10-1982

New Mexico v. Mescalero Apache Tribe

Lewis F. Powell Jr.

Views of S.G.

Jim - Request a more legible p 3.

Q: whether a state (N. Mex) has concurrent juris to regulate non-tribal members hunting & fishing on Resp's Reservation where ~~Tribe~~ Tribe has comprehensive game & fish Regs.

There is a conflict.

NO Q as to Tribe's juris

Preliminary Memo

November 5, 1982 Conference
List 1, Sheet 2

No. 82-331

NEW MEXICO, et al. (one state official)

v.

MESCALERO APACHE TRIBE

Timely

Cert to CA 10 (Doyle, Breitenstein & McKay)
Federal/Civil

1. SUMMARY: Whether New Mexico has concurrent jurisdiction to regulate hunting and fishing by nontribal members on resp's Indian reservation.

2. FACTS & DECISION BELOW: Resp Tribe has adopted a comprehensive scheme of laws to regulate hunting and fishing on its reservation. These tribal ordinances were adopted pursuant to the tribal constitution and were duly approved by the

CVSG - I would be interested in the SG's even if the Court is not interested in this case, I am sur- although there apparently is a conflict.

Secretary of the Interior. The ordinances conflict with state game laws in several respects. Most importantly, the tribal ordinances specifically allow nonmembers to hunt and fish on its reservation without a state license. Also, tribal hunting seasons and bag limits do not correspond with those of the state.

The Tribe has erected a resort complex, and many nonmember sportsmen come to the reservation to hunt and fish. The revenue the Tribe garners from these sportsmen comprises a significant portion of the tribal budget.

The Tribe has worked closely with the federal government to create and preserve wildlife resources. Several man-made lakes have been constructed with federal funds and are stocked from a national fish hatchery on the reservation. Moreover, with federal assistance, the Tribe has built up a substantial elk herd. The federal government also provides other forms of assistance to the Tribe. New Mexico has stipulated that tribal management of reservation wildlife resources has been exemplary, and in conformance with accepted wildlife management procedures.

Although at one time New Mexico also provided the Tribe with considerable assistance, such as training of tribal conservation officers, and stocking of streams on the reservation, state involvement with the Tribe's wildlife program began to diminish in 1969, and is now virtually nonexistent. Although the state once enforced its wildlife laws and regulations on the reservation against nontribal members, the Tribe has now told the state that its fish and game officers are not welcome on the reservation without permission.

The present controversy apparently erupted when the state threatened to arrest nonmembers for hunting on the reservation during one of the Tribe's big game seasons, which began prior to the state's season. The Tribe filed suit in D. N. Mex. and secured a judgment declaring that the state may not apply its hunting and fishing laws to any person within the boundaries of the tribal reservation. The DC also enjoined the state from enforcing its game laws against any person either on the reservation or off the reservation for acts done on the reservation.

CA 10 affirmed. Relying alternatively on federal preemption and tribal self-government grounds, see White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), CA 10 agreed that the Tribe had the exclusive right to regulate hunting and fishing on its reservation.

With respect to preemption, CA 10 found that the applicable treaty and federal statutes, read against the backdrop of Indian sovereignty, preempted exercise of state power in this case. The court first noted the Tribe's inherent authority over wildlife management, which stems from its traditional reliance on wild game for basic survival needs. Furthermore, CA 10 saw a strong treaty and statutory basis for federal preemption. The court relied on: (1) the Apache Treaty, 10 Stat. 979 (1852), under which the Tribe submitted itself "exclusively" to the jurisdiction and government of the United States; (2) the New Mexico Enabling Act, 36 Stat. 557 (1910), in which New Mexico

Indian lands were placed "under the absolute jurisdiction and control" of the United States;

(3) the Indian Reorganization Act of 1934, 35 U.S.C. §476, under which Congress provided that the adoption of a tribal constitution reconfirms in the tribe "all powers vested . . . by existing law"; (4) the tribal constitution, which gives the Tribe the power to "protect and preserve the property, wildlife and natural resources of the Tribe"; (5) the extensive federal participation in the Tribe's wildlife development program; and (6) the "negative inferences" from P.L. 280, 67 Stat. 590 (1953), which until 1968 allowed states the option of unilaterally asserting civil and criminal jurisdiction over certain Indian tribes. Even states that opted to assume jurisdiction could not deprive the tribes 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." 25 U.S.C. §1321(b). Since those states that opted to accept P.L. 280 jurisdiction were not permitted to hinder traditional hunting and fishing rights, the court felt that it followed a fortiori that New Mexico, which declined to accept P.L. 280 jurisdiction, could not do so.

Although recognizing that this Court appears to be gradually collapsing the preemption and tribal self-government tests into one, CA 10 felt that the two tests continue to provide different analytical prospectives, and, accordingly, it analyzed separately the propriety of New Mexico's regulations with respect to their impact on tribal self-government. The court concluded that, even

if its federal preemption rationale were insufficient, the DC would in any event have to be affirmed under a tribal self-government rationale. The court found a clear state interference with traditional tribal regulatory power. The Tribe made a showing that application of New Mexico's game laws would materially affect or frustrate the Indians' governance of themselves or any commercial, conservationist or other program administered by the Indians for their own advantage. Congress has declared that its policy is "to help develop and utilize Indian resources . . . to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources." 25 U.S.C. §1451. CA 10 reasoned that if it were to permit state interference with the tribal regulatory scheme, it would be effectively denying Indians the opportunity of developing their own system.

The state then filed for cert in this Court. We GVR'd for further consideration in light of Montana v. United States, 450 U.S. 544 (1981). New Mexico v. Mescalero Apache Tribe, No. 80-778, 450 U.S. 1036 (1981).

On remand, CA 10 reinstated its previous decision. Montana, reasoned the Court, dealt only with the right of an Indian tribe to regulate fishing and hunting by non-Indians on lands within its reservation owned in fee simple by non-Indians. 450 U.S. at 547. This case, in contrast, deals with the power of the Tribe to control, exploit, and regulate trial resources on tribal land. CA 10 also noted this Court's recent decision in Merrion v. Jicarilla Apache Tribe, 102 S.Ct. 894 (1982), in which the Court

held that, under the tribe's general sovereign authority to control economic activity within its jurisidiction, it could impose a severance tax on non-Indian mining activities on the tribe's reservation. Merrion convinced CA 10 that Montana does not dictate a result different from that originally reached by it.

3. CONTENTIONS: First, New Mexico argues that CA 10 erred by dismissing Montana as irrelevant. The Montana Court stated that, as a "general proposition," the inherent sovereign powers of an Indian tribe "do not extend to activities of nonmembers of the Tribe." 450 U.S. at 565. Thus, the factual differences between Montana and this case are completely inconsequential. Moreover, contrary to CA 10's opinion, Merrion, not Montana, is irrelevant to the resolution of this case. Merrion involved only the question of tribal authority to impose a severance tax; it did not address whether the state would have concurrent taxing or regulatory authority.

Second, New Mexico contends that CA 10's decision conflicts with a number of other cases that have held that a state has concurrent authority to regulate hunting and fishing by nontribal members on an Indian reservation. New Mexico cites White Earth Band of Chippewa Indians v. Alexander, 683 F.2d 1129 (CA 8 1982); White Mountain Apache Tribe v. Arizona, 649 F.2d 1274 (CA 9 1981); United States v. Montana, 604 F.2d 1162 (CA 9 1979), reversed on other grounds, 450 U.S. 544 (1981); United States v. Sanford, 547 F.2d 1085 (CA 9 1976); Montana ex. rel. Nepstad v. Danielson, 149 Mo. 438, 427 P.2d 689 (1967); and Ex Parte Crosby,

38 Nev. 389, 149 P. 989 (1915). Contra, Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Comm'n, 588 F.2d 75 (CA 4 1978), cert. dismissed, 446 U.S. 960 (1980).

Third, New Mexico argues at length that CA 10 erred by finding preemption and infringement of tribal self-government under the facts of this case.

Resp Tribe counters that CA 10 faithfully performed its duty on remand and correctly distinguished Montana. Second, without discussing the specific cases relied on by New Mexico as showing a conflict, the Tribe simply asserts that all cases cited by petr are distinguishable because the tribes in those cases did not do a good job of preparing an adequate factual foundation in support of their cases. Unlike those cases, the tribe here has a "sound factual foundation." Third, the Tribe argues that CA 10's decision is correct on the merits.

An amici brief in support of the petition has been filed on behalf of eight western states with Indian reservations located within. Amici adopt the arguments of New Mexico, and assert that CA 10's decision, if allowed to stand, will have the potential of totally disrupting long-established game management programs, and could divest the states of their sovereign rights to regulate and control the harvesting of game by non-Indian sportsmen within their borders. The deer, elk, and other wildlife migrate back and forth across reservation boundaries. The Tribe incorrectly appears to view this wildlife as tantamount to Indian livestock.

4. DISCUSSION: I believe that both Montana and Merrion are irrelevant to this case. Both of these cases dealt with the

tribe's authority to regulate non-Indian conduct on its reservation. Here, the Tribe's regulatory authority is undisputed. The issue is whether the state has concurrent jurisdiction to regulate.

The critical Supreme Court decision in this regard is White Mountain Apache Tribe v. Bracker, supra, in which the Court held that Arizona was preempted from imposing certain taxes on a non-Indian who was cutting timber on an Indian reservation. We stated that where "a State asserts authority over the conduct of non-Indians engaging in activities on the reservation," a court must make "a particularized inquiry into the nature of the State, Federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." Id. at 144-45. In finding preemption under the facts of Bracker, the Court gave particular weight to the following three factors:

(1) the comprehensive and pervasive federal regulatory scheme for harvesting and marketing Indian timber left no room for additional state taxes or burdens; (2) the assessment of state taxes would have obstructed federal policies relating to the profitability and management of Indian logging enterprises; and (3) there was no regulatory function or service performed by the state that would justify the assessment of taxes, the general desire to raise revenue alone being an insufficient justification for taxation in light of the "significant geographical component to tribal sovereignty," a factor which, although not absolute, is

"important" and highly relevant in preemption analysis. Id. at 145-50.

Applying the Bracker factors to the present case, I think the outcome is close. The first Bracker factor is not present here; there is no "comprehensive and pervasive" federal regulatory scheme involved. It arguably could be said, however, that state regulation in the present context would obstruct federal policy favoring profitability and self-management of the Indian hunting and fishing enterprise, and it arguably can be said that the state is no longer performing regulatory functions or services on the reservation with respect to wildlife that would justify its assertion of jurisdiction over this matter. The present facts seem closer to those of Bracker than to those of Washington v. Confederated Tribes, 447 U.S. 134 (1980), in which the Court upheld a state's assertion of concurrent taxing authority over cigarette sales to non-Indians on a reservation.

New Mexico correctly points out that CA 10's decision conflicts with other cases that have upheld state authority to regulate hunting and fishing by nontribal members on an Indian reservation. In White Earth Band, supra, a post-Bracker decision, CA 8 held that Minnesota had concurrent jurisdiction to subject non-Indians hunting or fishing on tribal lands to licensing regulations. It is true that White Earth Band is perhaps factually distinguishable; CA 8 held simply that the Indians had not met their "burden of showing that the state's gaming laws were unreasonable and unrelated to its regulatory authority." 683 F.2d at 1138.

CA 10's decision also conflicts with CA 9's pre-Bracker opinions in United States v. Montana, supra, and United States v. Sanford, supra. However, White Mountain Apache Tribe v. Arizona, supra, CA 9's most recent and only post-Bracker pronouncement on this subject, essentially is in accord with CA 10. While rejecting the argument that state regulation was barred on tribal self-government grounds, CA 9 intimated that state regulation might be preempted. In White Mountain, CA 9 consolidated two DC decisions, one of which had granted a preliminary injunction in favor of the Indians, and the other of which granted summary judgment against the Indians. Without deciding the merits of either case, CA 9 affirmed the grant of a preliminary injunction in the former case, and vacated the summary judgment and remanded the latter case for further consideration in light of Bracker.

