.

127. Both the Bureau of Indian Affairs and the Department of Interior's Bureau of Sport Fisheries and Wildlife participated in the Mescalero programs. 103 S. Ct. at 2388-89.

128. Id. at 2382-83.
reach the daily regulation the BIA exercised in Bracker, such assistance should never be ignored as it was in White Mountain. Yet, whether a state can restrict a tribe’s nonmember hunting and fishing regulations almost always will depend on the strength of the competing tribal and state interests. This conclusion is based on the observation that the weight of the federal interest only rests on the degree of federal agency involvement, which is rarely at the level of Mescalero III.

The Court referred to three tribal interests. First, it noted, as did the Tenth Circuit in Mescalero I, the tribe’s historic interest in wildlife management, which is confirmed by a treaty and federal trespass statutes. Although this interest is legitimate, it should be afforded much less significance because the fish and game management programs are for commercial sporting purposes and few tribes historically have engaged in these commercial ventures.

Second, the Court explained that the state’s more restrictive bag limits and hunting seasons would interfere with the tribe’s carefully planned management program to curb excessive population growth. Although the Court’s observation is insightful, many tribal programs are not as carefully conceived as the Court suggests. Therefore, tribal management has little applicability to most other cases.

Ultimately, the Court relied on the Colville test for determining when a loss in tribal revenue becomes important in the preemption analysis of dual regulation cases. The Court reasoned that the revenue interest is strong because the value of the tribal wildlife program is generated by Indian labor and land. The counter argument still stands that, in many cases like White Earth, the additional state license fee would not impair tribal revenue because many nonmembers already own a state license before going onto the reservation.

The Court’s reliance on the Colville test is especially appropriate because the test measures the practical impact of state regulation on tribal and state interests. The polar views on tribal sovereignty contained in Montana v. United States and Merrion are best reconciled by applying

129. See supra notes 57-58 and accompanying text.
130. See supra note 75 and accompanying text.
131. See supra note 89 and accompanying text.
132. 103 S. Ct. at 2387-88.
133. Id. at 2388-89.
134. See supra note 44 and accompanying text.
135. 103 S. Ct. 2378, 2390.
136. See supra note 107 and accompanying text.
137. Cf. Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) (holding in part that the Montana coal severance tax was not invalid under the commerce clause because the state can reasonably expect to be compensated for the cost of providing governmental services when the activity taxed is connected to interstate commerce).
138. See supra notes 96-100 and accompanying text.
139. See supra notes 112-14 and accompanying text.
the Colville test. Those contrasting positions are based on abstract notions of citizenship and territoriality, rather than the practical effect of state regulation. Indeed, applying the Colville test to those two contrasting cases would lead to the same result: in Montana v. United States, the nonmember sportsmen received no tribal services or anything of value from reservation land; and, in Merrion, the nonmember was taxed on the reservation's resources, and received tribal services like police protection.140

After balancing the federal and tribal interests against the state interests, the Court found the asserted state interests insufficient to justify New Mexico's proposed regulations for the following reasons. First, the state had no conservation interest because fish and game, for the most part, were not migratory, and the few that did migrate off the reservation were not a scarce state resource.141 Second, the state contributed no assistance to the tribe.142 Third, the state performed no services for the nonmembers which would be paid for by the state license fee.143 Fourth, a naked revenue interest was deemed inadequate by the Court to justify state regulation.144 Nevertheless, as the cases in the previous sections demonstrate, there are numerous situations where the state has a compelling interest in regulation. One strong state interest exists when scarce migratory game pass over reservation borders, as was emphasized by the Ninth Circuit in Montana145 and White Mountain.146 The state has a further legitimate interest when the tribe receives state assistance. Additionally, there are situations when more permissive tribal bag limits and sporting seasons will interfere with a carefully managed state program, as the White Earth court demonstrated.147 Indeed, the Court left the door open to these cases by stating that "[a] State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate State intervention."148

In summary, to determine whether a particular reservation can be subject to state restrictions on nonmember sporting activities, practitioners can use a three-step balancing test. First, look at the degree of federal involvement in the tribe's program. Second, evaluate the extent state

140. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137-38 (1982). The court noted, "They benefit from the provision of police protection and other governmental services, as well as from 'the advantages of a civilized society' that are assured by the existence of a tribal government." Id.
141. Mescalero III, 103 S. Ct. at 2390.
142. Id.
143. Id. at 2391.
144. Id.
145. See supra note 30 and accompanying text.
146. See supra note 81 and accompanying text.
147. See supra notes 106, 110 and accompanying texts.
148. 103 S. Ct. at 2387.
regulation will detrimentally affect tribal revenue. Third, assess the gravity of the state’s conservation interest.

VII. CONCLUSION

In *New Mexico v. Mescalero Apache Tribe*, the Supreme Court held that New Mexico could not regulate nonmember hunting and fishing on the Mescalero Apache reservation. This decision was based upon a balancing of the competing federal, tribal, and state interests at stake in state regulation. The facts in this case weighed strongly in favor of invalidation of state regulation.

This article suggests there are other situations in which state regulation would be constitutional. There are few firm guidelines for future cases, although this article has attempted to set forth the factors most likely to influence courts. These critical factors include: the extent of federal and/or state agency support of the tribe’s program; whether the tribe’s revenue from sportsmen license fees and nonmember purchases of Indian-owned shops would be significantly reduced by dual regulation; whether state regulation interferes with the conservation management plans of the tribe; and, whether the state has a strong interest in conserving scarce migratory animals.