The remaining cases cited by New Mexico are all pre-Bracker, as is Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Comm'n, supra, a CA 4 decision essentially in accord with CA 10.

Although all of these cases are slightly different factually, the underlying legal issue seems sufficiently important and recurring to warrant a grant. The views of the SG should be most interesting and helpful. According to footnote 4 of petr's brief, the Department of the Interior in 1971 issued a formal opinion advising that nontribal members could be subjected to state game laws on an Indian reservation. 78 I.D. 101 (1971). The opinion was withdrawn without explanation in 1976.

I recommend CVSG, with a view towards a grant.

There is a response, and one amici brief.

October 27, 1982 D'Zurilla Opinion in Petition

ME

November 5, 1982

Court ..... *Voted on*....., *19*...

Argued ....., *19*... *Assigned* ....., *19*...

Submitted ....., *19*... *Announced* ....., *19*...

No. 82-331

NEW MEXICO

vs.

MESCALERO APACHE TRIBE

Grant

Relist

for BRW

to take

2nd look.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.		✓		W	S	G	views						
Brennan, J.			✓										
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.		✓											
Powell, J.			✓										
Rehnquist, J.		✓											
Stevens, J.		✓											
O'Connor, J.				Call	5	G	views						

November 12, 1982

Court .....
Argued ....., *19*...
Submitted ....., *19*...

Voted on....., *19*...
Assigned ....., *19*...
Announced ....., *19*...

No. 82-331

NEW MEXICO

vs.

MESCALERO APACHE TRIBE

Granted

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.		✓											
Brennan, J.													
White, J.		✓											
Marshall, J.		✓											
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.		✓											
O'Connor, J.													

Same vote as 11/5

job 04/17/83

New Mexico v. Mescalero Apache Tribe, No. 82-331

You indicated that annotation of the pool memo would be sufficient in this case. I am in agreement with the memo writer and remain comfortable with my views expressed earlier. I would affirm.

The most relevant case for analytical purposes seems to be White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (w/POWELL, J.) (separate concurring opn). The Court directed that when "a State asserts authority over the conduct of non-Indians engaging in an activity on the reservation," what is called for is "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." Id., at 144-145. The Court indicated that "[i]n such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence." Id.

It is difficult to say that federal law will be violated directly by concurrent state jurisdiction. The CA10 has identified, however, six sources of federal preemption, which, I think, when read with due consideration for tribal sovereignty, counsel strongly for a conclusion that state authority is foreclosed. It seems clear to me that since the Treaty of July 1, 1852 that the United States has viewed the power to control hunting and fishing in the area in which the Apaches reside to be reserved. NM's enabling act would confirm this reservation, and the fact that Public Law 280, any

benefits of which NM has not elected to assume, specifically protects the tribes from the deprivation of "any right, privilege, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulating thereof," 25 U.S.C. §1321(b), makes it difficult for the State not to acknowledge federal preemption. Moreover, 18 U.S.C. §1165 provides for a criminal fine to be imposed on anyone hunting, fishing, or trapping on tribal trust land without tribal permission.

Although the Tribal wildlife regulations are not a pure federal regulatory scheme, I believe that they operate in a similar effect because of Congress' ability to preempt the Tribe's power. In any case, the Tribe's conservation program is "comprehensive" and "pervasive." I am inclined to think that "no room remains for state laws imposing additional burdens," and that the superimposition of state regulation "could...disturb and disarrange" the federally approved plan. Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685, 690, 691 (1965).

At the moment, there is very little regulatory function or service performed on the Reservation by the State, and there is no indication of need justifying concurrent jurisdiction. Moreover, whatever state interest there is seems relatively insignificant when compared with the interests of the Tribe in exploiting the resources that the reservation offers. I find interesting the SG's assertion that "absent special Congressional consent or clear necessity, we are not aware that this Court has ever condoned a State attempt to regulate the activities of non-Indians in their intercourse with a Tribe on tribal Reservation lands."

82-331 N. Mex. v Mescalero Apache (Pre-Ct.)

Affirm.

No express preemption by Fed law, but in this case N. Mex has failed to justify a basis for concurrent juris. to regulate hunting & fishing.

1. Conceded ~~Tribal~~ tribal regulation & conservation are adequate

2. Tribal program, including regulations has been sanctioned by Fed. Authority. Ordinances approved by Secretary

3. Interest of State – on this record is minimal.

4. Problems of dual ~~licensing~~ licensing – & esp. regulation – would be severe:
   Seasons / hours / days
   Game limits
   Type of rifles

82-331 NEW MEXICO v. MESCALERO APACHE Argued 4/19/83

Q. Whether State game laws apply to Indian Reservation.

Dunigan (Sp Asst AG - N. Mex)

Agrees Tribe may exclude non-Indians entirely. Montana v U.S.

When non-Indians are admitted, N Mex. laws also should apply.

& There are "conflicts" bet. the state & Indian laws. State laws should control.

Conceden Indian conservation practices are satisfactory.

[JPS noted there may be two questions: right to license & right to ~~regula~~ regulate.

Fettinger (Resp. Indian Tribe)

Tribe created the "elk" herd.

→ | Responding to J.P.S, ~~counsel~~ counsel seemed to say that if State regulation endangered the State's game resources, State could regulate.

Package (This counsel could'nt answer JPS's questions as to Court. theory of his case.)

Fellmeth (cont)

Ec (Tuc lawyer argued facts primarily)

Clairborne (SG)

~~Whether there~~ is -
No serious claim of a substantial state interest.

Preemption - see B+12,13

Secretary annually approves Tribal Ordinances.

Dunigan (Reply)

S.G. position is that Indian ordinances approved by Secretary have preemptive force of Fed law. This would have no limiting principle. Every Ind. ordinance would become fed law.

Affm - 9-0

No. 82-331, New Mexico v. Mescalero Apache Conf. 4/22/83

The Chief Justice

White Mountain

Presumption

Justice Brennan

Affm

Justice White

(not much discussion)

Justice Marshall

Justice Blackmun

Preemption

Justice Powell

See my note

Justice Rehnquist

Aff in

Agree with John

Justice Stevens

Aff.

No preemption - certainly not total

Indian activities did not affect State

"Tribal sovereignty" is proper

theory so long as no State

interest is affected

Justice O'Connor

Aff

Agree with John

Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

Circulated: MAY 26 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82–331

NEW MEXICO, ET AL., PETITIONER *v.* MESCALERO APACHE TRIBE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[May ——, 1983]

JUSTICE MARSHALL, delivered the opinion of the Court.

We are called upon to decide in this case whether a State may restrict an Indian Tribe's regulation of hunting and fishing on its reservation. With extensive federal assistance and supervision, the Mescalero Apache Tribe has established a comprehensive scheme to regulate hunting and fishing within its reservation. Federally approved Tribal ordinances regulate in detail the conditions under which both members of the Tribe and nonmembers may hunt and fish. New Mexico seeks to apply its own laws to hunting and fishing by nonmembers on the reservation. We hold that this application of New Mexico's hunting and fishing laws is preempted by the operation of federal law.

I

The Mescalero Apache Tribe (Tribe) resides on a reservation located within Otero County in south central New Mexico. The reservation, which represents only a small portion of the aboriginal Mescalero domain, was created by a succession of Executive Orders promulgated in the 1870's and 1880's.[1] The present reservation comprises more than

[1] See 1 C. Klapper, Indian Affairs, Laws and Treaties 870–873 (1904). The final boundaries were fixed by the Executive Order of Mar. 24, 1883

Renewed

I'll join — but see my letter to TM 05/26

460,000 acres, of which the Tribe owns all but 193.85 acres.[2] Approximately 2,000 members of the Tribe reside on the reservation, along with 179 non-Indians, including resident federal employees of the Bureau of Indian Affairs and the Indian Health Service.

The Tribe is organized under the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U. S. C. §461 *et seq.*, which authorizes any tribe residing on a reservation to adopt a constitution and bylaws, subject to the approval of the Secretary of the Interior (Secretary). The Tribe's Constitution, which was approved by the Secretary on January 12, 1965, requires the Tribal Council

> "[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, providing that any ordinance directly affecting non-members of the tribe shall be subject to review by the Secretary of Interior." App. 53.

The Constitution further provides that the Council shall

> "adopt and approve plans of operation to govern the conduct of any business or industry that will further the economic well-being of the members of the tribe, and to undertake any activity not inconsistent with Federal law or

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(Order of President Arthur). Portions of the reservation were briefly included in a National Forest, but were restored to the Mescalero reservation by the Executive Order of Feb. 17, 1912 (Order of President Taft). An intervening Executive Order of Mar. 1, 1910, issued by President Taft exempted from the reservation two "small holdings claims" covering settlements located before the establishment of the reservation. The Tribe has since purchased all but 23.8 acres of the land covered by these claims.

[2] These lands comprise the 23.8 acres remaining of the "small holdings claims," see note 1, *supra*; 10 acres granted to St. Joseph's Catholic Church by the Act of Mar. 29, 1928, ch. 299, 45 Stat. 1716; and the unimproved and unoccupied 160 acre "Dodson Tract" in the northwest portion of the reservation. See Brief for United States 2 n. 3.

> with this constitution, designed for the social or economic improvement of the Mescalero Apache people, . . . subject to review by the Secretary of the Interior." *Ibid.*

Anticipating a decline in the sale of lumber which has been the largest income-producing activity within the reservation, the Tribe has recently committed substantial time and resources to the development of other sources of income. The Tribe has constructed a resort complex financed principally by federal funds,[3] and has undertaken a substantial development of the reservation's hunting and fishing resources. These efforts provide employment opportunities for members of the Tribe, and the sale of hunting and fishing licenses and related services generate income which is used to maintain the Tribal government and provide services to Tribe members.[4]

Development of the reservation's fish and wildlife resources has involved a sustained, cooperative effort by the Tribe and the Federal Government. Indeed, the reservation's fishing resources are wholly attributable to these recent efforts. Using federal funds, the Tribe has established

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[3] Financing for the complex, the Inn of Mountain Gods, came principally from the Economic Development Administration (EDA), an agency of the United States Department of Commerce, and other federal sources. In addition, the Tribe obtained a $6 million loan from the Bank of New Mexico, 90% of which was guaranteed by the Secretary of the Interior under the Indian Financing Act of 1974, 25 U. S. C. §§ 1451–1543, and 10% of which was guaranteed by Tribal funds. Certain additional facilities at the Inn were completely funded by the EDA as public works projects, and other facilities received 50% funding from the EDA. Appendix to Brief in Opposition 7a–8a.

[4] Income from the sale of hunting and fishing licenses, "package hunts" which combine hunting and fishing with use of the facilities at the Inn, and campground and picnicking permits totalled $269,140 in 1976 and $271,520 in 1977. The vast majority of the nonmember hunters and fishermen on the reservation are not residents of the State of New Mexico.

eight artificial lakes which, together with the reservation's streams, are stocked by the Bureau of Sport Fisheries and Wildlife of the the U. S. Fish and Wildlife Service, Deparment of the Interior, which operates a federal hatchery located on the reservation. None of the waters are stocked by the State.[5] The United States has also contributed substantially to the creation of the reservation's game resources. Prior to 1966 there were only 13 elk in the vicinity of the reservation. In 1966 and 1967 the National Park Service donated a herd of 162 elk which was released on the reservation. Through its management and range development[6] the Tribe has dramatically increased the elk population, which by 1977 numbered approximately 1,200. New Mexico has not contributed significantly to the development of the elk herd or the other game on the reservation, which includes antelope, bear and deer.[7]

The Tribe and the Federal Government jointly conduct a comprehensive fish and game management program. Pursuant to its Constitution and to an agreement with the Bureau of Sport Fisheries and Wildlife,[8] the Tribal Council adopts hunting and fishing ordinances each year. The tribal ordinances, which establish bag limits and seasons and provide for licensing of hunting and fishing, are subject to ap-

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[5] The State has not stocked any waters on the reservation since 1976.

[6] These efforts have included controlling and reducing the population of other animals, such as wild horses and cattle, which compete for the available forage on the reservation.

[7] The New Mexico Department Game and Fish issued a permit for the importation of these elk from Wyoming into New Mexico. The Department has provided the Tribe with any management assistance which the Tribe has requested; such requests have been limited. Appendix to Brief in Opposition 16a.

[8] That agreement, which provides for the stocking of the reservation's artifical lakes by the Bureau, obligates the Tribe to "designate those waters of the reservation which shall be open to public fishing" and "to establish regulations for the conservation of fishery resources."

proval by the Secretary under the Tribal Constitution and have been so approved. The Tribal Council adopts the game ordinances on the basis of recommendations submitted by a Bureau of Indian Affairs range conservationist who is assisted by full-time conservation officers employed by the Tribe. The recommendations are made in light of the conservation needs of the reservation, which are determined on the basis of annual game counts and surveys. Through the Bureau of Fish and Wildlife, the Secretary also determines the stocking of the reservation's waters based upon periodic surveys of the reservation.

Numerous conflicts exist between State and tribal hunting regulations.[9] For instance, tribal seasons and bag limits for both hunting and fishing often do not coincide with those imposed by the State. The Tribe permits a hunter to kill both a buck and a doe; the State permits only buck to be killed. Unlike the State, the Tribe permits a person to purchase an elk license in two consecutive years. Moreover, since 1977, the Tribe's ordinances have specified that State hunting and fishing licenses are not required for Indians or non-Indians who hunt or fish on the reservation.[10] The New Mexico Department of Game and Fish has enforced the State's regulations by arresting non-Indian hunters for illegal possession of game killed on the reservation in accordance with tribal ordinances but not in accordance with State hunting regulations.

In 1977 the Tribe filed suit against the State and the Director of its Fish and Game Department in the United States District Court for the District of New Mexico, seeking to prevent the State from regulating on-reservation hunting or

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[9] These conflicts have persisted despite the parties' stipulation that the New Mexico State Game Commission has attempted to "accomodate the preferences of the Mescalero Apache Tribe and other Indian tribes." Appendix to Brief in Opposition 25a.

[10] Prior to 1977 the Tribe consented to the application to the reservation of the State's hunting and fishing regulations.

fishing by members or nonmembers. On August 2, 1978, the District Court ruled in favor of the Tribe and granted declaratory and injunctive relief against the enforcement of the State's hunting and fishing laws against any person for hunting and fishing activities conducted on the reservation. The United States Court of Appeals for the Ninth Circuit affirmed. 630 F. 2d 724 (1980). Following New Mexico's petition for a writ of certiorari, this Court vacated the Tenth Circuit's judgment, 450 U. S. 1036 (1981), and remanded the case for reconsideration in light of *Montana* v. *United States*, 450 U. S. 544 (1981). On remand, the Court of Appeals adhered to its earlier decision. 677 F. 2d 55 (1982). We granted certiorari, —— U. S. —— (1982), and we now affirm.

II

New Mexico concedes that within the reservation the Tribe exercises exclusive jurisdiction over hunting and fishing by members of the Tribe and may also regulate the hunting and fishing by nonmembers.[11] New Mexico contends, however, that it may exercise concurrent jurisdiction over nonmembers and that therefore its regulations governing hunting and fishing throughout the State should also apply to hunting and fishing by nonmembers on the reservation. Although New Mexico does not claim that it can require the Tribe to permit nonmembers to hunt and fish on the reservation, it claims that, once the Tribe chooses to permit hunting and fishing by nonmembers, such hunting and fishing is subject to any State-imposed conditions. Under this view the State would be free to impose conditions more restrictive than the Tribe's own regulations, including an outright prohibition. The question in this case is whether the State may so restrict the Tribe's exercise of its authority.

Our decision in *Montana* v. *United States*, *supra*, does not resolve this question. Unlike this case, *Montana* concerned

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[11] Brief for Petitioner 7, 12, 20; Tr. of Oral Arg. 7.

lands located within the reservation but *not* owned by the Tribe or its members. We held that the Crow Tribe could not as a general matter regulate hunting and fishing on those lands. 450 U. S., at 557–567.[12] But as to "lands belonging to the Tribe or held by the United States in trust for the Tribe," we "readily agree[d]" that a Tribe may "prohibit nonmembers from hunting or fishing . . . [or] condition their entry by charging a fee or establish bag and creel limits." *Id.*, at 557. We had no occasion to decide whether a Tribe may only exercise this authority in a manner permitted by a State.

On numerous occasions this Court has considered the question whether a State may assert authority over a reservation. The decision in *Worcester* v. *Georgia*, 6 Pet. 515, 561 (1832), reflected the view that Indian tribes were wholly distinct nations within whose boundaries "the laws of [a State] can have no force." We long ago departed from the "conceptual clarity of Mr. Chief Justice Marshall's view in *Worcester*," *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148 (1973), and have acknowledged certain limitations on tribal sovereignty. For instance, we have held that Indian tribes have been implicitly divested of their sovereignty in certain respects by virtue of their dependent status,[13] that under certain circumstances a State may validly assert authority over the activi-

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[12] Even so, the Court acknowledged that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." 450 U. S., at 565. The Court stressed that in *Montana* the pleadings "did not allege that non-Indian hunting and fishing on [non-Indian] reservation lands [had] impaired [the Tribe's reserved hunting and fishing privileges]," *id.*, at 558 n.6, or "that non-Indian hunting and fishing on fee lands imperil the subsistence or welfare of the Tribe," *id.*, at 566, and that the existing record ~~both~~ failed to suggested "that such non-Indian hunting and fishing . . . threaten the Tribe's political or economic security," *ibid.*

[13] See, *e. g.*, *Oneida Indian Nation* v. *County of Oneida*, 414 U. S. 661, 667–668 (1974); *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191 (1978).

ties of nonmembers on a reservation,[14] and that in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members.[15]

Nevertheless, in demarcating the respective spheres of State and tribal authority over Indian reservations, we have continued to stress that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory," *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 142 (1980), quoting *United States* v. *Mazurie*, 419 U. S. 544, 557 (1975). Because of their sovereign status, tribes and their reservation lands are insulated by an "historic immunity from state and local control," *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 152 (1973), and tribes retain any aspect of their historical sovereignty not "inconsistent with the overriding interests of the National Government." *Washington* v. *Confederated Tribes*, *supra*, at 153.

The sovereignty retained by tribes includes "the power of regulating their internal and social relations," *United States* v. *Kagama*, 118 U. S. 375, 381–382 (1886), cited in *United States* v. *Wheeler*, 435 U. S. 313, 322 (1978). A tribe's power to presribe the conduct of tribal members has never been doubted, and our cases establish that a State may not assert its authority over the activities of members on a res-

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[14] See, *e. g.*, *Washington* v. *Confederated Tribes*, 447 U. S. 134 (1980); *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463 (1976).

[15] See *Puyallup Tribe* v. *Washington Game Dept.*, 433 U. S. 165 (1977). *Puyallup* upheld the State of Washington's authority to regulate on-reservation fishing by tribal members. Like *Montana* v. *United States*, *supra*, the decision in *Puyallup* rested in part on the fact that the dispute centered on lands which, although located within the reservation boundaries, no longer belonged to the tribe; all but 22 of the 18,000 acres had been alienated in fee simple. The Court also relied on a provision of the Indian treaty which qualified the Indians' fishing rights by requiring that they be exercised "in common with all citizens of the Territory," *id.*, 175, and on the State's interest in conserving a scarce, common resource. *Id.*, at 174, 175–177.

ervation in the absence of express tribal consent or congressional grant. See *Fisher* v. *District Court*, 424 U. S. 382, 388–389 (1976)(per curiam); *McClanahan* v. *Arizona Stae Tax Comm'n*, 411 U. S. 164, 171 (1973); *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148 (1973). See also *Williams* v. *Lee*, 358 U. S. 217, 222 (1959).

A tribe's power to exclude nonmembers entirely or to condition their presence on the reservation is equally well established. See, *e. g.*, *Montana* v. *United States*, *supra*; *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130 (1982). Whether a State may also assert its authority over the on-reservation activities of nonmembers raises "[m]ore difficult questions," *Bracker*, *supra*, at 144. While under some circumstances a State may exercise concurrent jurisdiction over non-Indians acting on tribal reservations, see, *e. g.*, *Washington* v. *Confederated Tribes*, *supra*; *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463 (1976), such authority may be asserted only if not preempted by the operation of federal law. See, *e. g.*, *Ramah Navajo School Bd.*, *supra*; *White Mountain Apache Tribe* v. *Bracker*, *supra*; *Central Machinery Co.* v. *Arizona Tax Comm'n*, 448 U. S. 160 (1980); *Williams* v. *Lee*, 358 U. S. 217 (1959); *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685 (1965); *Fisher* v. *District Court*, *supra*; *Kennerly* v. *District Court of Montana*, 400 U. S. 423 (1971).

In *Bracker* we reviewed our prior decisions concerning tribal and State authority over Indian reservations and extracted certain principles governing the determination whether federal law preempts the assertion of State authority over nonmembers on a reservation. We stated that that determination does not depend "on mechanical or absolute conceptions of state or tribal sovereignty, but calls for a particularized inquiry into the nature of the state, federal, and tribal interests at stake." 448 U. S., at 145.

We also emphasized the special sense in which the doctrine of preemption is applied in this context. See *id.*, at 143–144; *Ramah Navajo School Bd.*, *supra*, —— U. S., at ——. Al-

though a State will certainly be without jurisdiction if its authority is preempted under familiar principles of preemption, we cautioned that our prior cases did not limit preemption of State laws affecting Indian tribes to only those circumstances. "The unique historical origins of tribal sovereignty" and the federal commitment to tribal self-sufficiency and self-determination make it "treacherous to import . . . notions of preemption that are properly applied to other contexts." *Bracker*, *supra*, at 143. See also *Ramah Navajo School Bd.*, *supra*, at ——. By resting preemption analysis principally on a consideration of the nature of the competing interests at stake, our cases have rejected a narrow focus on congressional intent to preempt State law as the sole touchstone. They have also rejected the proposition that preemption requires "an express congressional statement to that effect." *Bracker*, *supra*, at 144 (footnote omitted). State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority. *Bracker*, *supra*, at 145. See also *Ramah Navajo School Bd.*, *supra*, at——, quoting *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941).[16]

Certain broad considerations guide our assessment of the federal and tribal interests. The traditional notions of Indian sovereignty provide a crucial "backdrop," *Bracker*, *supra*, at 143, citing *McClanahan*, *supra*, at 172, against which any assertion of State authority must be assessed.

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[16] The exercise of State authority may also be barred by an independent barrier—inherent tribal sovereignty—if it "unlawfully infringe[s] 'on the right of reservation Indians to make their own laws and be ruled by them." *White Mountain Apache Tribe* v. *Bracker*, 448 U. S., at 142, quoting *Williams* v. *Lee*, 358 U. S. 217, 220 (1959). See also *Washington* v. *Yakima Indian Nation*, 439 U. S. 463, 502 (1979); *Fisher* v. *District Court*, 424 U. S. 382 (1976) (*per curiam*); *Kennerly* v. *District Court of Montana*, 400 U. S. 423 (1971)." 448 U. S., at 142–143.

Moreover, both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes.[17] We have stressed that Congress' objective of furthering tribal self-government encompasses far more than encouraging tribal management of disputes between members, but includes Congress' overriding goal of encouraging tribes "to assume control over their 'business and economic affairs,'" *Bracker*, *supra*, at 149, citing *Mescalero Apache Tribe* v. *Jones*, 411 U. S., at 151. In part as a necessary implication of this broad federal commitment, we have held that tribes have the power to manage the use of its territory and resources by both members and nonmembers,[18] *Merrion*, *supra*, at 137; *Bracker*, *supra*, at 151; *Montana* v. *United*

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[17] For example, the Indian Financing Act of 1974, 25 U. S. C. § 1451 *et seq.*, states: "It is hereby declared to be the policy of Congress . . . 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." § 1451. Similar policies underlie the Indian Self-Determination and Education Assistance Act of 1975, 25 U. S. C. § 450 *et seq.*, as well as the Indian Reorganization Act of 1934, 25 U. S. C. § 461 *et seq.*, pursuant to which the Mescalero Apache Tribe adopted its Constitution. The "intent and purpose of the Reorganization Act was '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., at 152, quoting H. R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934). The Indian Civil Rights Act of 1968, 25 U. S. C. § 1301 *et seq.*, likewise reflects Congress' intent "to promote the well-established federal 'policy of furthering Indian self-government.'" *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 62 (1978), quoting *Morton* v. *Mancari*, 417 U. S. 535, 551 (1974).

[18] Our cases have recognized that tribal sovereignty contains a "significant geographical component." *Bracker*, *supra*, at 151. Thus the off-reservation activities of Indians are generally subject to the prescriptions of a "nondiscriminatory state law" in the absence of "express federal law to the contrary." *Mescalero Apache Tribe* v. *Jones*, 411 U. S., at 148–149.

States, *supra*; 28 U. S. C. § 1162(b); 25 U. S. C. §§ 1321(b), 1322(b); 18 U. S. C. § 1165, to undertake and regulate economic activity within the reservation, *Merrion*, *supra*, at 137, and to defray the cost of governmental services by levying taxes. *Ibid.* Thus, when a tribe undertakes an enterprise under the authority of federal law, an assertion of State authority is preempted to the extent that it "threaten[s] the overriding federal objective" of promoting "tribal self-sufficiency and economic development." *Bracker*, *supra*, at 149, 143 (footnote omitted). See also *Ramah Navajo School Bd.*, *supra*, at ——, quoting *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941) (State authority precluded when it "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress").

Our prior decisions also guides our assessment of the state interest asserted to justify State jurisdiction over a reservation. The exercise of State authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the State in connection with the on-reservation activity. *Ramah Navajo School Bd.*, *supra*, at —— & note 7; *Bracker*, *supra*, at 148–149; *Central Machinery Co.* v. *Arizona Tax Comm'n*, 448 U. S. 160, 174 (1980) (POWELL, J., concurring). Thus a State seeking to impose a tax on a transaction between a Tribe and nonmembers must point to more than its general interest in raising revenues. See, *e. g.*, *Warren Trading Post Co.*, *supra*; *Bracker*, *supra*; *Ramah Navajo School Bd.*, *supra*. A State seeking not merely to tax but to regulate a tribal activity is under a greater burden to advance a significant State interest, since duplicative and potentially conflicting regulation is generally more disruptive than double taxation. *Cf. Confederated Tribes*, *supra*, at 159. A State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate State intervention. *Cf. Puyallup Tribe* v. *Washington Game Dept.*, *supra*.

III

With these principles in mind, we turn to New Mexico's claim that it may superimpose its own hunting and fishing regulations on the Mescalero Apache Tribe's regulatory scheme.

A

It is beyond doubt that the Mescalero Apache Tribe lawfully exercises substantial control over the lands and resources of its reservation, including its wildlife. As noted above, *supra*, at 6–7, and as conceded by New Mexico,[19] the sovereignty retained by the Tribe under the Treaty of 1852 includes its right to regulate the use of its resources by members as well as non-members. In *Montana* v. *United States*, *supra*, we specifically recognized that tribes in general retain this authority.

Moreover, this aspect of tribal sovereignty has been expressly confirmed by numerous federal statutes.[20] Pub. L. 280 specifically confirms the power of tribes to regulate on-reservation hunting and fishing. 67 Stat. 588, 25 U. S. C. § 1321(b); 18 U. S. C. § 1162(b).[21] This authority is afforded

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[19] New Mexico concedes that the Tribe originally relied on wildlife for subsistance, that tribal members freely took fish and game in ancestral territory, and that the Treaty of July 1, 1852, 10 Stat. 979, between the Tribe and the United States confirmed the Tribe's rights regarding hunting and fishing on the small portion of the aboriginal Mescalero domain that was eventually set apart as the Tribe's reservation. Brief, at 12. See *Menominee Tribe of Indians* v. *United States*, 391 U. S. 404 (1968); *Montana* v. *United States*, 450 U. S. 544, 558–559 (1981). See also *United States* v. *Winans*, 198 U. S. 371, 381 (1905)(recognizing that hunting and fishing "were not much less necessary to the existence of the Indians than the atmosphere they breathed").

[20] The Tribe's authority was also confirmed more generally by the Indian Reorganization Act, 25 U. S. C. § 476, which reaffirms "all powers vested in any Indian tribe or tribal council by existing law."

[21] The provision of Pub. L. 280 granting States criminal jurisdiction over Indian reservations under certain conditions provides that States were not thereby authorized to

the protection of the federal criminal law by 18 U. S. C. § 1165, which makes it a violation of federal law to enter Indian land to hunt, trap or fish without the consent of the tribe. See *Montana* v. *United States*, 450 U. S., at 562 n. 11. The 1981 amendments to the Lacey Act, 16 U. S. C. § 3371 *et seq.*, further accord tribal hunting and fishing regulations the force of federal law by making it a federal offense to violate "any Indian tribal law." § 3372(a)(1).[22]

B

Several considerations strongly support the Court of Appeals' conclusion that the Tribe's authority to regulate hunting and fishing preempts State jurisdiction. It is important to emphasize that concurrent jurisdiction would effectively nullify the Tribe's authority to control hunting and fishing on the reservation. Concurrent jurisdiction would empower New Mexico wholly to supplant tribal regulations. The State would be able to dictate the terms on which nonmembers are permitted to utilize the reservation's resources. The Tribe would thus exercise its authority over the reservation only at the sufferance of the State. The tribal authority to regulate hunting and fishing by nonmembers, which has been repeatedly confirmed by federal treaties and laws and which we explicitly recognized in *Montana* v. *United States*, *supra*, would have a rather hollow ring if tribal authority amounted to no more than this.

Furthermore, the exercise of concurrent State jurisdiction in this case would completely "disturb and disarrange", *War-*

"deprive any Indian of any Indian trie, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing *or the control, licensing or regulation thereof.*" 18 U. S. C. § 1162(b); 25 U. S. C. § 1321(b) (emphasis added).

[22] Sections 3375(a) and (b) authorize the Secretary to enter into agreements with Indian tribes to enforce the provisions of the law by, *inter alia*, making arrests and serving process.

ren Trading Post Co. v. *Arizona Tax Comm'n*, 380 U. S. 685, 691 (1965), the comprehensive scheme of federal and tribal management established pursuant to federal law. As described above, *infra*, at 2-3, federal law requires the Secretary to review each of the Tribe's hunting and fishing ordinances. Those ordinances are based on the recommendations made by a federal range conservationist employed by the Bureau of Indian Affairs. Moreover, the Bureau of Sport Fisheries and Wildlife stocks the reservation's waters based on its own determinations concerning the availability of fish, biological requirements, and the fishing pressure created by on-reservation fishing. App. 71.[23]

Concurrent State jurisdiction would supplant this regulatory scheme with an inconsistent dual system: members would be governed by Tribal ordinances, while nonmembers would be regulated by general State hunting and fishing laws. This could severely hinder the ability of the Tribe to conduct a sound management program. Tribal ordinances reflect the specific needs of the reservation by establishing the optimal level of hunting and fishing that should occur, not simply a maximum level that should not be exceeded. State laws in contrast are based on considerations not necessarily relevant to, and possibly hostile to, the needs of the reservation. For instance, the ordinance permitting a hunter to kill a buck and a doe was designed to curb excessive growth of the deer population on the reservation. App. at 153–154. Enforcement of the State regulation permitting only buck to be killed would frustrate that objective. Similarly, by determining the Tribal hunting seasons, bag limits, and permit availability, the Tribe regulates the duration and intensity of hunting. These determinations take into account numerous factors, including the game capacity of the terrain, the range utilization of the game animals, and the

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[23] In addition, as noted earlier, *supra*, at 3-4, the Federal Government played a substantial role in the development of the Tribe's resources.

availability of tribal personnel to monitor the hunts. Permitting the State to enforce different restrictions simply because they have been determined to be appropriate for the State as a whole would impose on the Tribe the possibly insurmountable task of ensuring that the patchwork application of State and Tribal regulations remains consistent with sound management of the reservation's resources.

Federal law commits to the Secretary and the Tribal Council the responsibility to manage the reservation's resources. It is most unlikely that Congress would have authorized, and the Secretary would have established, financed, and participated in Tribal management if it were thought that New Mexico was free to nullify the entire arrangement.[24] Requiring Tribal ordinances to yield whenever State law is more restrictive would seriously "undermine the Secretary's [and the Tribe's] ability to make the wide range of determinations committed to [their] authority." *Bracker*, *supra*, at 149. See *Fisher* v. *District Court*, 424 U. S. 382, 390 (1976)(*per curiam); United States* v. *Mazurie*, 419 U. S. 544 (1975).[25]

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[24] The Secretary assumed precisely the opposite is true—that State jurisdiction is preempted—when he approved a tribal ordinance which provided that nonmembers hunting and fishing on the reservation need not obtain State licenses. That assumption is also embodied in an agreement between the Tribe and the Department of Interior's Bureau of Sport Fisheries and Wildlife, see note 7, *supra*, which openly acknowledges that tribal regulations need not agree with State laws. The agreement provides that "*[i]nsofar as possible* said regulations shall be in agreement with State regulations." (Emphasis added).

[25] Congress' intent to preempt State regulation of hunting and fishing on reservations is reinforced by Pub. L. 280. That law, which grants limited criminal and civil jurisdiction over Indians reservations to States which meet certain requirements, contains a provision which expressly excludes authority over hunting and fishing. That provision provides that a State which has properly assumed jurisdiction under Pub. L. 280 is not thereby authorized to

"deprive any Indian of any Indian trie, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or stat-

The assertion of concurrent jurisdiction by New Mexico not only would threaten to disrupt the federal and tribal regulatory scheme, but also threaten Congress' overriding objective of encouraging tribal self-government and economic development. The Tribe has engaged in a concerted and sustained undertaking to develop and manage the reservation's wildlife and land resources specifically for the benefit of its members. The project generates funds for essential tribal services and provides employment for members who reside on the reservation. This case is thus far removed from those situations, such as on-reservation sales outlets which market to nonmembers goods not manufactured by the tribe or its members, in which the tribal contribution to an enterprise is *de minimis*. See *Washington* v. *Confederated Tribes*, 447 U. S. 134, 154–159 (1980).[26] The Tribal enterprise in this case clearly involves "value generated on the reservation by activities involving the Trib[e]." *Id.*, at 156–157. The disruptive effect that would result from the

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ute with respect to hunting, trapping, or fishing *or the control, licensing or regulation thereof.*" 18 U. S. C. § 1162(b); 25 U. S. C. § 1321(b) (emphasis added).

Pub. L. 280 evidences Congress' understanding that tribal regulation of hunting and fishing should generally be insulated from State interference, since "Congress would not have jealously protected" tribal exemption from conflicting State hunting and fishing laws "had it thought that the States had residual power to impose such [laws] in any event." *McClanahan* v. *Arizona Tax Comm'n*, 411 U. S. 164, 177 (1973). In *McClanahan* we concluded that the Buck Act, 4 U. S. C. § 105 *et seq.*, which contains a provision exempting Indians from a grant to the States of general authority to tax residents of federal areas, likewise provided evidence of Congress' intent to exempt Indians from State taxes. *Ibid.*

[26] In *Washington* v. *Confederated Tribes* the Court held that the sales of tribal smokeshops which sold cigarettes to nonmembers were subject to the State sales and cigarette taxes. *Id.*, at 154–159. The Court relied on the fact that the tribal smokeshops were not marketing "value generated on the reservation," *id.*, at 156–157, but instead were seeking merely to market a "tax exemption to nonmembers who do not receive significant tribal services." *Id.*, at 157.

assertion of concurrent jurisdiction by New Mexico would plainly "stan[d] as an obstacle to the accomplishment of the full purposes and objectives of Congress," *Ramah Navajo School Bd.*, *supra*, at ——, quoting *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941).

C

The State has failed to "identify any regulatory function or service . . . that would justify" the assertion of concurrent regulatory authority. *Bracker*, *supra*, at 148. The hunting and fishing permitted by the Tribe occurs entirely on the reservation. The fish and wildlife resources are either native to the reservation or were created by the joint efforts of the Tribe and the Federal Government. New Mexico does not contribute in any significant respect to the maintenance of these resources, and can point to no other "governmental functions it provides," *Ramah Navajo School Bd.*, *supra*, at ——, in connection with hunting and fishing on the reservation by nonmembers that would justify the assertion of its authority.

The State also cannot point to any off-reservation effects that warrant State intervention. Some species of game never leave tribal lands, and the State points to no specific interest concerning those that occasionally do. Unlike *Puyallup Tribe* v. *Washington Game Dept.*, *supra*, this is not a case in which a Treaty expressly subjects a tribe's hunting and fishing rights to the common rights of nonmembers and in which a State's interest in conserving a scarce, common supply justifies State intervention. 433 U. S., at 174, 175–177. The State concedes that the Tribe's management has not had an adverse impact on fish and wildlife outside the reservation." Respondent's Brief in Opposition, App. 35a.[27]

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[27] We rejct the State's claim that the Tribe's ability to manage its wildlife resources suffers from a lack of enforcement powers and that therefore concurrent jurisdiction is necessary to fill the void. The Tribe clearly can exclude or expel those who violate Tribal ordinances. Trespassers may be

New Mexico contends that it will be deprived of the sale of state licenses to nonmembers who hunt and fish on the reservation, as well as some federal matching funds calculated in part on the basis of the number of State licenses sold.[28] However, the State expressly disavows any reliance on its taxing powers as the basis for concurrent jurisdiction. It defends the application of its hunting and fishing laws, including the State's license requirement, solely as a proper exercise of its regulatory authority, Petitioner's Brief 18 n. 5, and the State's regulatory interests, as we have indicated, are insignificant. Even if the State's licensing requirement were properly characterized and defended as an independent taxing measure, the State's financial interests are insufficient to justify the exercise of concurrent jurisdiction. The loss of revenues to the State is likely to be insubstantial given the small numbers of persons who purchase tribal hunting licenses.[29] Moreover, as already noted, *supra*, at 18, the State has pointed to no services it has performed in connection with hunting and fishing by nonmembers which justify imposing a tax in the form of a hunting and fishing license, *Ramaha Navajo School Bd.*, *supra*, at ——; *Central Machinery Co.* v. *Arizona Tax Comm'n*, 448 U. S., at 174 (Pow-

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referred for prosecution under 18 U. S. C. § 1165. Furthermore, the Lacey Act Amendments of 1981, 16 U. S. C. § 3371 *et seq.*, make it a federal offense to violate any tribal law, provide for civil and criminal penalties and authorizes forfeiture of fish or wildlife as well as vehicles or equipment used in the violation, §§ 3373, 3374, and provide that the Secretary can grant authority to tribal personnel to enforce these provisions. § 3375(a), (b).

[28] The State receives federal matching funds through the Pittman-Robinson Act, 16 U. S. C. 669 (hunting), and the Dingle-Johnson Act, 16 U. S. C. 777 (fishing), which are allocated through a formula which considers the number of licenses sold and the number of acres in the State.

[29] In recent years the Tribe sold 10 antelope licenses compared to 3,500 for the State, 50 elk licenses compared to 14,000 by the State, and 500 deer licenses compared to 100,000 for the State.

ELL, J., concurring), and its general desire to avoid a loss of revenues is simply inadequate to justify the assertion of concurrent jurisdiction in this case. See *Bracker*, 448 U. S., at 150; *Ramah Navajo School Bd.*, *supra*, at ——.[30]

IV

In this case the governing body of an Indian Tribe, working closely with the Federal Government and under the authority of federal law, has exercised its lawful authority to develop and manage the reservation's resources for the benefit of its members. The exercise of concurrent jurisdiction by the State would effectively nullify the Tribe's unquestioned authority to regulate the use of its resources by members and nonmembers, interfere with the comprehensive tribal regulatory scheme, and threaten Congress' firm commitment to the encouragement of tribal self-sufficiency and economic development. Given the strong interests favoring exclusive tribal jurisdiction and the absence of State interests which justify the assertion of concurrent authority, we conclude that the application of the State's hunting and fishing laws to the reservation is preempted.

Accordingly, the judgment of the Court of Appeals is

Affirmed.

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[30] New Mexico concedes that it has expended no Dingle-Johnson funds for projects within the reservation during the last six to eight years. Brf. in Op. App. 17a–18a. It presented no evidence as to expenditures of Pittman-Robinson funds within the reservation.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 27, 1983

No. 82-331

New Mexico, et al.
v. Mescalero Apache Tribe

Dear Thurgood,

I agree.

Sincerely,

Bill

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 27, 1983

Re: No. 82-331, New Mexico v. Mescalero Apache Tribe

Dear Thurgood,

As you know, I voted with the majority in this case. Because of my position in Rice v. Rehner, however, I am having some difficulty with some of the language in your proposed opinion. As soon as I can get to it, I will either send along some possible specific suggestions or will circulate a separate concurrence in the result.

Sincerely,

Sandra

Justice Marshall

Copies to the Conference

job 05/27/83

See my letter to TM

To: Mr. Justice Powell

From: Jim

Re: New Mexico v. Mescalero Apache Tribe, No. 82-331

I have no problem with this draft and recommend that you join. There is one sentence, however, that troubles me. On p. 12, 4th sentence of the 1st full ¶, JUSTICE MARSHALL states: "A State seeking not merely to tax but to regulate a tribal activity is under a greater burden to advance a significant State interest, since duplicative and potentially conflicting regulation is generally more disruptive than double taxation." I do not agree with this as a description of reality or as a legal conclusion. Nor do I think that JUSTICE MARSHALL's citation to Washington v. Confederated Tribes, 447 U.S. 134, 159 (1980), helps him much. There, the Court said: "Other provisions of the tribal ordinances do comprehensively regulate the marketing of cigarettes by the tribal enterprises; but the State does not interfere with the Tribes' power to regulate tribal enterprises when it simply imposes its tax on sales to nonmembers." The rest of p. 159 in Confederated Tribes discusses the recordkeeping requirements necessary to ensure the collection of state taxes. The Court upheld those requirements, because the Indians had not met their burden of showing that the requirements were invalid. Thus, JUSTICE MARSHALL has not shown much authority for his assertion.

There is no reason to make law where it could have troubling implications for Western States that have to deal in a real world sense with sovereign states within their boundaries. The statement is not necessary for JUSTICE MARSHALL's opn. I would suggest that it be deleted.

May 27, 1983

82-331 New Mexico v. Mescalero Apache Tribe

Dear Thurgood:

You have written a fine opinion and - subject to one suggestion - I will be happy to join you. On p. 12, 4th sentence of the first full paragraph, your draft opinion states:

> "A State seeking not merely to tax but to regulate a tribal activity is under a greater burden to advance a significant State interest, since duplicative and potentially conflicting regulation is generally more disruptive than double taxation."

As I read Washington v. Confederated Tribes, 447 U.S. 143, 159, I am not sure that it goes quite this far. Moreover, as a general proposition I would think that some types of regulation could be less "disruptive" of tribal activity than heavy double taxation. The extent of interference with tribal activity would depend on the facts and circumstances. Thus, it seems unnecessary - certainly in this case - to draw a distinction between the burden of justification required by the state.

If you are disposed to delete this sentence, I will be happy to join you.

Sincerely,

Justice Marshall

lfp/ss

STYLISTIC CHANGES THROUGHOUT.

pp. 11, 12, 14

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

LFP

From: **Justice Marshall**

Circulated: _____

Recirculated: MAY 31 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-331

NEW MEXICO, ET AL., PETITIONER *v.*
MESCALERO APACHE TRIBE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[June ——, 1983]

JUSTICE MARSHALL, delivered the opinion of the Court.

We are called upon to decide in this case whether a State may restrict an Indian Tribe's regulation of hunting and fishing on its reservation. With extensive federal assistance and supervision, the Mescalero Apache Tribe has established a comprehensive scheme for managing the reservation's fish and wildlife resources. Federally approved Tribal ordinances regulate in detail the conditions under which both members of the Tribe and nonmembers may hunt and fish. New Mexico seeks to apply its own laws to hunting and fishing by nonmembers on the reservation. We hold that this application of New Mexico's hunting and fishing laws is preempted by the operation of federal law.

I

The Mescalero Apache Tribe (Tribe) resides on a reservation located within Otero County in south central New Mexico. The reservation, which represents only a small portion of the aboriginal Mescalero domain, was created by a succession of Executive Orders promulgated in the 1870's and 1880's.[1] The present reservation comprises more than

[1] See 1 C. Klapper, Indian Affairs, Laws and Treaties 870–873 (1904). The final boundaries were fixed by the Executive Order of Mar. 24, 1883

I don't think these changes make enough difference for me not to join

Do not join.

I am not enthusiastic about the two changes on pp. 11, 12 that I have marked. P. 14 is ok and the second change on p. 12 is the one you suggested. I have trouble with the change on p. 11.

460,000 acres, of which the Tribe owns all but 193.85 acres.[2] Approximately 2,000 members of the Tribe reside on the reservation, along with 179 non-Indians, including resident federal employees of the Bureau of Indian Affairs and the Indian Health Service.

The Tribe is organized under the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U. S. C. § 461 *et seq.*, which authorizes any tribe residing on a reservation to adopt a constitution and bylaws, subject to the approval of the Secretary of the Interior (Secretary). The Tribe's Constitution, which was approved by the Secretary on January 12, 1965, requires the Tribal Council

> "[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, providing that any ordinance directly affecting non-members of the tribe shall be subject to review by the Secretary of Interior." App. 53.

The Constitution further provides that the Council shall

> "adopt and approve plans of operation to govern the conduct of any business or industry that will further the economic well-being of the members of the tribe, and to undertake any activity not inconsistent with Federal law or

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(Order of President Arthur). Portions of the reservation were briefly included in a National Forest, but were restored to the Mescalero reservation by the Executive Order of Feb. 17, 1912 (Order of President Taft). An intervening Executive Order of Mar. 1, 1910, issued by President Taft exempted from the reservation two "small holdings claims" covering settlements located before the establishment of the reservation. The Tribe has since purchased all but 23.8 acres of the land covered by these claims.

[2] These lands comprise the 23.8 acres remaining of the "small holdings claims," see note 1, *supra*; 10 acres granted to St. Joseph's Catholic Church by the Act of Mar. 29, 1928, ch. 299, 45 Stat. 1716; and the unimproved and unoccupied 160 acre "Dodson Tract" in the northwest portion of the reservation. See Brief for United States 2 n. 3.

> with this constitution, designed for the social or economic improvement of the Mescalero Apache people, . . . subject to review by the Secretary of the Interior." *Ibid.*

Anticipating a decline in the sale of lumber which has been the largest income-producing activity within the reservation, the Tribe has recently committed substantial time and resources to the development of other sources of income. The Tribe has constructed a resort complex financed principally by federal funds,[3] and has undertaken a substantial development of the reservation's hunting and fishing resources. These efforts provide employment opportunities for members of the Tribe, and the sale of hunting and fishing licenses and related services generates income which is used to maintain the Tribal government and provide services to Tribe members.[4]

Development of the reservation's fish and wildlife resources has involved a sustained, cooperative effort by the Tribe and the Federal Government. Indeed, the reservation's fishing resources are wholly attributable to these recent efforts. Using federal funds, the Tribe has established

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[3] Financing for the complex, the Inn of Mountain Gods, came principally from the Economic Development Administration (EDA), an agency of the United States Department of Commerce, and other federal sources. In addition, the Tribe obtained a $6 million loan from the Bank of New Mexico, 90% of which was guaranteed by the Secretary of the Interior under the Indian Financing Act of 1974, 25 U. S. C. §§ 1451–1543, and 10% of which was guaranteed by Tribal funds. Certain additional facilities at the Inn were completely funded by the EDA as public works projects, and other facilities received 50% funding from the EDA. Appendix to Brief in Opposition 7a–8a.

[4] Income from the sale of hunting and fishing licenses, "package hunts" which combine hunting and fishing with use of the facilities at the Inn, and campground and picnicking permits totalled $269,140 in 1976 and $271,520 in 1977. The vast majority of the nonmember hunters and fishermen on the reservation are not residents of the State of New Mexico.

eight artificial lakes which, together with the reservation's streams, are stocked by the Bureau of Sport Fisheries and Wildlife of the the U. S. Fish and Wildlife Service, Department of the Interior, which operates a federal hatchery located on the reservation. None of the waters are stocked by the State.[5] The United States has also contributed substantially to the creation of the reservation's game resources. Prior to 1966 there were only 13 elk in the vicinity of the reservation. In 1966 and 1967 the National Park Service donated a herd of 162 elk which was released on the reservation. Through its management and range development[6] the Tribe has dramatically increased the elk population, which by 1977 numbered approximately 1,200. New Mexico has not contributed significantly to the development of the elk herd or the other game on the reservation, which includes antelope, bear and deer.[7]

The Tribe and the Federal Government jointly conduct a comprehensive fish and game management program. Pursuant to its Constitution and to an agreement with the Bureau of Sport Fisheries and Wildlife,[8] the Tribal Council adopts hunting and fishing ordinances each year. The tribal ordinances, which establish bag limits and seasons and provide for licensing of hunting and fishing, are subject to ap-

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[5] The State has not stocked any waters on the reservation since 1976.

[6] These efforts have included controlling and reducing the population of other animals, such as wild horses and cattle, which compete for the available forage on the reservation.

[7] The New Mexico Department Game and Fish issued a permit for the importation of the elk from Wyoming into New Mexico. The Department has provided the Tribe with any management assistance which the Tribe has requested; such requests have been limited. Appendix to Brief in Opposition 16a.

[8] That agreement, which provides for the stocking of the reservation's artifical lakes by the Bureau, obligates the Tribe to "designate those waters of the reservation which shall be open to public fishing" and "to establish regulations for the conservation of fishery resources." App. 71.

proval by the Secretary under the Tribal Constitution and have been so approved. The Tribal Council adopts the game ordinances on the basis of recommendations submitted by a Bureau of Indian Affairs range conservationist who is assisted by full-time conservation officers employed by the Tribe. The recommendations are made in light of the conservation needs of the reservation, which are determined on the basis of annual game counts and surveys. Through the Bureau of Fish and Wildlife, the Secretary also determines the stocking of the reservation's waters based upon periodic surveys of the reservation.

Numerous conflicts exist between State and tribal hunting regulations.[9] For instance, tribal seasons and bag limits for both hunting and fishing often do not coincide with those imposed by the State. The Tribe permits a hunter to kill both a buck and a doe; the State permits only buck to be killed. Unlike the State, the Tribe permits a person to purchase an elk license in two consecutive years. Moreover, since 1977, the Tribe's ordinances have specified that State hunting and fishing licenses are not required for Indians or non-Indians who hunt or fish on the reservation.[10] The New Mexico Department of Game and Fish has enforced the State's regulations by arresting non-Indian hunters for illegal possession of game killed on the reservation in accordance with tribal ordinances but not in accordance with State hunting regulations.

In 1977 the Tribe filed suit against the State and the Director of its Fish and Game Department in the United States District Court for the District of New Mexico, seeking to prevent the State from regulating on-reservation hunting or

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[9] These conflicts have persisted despite the parties' stipulation that the New Mexico State Game Commission has attempted to "accomodate the preferences of the Mescalero Apache Tribe and other Indian tribes." Appendix to Brief in Opposition 25a.

[10] Prior to 1977 the Tribe consented to the application to the reservation of the State's hunting and fishing regulations.

fishing by members or nonmembers. On August 2, 1978, the District Court ruled in favor of the Tribe and granted declaratory and injunctive relief against the enforcement of the State's hunting and fishing laws against any person for hunting and fishing activities conducted on the reservation. The United States Court of Appeals for the Ninth Circuit affirmed. 630 F. 2d 724 (1980). Following New Mexico's petition for a writ of certiorari, this Court vacated the Tenth Circuit's judgment, 450 U. S. 1036 (1981), and remanded the case for reconsideration in light of *Montana* v. *United States*, 450 U. S. 544 (1981). On remand, the Court of Appeals adhered to its earlier decision. 677 F. 2d 55 (1982). We granted certiorari, —— U. S. —— (1982), and we now affirm.

II

New Mexico concedes that on the reservation the Tribe exercises exclusive jurisdiction over hunting and fishing by members of the Tribe and may also regulate the hunting and fishing by nonmembers.[11] New Mexico contends, however, that it may exercise concurrent jurisdiction over nonmembers and that therefore its regulations governing hunting and fishing throughout the State should also apply to hunting and fishing by nonmembers on the reservation. Although New Mexico does not claim that it can require the Tribe to permit nonmembers to hunt and fish on the reservation, it claims that, once the Tribe chooses to permit hunting and fishing by nonmembers, such hunting and fishing is subject to any State-imposed conditions. Under this view the State would be free to impose conditions more restrictive than the Tribe's own regulations, including an outright prohibition. The question in this case is whether the State may so restrict the Tribe's exercise of its authority.

Our decision in *Montana* v. *United States*, *supra*, does not resolve this question. Unlike this case, *Montana* concerned

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[11] Brief for Petitioner 7, 12, 20; Tr. of Oral Arg. 7.

lands located within the reservation but *not* owned by the Tribe or its members. We held that the Crow Tribe could not as a general matter regulate hunting and fishing on those lands. 450 U. S., at 557–567.[12] But as to "lands belonging to the Tribe or held by the United States in trust for the Tribe," we "readily agree[d]" that a Tribe may "prohibit nonmembers from hunting or fishing . . . [or] condition their entry by charging a fee or establish bag and creel limits." *Id.*, at 557. We had no occasion to decide whether a Tribe may only exercise this authority in a manner permitted by a State.

On numerous occasions this Court has considered the question whether a State may assert authority over a reservation. The decision in *Worcester* v. *Georgia*, 6 Pet. 515, 561 (1832), reflected the view that Indian tribes were wholly distinct nations within whose boundaries "the laws of [a State] can have no force." We long ago departed from the "conceptual clarity of Mr. Chief Justice Marshall's view in *Worcester*," *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148 (1973), and have acknowledged certain limitations on tribal sovereignty. For instance, we have held that Indian tribes have been implicitly divested of their sovereignty in certain respects by virtue of their dependent status,[13] that under certain circumstances a State may validly assert authority over the activi-

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[12] Even so, the Court acknowledged that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." 450 U. S., at 565. The Court stressed that in *Montana* the pleadings "did not allege that non-Indian hunting and fishing on [non-Indian] reservation lands [had] impaired [the Tribe's reserved hunting and fishing privileges]," *id.*, at 558 n. 6, or "that non-Indian hunting and fishing on fee lands imperil the subsistence or welfare of the Tribe," *id.*, at 566, and that the existing record failed to suggested "that such non-Indian hunting and fishing . . . threaten the Tribe's political or economic security." *Ibid.*

[13] See, *e. g.*, *Oneida Indian Nation* v. *County of Oneida*, 414 U. S. 661, 667–668 (1974); *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191 (1978).

ties of nonmembers on a reservation,[14] and that in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members.[15]

Nevertheless, in demarcating the respective spheres of State and tribal authority over Indian reservations, we have continued to stress that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory," *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 142 (1980), quoting *United States* v. *Mazurie*, 419 U. S. 544, 557 (1975). Because of their sovereign status, tribes and their reservation lands are insulated by an "historic immunity from state and local control," *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 152 (1973), and tribes retain any aspect of their historical sovereignty not "inconsistent with the overriding interests of the National Government." *Washington* v. *Confederated Tribes*, *supra*, at 153.

The sovereignty retained by tribes includes "the power of regulating their internal and social relations," *United States* v. *Kagama*, 118 U. S. 375, 381–382 (1886), cited in *United States* v. *Wheeler*, 435 U. S. 313, 322 (1978). A tribe's power to presribe the conduct of tribal members has never been doubted, and our cases establish that a State may not assert its authority over the activities of members on a res-

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[14] See, *e. g.*, *Washington* v. *Confederated Tribes*, 447 U. S. 134 (1980); *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463 (1976).

[15] See *Puyallup Tribe* v. *Washington Game Dept.*, 433 U. S. 165 (1977). *Puyallup* upheld the State of Washington's authority to regulate on-reservation fishing by tribal members. Like *Montana* v. *United States*, *supra*, the decision in *Puyallup* rested in part on the fact that the dispute centered on lands which, although located within the reservation boundaries, no longer belonged to the tribe; all but 22 of the 18,000 acres had been alienated in fee simple. The Court also relied on a provision of the Indian treaty which qualified the Indians' fishing rights by requiring that they be exercised "in common with all citizens of the Territory," *id.*, 175, and on the State's interest in conserving a scarce, common resource. *Id.*, at 174, 175–177.

ervation in the absence of express tribal consent or congressional grant. See *Fisher* v. *District Court*, 424 U. S. 382, 388–389 (1976) (per curiam); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 171 (1973); *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148 (1973). See also *Williams* v. *Lee*, 358 U. S. 217, 222 (1959).

A tribe's power to exclude nonmembers entirely or to condition their presence on the reservation is equally well established. See, *e. g.*, *Montana* v. *United States*, *supra*; *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130 (1982). Whether a State may also assert its authority over the on-reservation activities of nonmembers raises "[m]ore difficult questions," *Bracker*, *supra*, at 144. While under some circumstances a State may exercise concurrent jurisdiction over non-Indians acting on tribal reservations, see, *e. g.*, *Washington* v. *Confederated Tribes*, *supra*; *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463 (1976), such authority may be asserted only if not preempted by the operation of federal law. See, *e. g.*, *Ramah Navajo School Bd.*, *supra*; *White Mountain Apache Tribe* v. *Bracker*, *supra*; *Central Machinery Co.* v. *Arizona Tax Comm'n*, 448 U. S. 160 (1980); *Williams* v. *Lee*, 358 U. S. 217 (1959); *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685 (1965); *Fisher* v. *District Court*, *supra*; *Kennerly* v. *District Court of Montana*, 400 U. S. 423 (1971).

In *Bracker* we reviewed our prior decisions concerning tribal and State authority over Indian reservations and extracted certain principles governing the determination whether federal law preempts the assertion of State authority over nonmembers on a reservation. We stated that that determination does not depend "on mechanical or absolute conceptions of state or tribal sovereignty, but calls for a particularized inquiry into the nature of the state, federal, and tribal interests at stake." 448 U. S., at 145.

We also emphasized the special sense in which the doctrine of preemption is applied in this context. See *id.*, at 143–144; *Ramah Navajo School Bd.*, *supra*, —— U. S., at ——. Al-

though a State will certainly be without jurisdiction if its authority is preempted under familiar principles of preemption, we cautioned that our prior cases did not limit preemption of State laws affecting Indian tribes to only those circumstances. "The unique historical origins of tribal sovereignty" and the federal commitment to tribal self-sufficiency and self-determination make it "treacherous to import . . . notions of preemption that are properly applied to other contexts." *Bracker, supra,* at 143. See also *Ramah Navajo School Bd., supra,* at ——. By resting preemption analysis principally on a consideration of the nature of the competing interests at stake, our cases have rejected a narrow focus on congressional intent to preempt State law as the sole touchstone. They have also rejected the proposition that preemption requires "an express congressional statement to that effect." *Bracker, supra,* at 144 (footnote omitted). State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority. *Bracker, supra,* at 145. See also *Ramah Navajo School Bd., supra,* at ——, quoting *Hines* v. *Davidowitz,* 312 U. S. 52, 67 (1941).[16]

Certain broad considerations guide our assessment of the federal and tribal interests. The traditional notions of Indian sovereignty provide a crucial "backdrop," *Bracker, supra,* at 143, citing *McClanahan, supra,* at 172, against which any assertion of State authority must be assessed.

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[16] The exercise of State authority may also be barred by an independent barrier—inherent tribal sovereignty—if it "unlawfully infringe[s] 'on the right of reservation Indians to make their own laws and be ruled by them." *White Mountain Apache Tribe* v. *Bracker,* 448 U. S., at 142, quoting *Williams* v. *Lee,* 358 U. S. 217, 220 (1959). See also *Washington* v. *Yakima Indian Nation,* 439 U. S. 463, 502 (1979); *Fisher* v. *District Court,* 424 U. S. 382 (1976) (*per curiam*); *Kennerly* v. *District Court of Montana,* 400 U. S. 423 (1971)." 448 U. S., at 142–143.

real difference?

Moreover, both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes.[17] We have stressed that Congress' objective of furthering tribal self-government encompasses far more than encouraging tribal management of disputes between members, but includes Congress' overriding goal of encouraging "tribal self-sufficiency and economic development." *Bracker*, *supra*, at 143 (footnote omitted). In part as a necessary implication of this broad federal commitment, we have held that tribes have the power to manage the use of its territory and resources by both members and nonmembers,[18] *Merrion*, *supra*, at 137; *Bracker*, *supra*, at 151; *Montana* v. *United States*, *supra*; 28 U. S. C. §1162(b); 25 U. S. C. §§1321(b), 1322(b); 18

the material in quotation marks originally read: "to assume control over their business and economic affairs,"

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[17] For example, the Indian Financing Act of 1974, 25 U. S. C. § 1451 *et seq.*, states: "It is hereby declared to be the policy of Congress . . . 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." § 1451. Similar policies underlie the Indian Self-Determination and Education Assistance Act of 1975, 25 U. S. C. § 450 *et seq.*, as well as the Indian Reorganization Act of 1934, 25 U. S. C. § 461 *et seq.*, pursuant to which the Mescalero Apache Tribe adopted its Constitution. The "intent and purpose of the Reorganization Act was '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., at 152, quoting H. R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934). The Indian Civil Rights Act of 1968, 25 U. S. C. § 1301 *et seq.*, likewise reflects Congress' intent "to promote the well-established federal 'policy of furthering Indian self-government.'" *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 62 (1978), quoting *Morton* v. *Mancari*, 417 U. S. 535, 551 (1974).

[18] Our cases have recognized that tribal sovereignty contains a "significant geographical component." *Bracker*, *supra*, at 151. Thus the off-reservation activities of Indians are generally subject to the prescriptions of a "nondiscriminatory state law" in the absence of "express federal law to the contrary." *Mescalero Apache Tribe* v. *Jones*, 411 U. S., at 148–149.

U. S. C. § 1165, to undertake and regulate economic activity within the reservation, *Merrion*, *supra*, at 137, and to defray the cost of governmental services by levying taxes. *Ibid.* Thus, when a tribe undertakes an enterprise under the authority of federal law, an assertion of State authority is preempted if it threatens to interfere with the successful accomplishment of the federal purpose. See generally *Bracker*, *supra*, at 143 (footnote omitted), *Ramah Navajo School Bd.*, *supra*, at ——, quoting *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941) (State authority precluded when it "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress").

Our prior decisions also guides our assessment of the state interest asserted to justify State jurisdiction over a reservation. The exercise of State authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the State in connection with the on-reservation activity. *Ramah Navajo School Bd.*, *supra*, at —— and note 7; *Bracker*, *supra*, at 148–149; *Central Machinery Co.* v. *Arizona Tax Comm'n*, 448 U. S. 160, 174 (1980) (POWELL, J., concurring). Thus a State seeking to impose a tax on a transaction between a Tribe and nonmembers must point to more than its general interest in raising revenues. See, *e. g.*, *Warren Trading Post Co.*, *supra*; *Bracker*, *supra*; *Ramah Navajo School Bd.*, *supra*. A State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate State intervention. Cf. *Puyallup Tribe* v. *Washington Game Dept.*, *supra*.

III

With these principles in mind, we turn to New Mexico's claim that it may superimpose its own hunting and fishing regulations on the Mescalero Apache Tribe's regulatory scheme.

A

It is beyond doubt that the Mescalero Apache Tribe law-

fully exercises substantial control over the lands and resources of its reservation, including its wildlife. As noted above, *supra*, at 6–7, and as conceded by New Mexico,[19] the sovereignty retained by the Tribe under the Treaty of 1852 includes its right to regulate the use of its resources by members as well as non-members. In *Montana* v. *United States*, *supra*, we specifically recognized that tribes in general retain this authority.

Moreover, this aspect of tribal sovereignty has been expressly confirmed by numerous federal statutes.[20] Pub. L. 280 specifically confirms the power of tribes to regulate on-reservation hunting and fishing. 67 Stat. 588, 25 U. S. C. § 1321(b); 18 U. S. C. § 1162(b).[21] This authority is afforded the protection of the federal criminal law by 18 U. S. C. § 1165, which makes it a violation of federal law to enter In-

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[19] New Mexico concedes that the Tribe originally relied on wildlife for subsistence, that tribal members freely took fish and game in ancestral territory, and that the Treaty of July 1, 1852, 10 Stat. 979, between the Tribe and the United States confirmed the Tribe's rights regarding hunting and fishing on the small portion of the aboriginal Mescalero domain that was eventually set apart as the Tribe's reservation. Brief, at 12. See *Menominee Tribe of Indians* v. *United States*, 391 U. S. 404 (1968); *Montana* v. *United States*, 450 U. S. 544, 558–559 (1981). See also *United States* v. *Winans*, 198 U. S. 371, 381 (1905) (recognizing that hunting and fishing "were not much less necessary to the existence of the Indians than the atmosphere they breathed").

[20] The Tribe's authority was also confirmed more generally by the Indian Reorganization Act, 25 U. S. C. § 476, which reaffirms "all powers vested in any Indian tribe or tribal council by existing law."

[21] The provision of Pub. L. 280 granting States criminal jurisdiction over Indian reservations under certain conditions provides that States were not thereby authorized to

"deprive any Indian of any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing *or the control, licensing or regulation thereof.*" 18 U. S. C. § 1162(b); 25 U. S. C. § 1321(b) (emphasis added).

dian land to hunt, trap or fish without the consent of the tribe. See *Montana* v. *United States*, 450 U. S., at 562 n. 11. The 1981 amendments to the Lacey Act, 16 U. S. C. § 3371 *et seq.*, further accord tribal hunting and fishing regulations the force of federal law by making it a federal offense "to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife . . . taken or possessed in violation of any . . . Indian tribal law." § 3372(a)(1).[22]

quotes in full the statute

B

Several considerations strongly support the Court of Appeals' conclusion that the Tribe's authority to regulate hunting and fishing preempts State jurisdiction. It is important to emphasize that concurrent jurisdiction would effectively nullify the Tribe's authority to control hunting and fishing on the reservation. Concurrent jurisdiction would empower New Mexico wholly to supplant tribal regulations. The State would be able to dictate the terms on which nonmembers are permitted to utilize the reservation's resources. The Tribe would thus exercise its authority over the reservation only at the sufferance of the State. The tribal authority to regulate hunting and fishing by nonmembers, which has been repeatedly confirmed by federal treaties and laws and which we explicitly recognized in *Montana* v. *United States*, *supra*, would have a rather hollow ring if tribal authority amounted to no more than this.

Furthermore, the exercise of concurrent State jurisdiction in this case would completely "disturb and disarrange", *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685, 691 (1965), the comprehensive scheme of federal and tribal management established pursuant to federal law. As described above, *supra*, at 2–3, federal law requires the Sec-

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[22] Sections 3375(a) and (b) authorize the Secretary to enter into agreements with Indian tribes to enforce the provisions of the law by, *inter alia*, making arrests and serving process.

retary to review each of the Tribe's hunting and fishing ordinances. Those ordinances are based on the recommendations made by a federal range conservationist employed by the Bureau of Indian Affairs. Moreover, the Bureau of Sport Fisheries and Wildlife stocks the reservation's waters based on its own determinations concerning the availability of fish, biological requirements, and the fishing pressure created by on-reservation fishing. App. 71.[23]

Concurrent State jurisdiction would supplant this regulatory scheme with an inconsistent dual system: members would be governed by Tribal ordinances, while nonmembers would be regulated by general State hunting and fishing laws. This could severely hinder the ability of the Tribe to conduct a sound management program. Tribal ordinances reflect the specific needs of the reservation by establishing the optimal level of hunting and fishing that should occur, not simply a maximum level that should not be exceeded. State laws in contrast are based on considerations not necessarily relevant to, and possibly hostile to, the needs of the reservation. For instance, the ordinance permitting a hunter to kill a buck and a doe was designed to curb excessive growth of the deer population on the reservation. App. at 153–154. Enforcement of the State regulation permitting only buck to be killed would frustrate that objective. Similarly, by determining the Tribal hunting seasons, bag limits, and permit availability, the Tribe regulates the duration and intensity of hunting. These determinations take into account numerous factors, including the game capacity of the terrain, the range utilization of the game animals, and the availability of tribal personnel to monitor the hunts. Permitting the State to enforce different restrictions simply because they have been determined to be appropriate for the State as a whole would impose on the Tribe the possibly insurmountable task of

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[23] In addition, as noted earlier, *supra*, at 3–4, the Federal Government played a substantial role in the development of the Tribe's resources.

ensuring that the patchwork application of State and Tribal regulations remains consistent with sound management of the reservation's resources.

Federal law commits to the Secretary and the Tribal Council the responsibility to manage the reservation's resources. It is most unlikely that Congress would have authorized, and the Secretary would have established, financed, and participated in Tribal management if it were thought that New Mexico was free to nullify the entire arrangement.[24] Requiring Tribal ordinances to yield whenever State law is more restrictive would seriously "undermine the Secretary's [and the Tribe's] ability to make the wide range of determinations committed to [their] authority." *Bracker*, *supra*, at 149. See *Fisher* v. *District Court*, 424 U. S. 382, 390 (1976) *(per curiam)*; *United States* v. *Mazurie*, 419 U. S. 544 (1975).[25]

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[24] The Secretary assumed precisely the opposite is true—that State jurisdiction is preempted—when he approved a tribal ordinance which provided that nonmembers hunting and fishing on the reservation need not obtain State licenses. That assumption is also embodied in an agreement between the Tribe and the Department of Interior's Bureau of Sport Fisheries and Wildlife, see note 7, *supra*, which openly acknowledges that tribal regulations need not agree with State laws. The agreement provides that "*[i]nsofar as possible* said regulations shall be in agreement with State regulations." (Emphasis added).

[25] Congress' intent to preempt State regulation of hunting and fishing on reservations is reinforced by Pub. L. 280. That law, which grants limited criminal and civil jurisdiction over Indians reservations to States which meet certain requirements, contains a provision which expressly excludes authority over hunting and fishing. That provision provides that a State which has properly assumed jurisdiction under Pub. L. 280 is not thereby authorized to

"deprive any Indian of any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing *or the control, licensing or regulation thereof.*" 18 U. S. C. § 1162(b); 25 U. S. C. § 1321(b) (emphasis added).

Pub. L. 280 evidences Congress' understanding that tribal regulation of

The assertion of concurrent jurisdiction by New Mexico not only would threaten to disrupt the federal and tribal regulatory scheme, but would also threaten Congress' overriding objective of encouraging tribal self-government and economic development. The Tribe has engaged in a concerted and sustained undertaking to develop and manage the reservation's wildlife and land resources specifically for the benefit of its members. The project generates funds for essential tribal services and provides employment for members who reside on the reservation. This case is thus far removed from those situations, such as on-reservation sales outlets which market to nonmembers goods not manufactured by the tribe or its members, in which the tribal contribution to an enterprise is *de minimis*. See *Washington* v. *Confederated Tribes*, 447 U. S. 134, 154–159 (1980).[26] The Tribal enterprise in this case clearly involves "value generated on the reservation by activities involving the Trib[e]." *Id.*, at 156–157. The disruptive effect that would result from the assertion of concurrent jurisdiction by New Mexico would plainly "stan[d] as an obstacle to the accomplishment of the

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hunting and fishing should generally be insulated from State interference, since "Congress would not have jealously protected" tribal exemption from conflicting State hunting and fishing laws "had it thought that the States had residual power to impose such [laws] in any event." *McClanahan* v. *Arizona Tax Comm'n*, 411 U. S. 164, 177 (1973). In *McClanahan* we concluded that the Buck Act, 4 U. S. C. § 105 *et seq.*, which contains a provision exempting Indians from a grant to the States of general authority to tax residents of federal areas, likewise provided evidence of Congress' intent to exempt Indians from State taxes. *Ibid.*

[26] In *Washington* v. *Confederated Tribes* the Court held that the sales of tribal smokeshops which sold cigarettes to nonmembers were subject to the State sales and cigarette taxes. *Id.*, at 154–159. The Court relied on the fact that the tribal smokeshops were not marketing "value generated on the reservation," *id.*, at 156–157, but instead were seeking merely to market a "tax exemption to nonmembers who do not receive significant tribal services." *Id.*, at 157.

full purposes and objectives of Congress," *Ramah Navajo School Bd., supra,* at ——, quoting *Hines* v. *Davidowitz,* 312 U. S. 52, 67 (1941).

C

The State has failed to "identify any regulatory function or service . . . that would justify" the assertion of concurrent regulatory authority. *Bracker, supra,* at 148. The hunting and fishing permitted by the Tribe occur entirely on the reservation. The fish and wildlife resources are either native to the reservation or were created by the joint efforts of the Tribe and the Federal Government. New Mexico does not contribute in any significant respect to the maintenance of these resources, and can point to no other "governmental functions it provides," *Ramah Navajo School Bd., supra,* at ——, in connection with hunting and fishing on the reservation by nonmembers that would justify the assertion of its authority.

The State also cannot point to any off-reservation effects that warrant State intervention. Some species of game never leave tribal lands, and the State points to no specific interest concerning those that occasionally do. Unlike *Puyallup Tribe* v. *Washington Game Dept., supra,* this is not a case in which a Treaty expressly subjects a tribe's hunting and fishing rights to the common rights of nonmembers and in which a State's interest in conserving a scarce, common supply justifies State intervention. 433 U. S., at 174, 175–177. The State concedes that the Tribe's management has not had an adverse impact on fish and wildlife outside the reservation." Appendix to Brief in Opposition 35a.[27]

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[27] We reject the State's claim that the Tribe's ability to manage its wildlife resources suffers from a lack of enforcement powers and that therefore concurrent jurisdiction is necessary to fill the void. The Tribe clearly can exclude or expel those who violate Tribal ordinances. Trespassers may be referred for prosecution under 18 U. S. C. § 1165. Furthermore, the

New Mexico contends that it will be deprived of the sale of state licenses to nonmembers who hunt and fish on the reservation, as well as some federal matching funds calculated in part on the basis of the number of State licenses sold.[28] However, the State expressly disavows any reliance on its taxing powers as the basis for concurrent jurisdiction. It defends the application of its hunting and fishing laws, including the State's license requirement, solely as a proper exercise of its regulatory authority, Petitioner's Brief 18 n. 5, and the State's regulatory interests, as we have indicated, are insignificant. Even if the State's licensing requirement were properly characterized and defended as an independent taxing measure, the State's financial interests are insufficient to justify the exercise of concurrent jurisdiction. The loss of revenues to the State is likely to be insubstantial given the small numbers of persons who purchase tribal hunting licenses.[29] Moreover, as already noted, *supra*, at 18,the State has pointed to no services it has performed in connection with hunting and fishing by nonmembers which justify imposing a tax in the form of a hunting and fishing license, *Ramaha Navajo School Bd.*, *supra*, at ——; *Central Machinery Co.* v. *Arizona Tax Comm'n*, 448 U. S., at 174

Lacey Act Amendments of 1981, 16 U. S. C. § 3371 *et seq.*, make it a federal offense to violate any tribal law, provide for civil and criminal penalties and authorizes forfeiture of fish or wildlife as well as vehicles or equipment used in the violation, §§ 3373, 3374, and provide that the Secretary can grant authority to tribal personnel to enforce these provisions. § 3375(a), (b).

[28] The State receives federal matching funds through the Pittman-Robinson Act, 16 U. S. C. 669 (hunting), and the Dingle-Johnson Act, 16 U. S. C. 777 (fishing), which are allocated through a formula which considers the number of licenses sold and the number of acres in the State.

[29] In recent years the Tribe sold 10 antelope licenses compared to 3,500 for the State, 50 elk licenses compared to 14,000 by the State, and 500 deer licenses compared to 100,000 for the State.

(POWELL, J., concurring), and its general desire to obtain revenues is simply inadequate to justify the assertion of concurrent jurisdiction in this case. See *Bracker*, *supra*, at 150; *Ramah Navajo School Bd.*, *supra*, at ——.[30]

IV

In this case the governing body of an Indian Tribe, working closely with the Federal Government and under the authority of federal law, has exercised its lawful authority to develop and manage the reservation's resources for the benefit of its members. The exercise of concurrent jurisdiction by the State would effectively nullify the Tribe's unquestioned authority to regulate the use of its resources by members and nonmembers, interfere with the comprehensive tribal regulatory scheme, and threaten Congress' firm commitment to the encouragement of tribal self-sufficiency and economic development. Given the strong interests favoring exclusive tribal jurisdiction and the absence of State interests which justify the assertion of concurrent authority, we conclude that the application of the State's hunting and fishing laws to the reservation is preempted.

Accordingly, the judgment of the Court of Appeals is

Affirmed.

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[30] New Mexico concedes that it has expended no Dingle-Johnson funds for projects within the reservation during the last six to eight years. Appendix to Br. in Opposition 17a–18a. It presented no evidence as to expenditures of Pittman-Robinson funds within the reservation.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 31, 1983

Re: New Mexico v. Mescalero Apache Tribe, No. 82-231

Dear Thurgood,

I am essentially in agreement with both the result and your approach in this case.

As I mentioned to you in my earlier letter, I am having some difficulty with certain portions of your proposed opinion due to my hope that it can be compatible with my draft opinion in Rice v. Rehner. My specific problems are these:

1. On page 8, in the first full paragraph, you quote Mescalero and Confederated Tribes for the proposition that Indians on reservations have been historically immune from all state control, and that they retain this immunity insofar as it is consistent with federal objectives. I think it would be more accurate to say that "Because of their sovereign status, tribes and their reservation lands have, in some circumstances, possessed 'historic immunity from state and local control,' . . . ." This would avoid conveying the impression that Indians have enjoyed a tradition of immunity from state law in all areas.

2. Also on page 8, in the second full paragraph going over to page 9, you state that "our cases establish that a State may not assert its authority over the activities of members on a reservation in the absence of express tribal consent or congressional grant." Again, I think that this statement would be more accurate if it were to read: "our cases establish that where there is a tradition of tribal sovereign immunity, the State . . . ."

3. On page 12, in the carryover paragraph, you state: "Thus, when a tribe undertakes an enterprise under the authority of federal law, an assertion of State authority is preempted to the extent that it 'threaten[s] the overriding federal objective' of promoting 'tribal self-sufficiency and economic development.'" I think the implication of this statement is too broad and contrary to the balancing structure for preemption analysis established in Bracker. The statement suggests that anytime state authority threatens the federal policy in favor of Indian economic self-development, state regulation is preempted. To me this is contrary to the spirit of Bracker. The threat to a federal policy is only one factor to be considered. There is no preemption "to the extent" there is a threat, as the opinion suggests. In short, some financial burdens imposed by state regulation may be perfectly permissible depending on the outcome of balancing federal and tribal interests against state interests. I suggest that the sentence be changed to read: "Thus, when a tribe undertakes an enterprise under the authority of federal law, an assertion of State authority must be weighed against any threat to an "overriding federal objective" of promoting "tribal self-sufficiency."

4. Also on page 12, in the first full paragraph, you suggest that when a State seeks to impose additional burdens on a tribal enterprise, it must ordinarily justify those burdens by performance of services. I think that it would be appropriate to mention in this context our decisions in Confederated Tribes and Moe, which held that the State may tax certain on-reservation transactions, and may impose burdens on Indian businesses to aid in collecting and enforcing that tax.

5. Also on page 12, in the first full paragraph, you state: "A State seeking not merely to tax but to regulate a tribal activity is under a greater burden to advance a significant State interest, since duplicative and potentially conflicting regulation is generally more disruptive than double taxation." As far as I know, we have never required that States advance a "significant interest" in order to impose a regulation when non-members are involved, or where there is no tradition of tribal immunity. Perhaps this sentence could be changed to read: "When a State seeks to regulate traditionally immune transactions between tribal members on a reservation, the State must have a significant interest in order to impose the regulation."

6. On page 19, you suggest that even if the State sought to characterize the licensing requirement as a tax, "the State's financial interests are insufficient to justify the exercise of concurrent jurisdiction." As you acknowledge, the State defends the licensing requirement only as a proper exercise of its regulatory power. I see no reason to discuss what would happen if the State characterized the requirement here as a proper tax measure. Moreover, I would prefer to avoid any suggestion that the tribes have a sovereign interest in sales of "hunting packages" to non-members of the tribe for purposes of state taxation of those "packages." That would seem to create a tension with our decisions in Confederated Tribes and Moe.

I think none of the suggested changes would alter your essential approach and if you could accommodate these concerns, I would be happy to join your opinion.

Sincerely,

Sandra

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 31, 1983

Re: 82-331 - New Mexico v. Mescalero Apache Tribe

Dear Thurgood:

Please join me.

Respectfully,

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 1, 1983

Re: No. 82-331, New Mexico v. Mescalero Apache Tribe

Dear Thurgood:

I join.

Regards,

Justice Marshall

Copies to the Conference

June 2, 1983

81-331 New Mexico v. Mescalero Apache Tribe

Dear Thurgood:

Please join me.

Sincerely,

Justice Marshall

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 3, 1983

82-331 - New Mexico v. Mescalero Apache Tribe

Dear Thurgood,

Please join me in your third circulation.

Sincerely,

Byron

Justice Marshall
Copies to the Conference
cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 3, 1983

Re: New Mexico v. Mescalero Apache Tribe, No. 82-331

Dear Thurgood,

Thank you for accommodating my suggestions in order to remove any inconsistency with Rice v. Rehner, No. 82-401. Please join me.

Sincerely,

Sandra

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 6, 1983

Re: No. 82-331 - New Mexico v. Mescalero Apache Tribe

Dear Thurgood:

Please join me.

Sincerely,

Harry

Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 7, 1983

Re: No. 82-331 New Mexico v. Mescalero Apache Tribe

Dear Thurgood:

Please join me.

Sincerely,

WHR

Justice Marshall

cc: The Conference

82-331 New Mexico v. Mescalero Apache Tribe (Jim)

TM for the Court
1st draft 5/26/83
2nd draft 5/31/83
3rd draft 6/3/83
Joined by CJ, WJB, BRW, HAB, LFP, WHR,JPS, SCO