A DOCTRINAL TRAFFIC JAM: THE ROLE OF FEDERAL PREEMPTION ANALYSIS IN CONFLICTS BETWEEN STATE AND TRIBAL VEHICLE CODES

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INTRODUCTION

As Indian tribes increasingly exercise police powers,[1] they rely on the principle that they possess exclusive regulatory jurisdiction over their members within tribal reservation boundaries, free from state regulation.[2] Tribes have exercised

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1. "For many years, the tribes have slumbered in the absence of having the resources to put into and fund their own [law enforcement] departments. But with . . . economic development and the sophistication that comes with education, many tribes . . . want to exercise this important and fundamental right . . . to enforce law and, if you will, blossom and fulfill their destinies as true and meaningful contributors within the family of governments in the United States." Videotape: Spirit to Serve (Cabazon Band of Mission Indians 2000) (available from the Cabazon Band of Mission Indians) [hereinafter Spirit to Serve] (statement of Mark Nichols, Chief Executive Officer, Cabazon Band of Mission Indians). In addition to law enforcement programs, tribes have developed emergency response services, land management departments, planning and environmental protection services, and road and bridge departments. *See, e.g.*, Prairie Band Potawatomi Nation, *Public Works*, *at* http://www.pbpindiantribe.com/pworks.htm (last visited November 16, 2002); Prairie Band Potawatomi Nation, *Protective Services*, *at* http://www.pbpindiantribe.com/proser.htm (last visited November 16, 2002); *see also This Tribe Plays for Keeps*, TIME, Dec. 16, 2002, at 58.

2. *See, e.g.*, Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 163–64 (1980) (refusing to allow a state to tax tribal members' on-reservation use of motor vehicles but allowing state to "tailor" tax to amount of off-reservation use); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 480–81 (1976) (holding that state lacked power both to impose personal property taxes on on-reservation property owned by members and to tax on-reservation sales by members to members); McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 165 (1972) (striking down application of state income tax to member residing on the reservation when entire income earned on the reservation).

this authority to regulate vehicles owned by tribes and tribal members on reservations.[3] State laws, however, often fail to anticipate the activities of tribal governments, and over the last twenty years, various tribes' vehicle regulations have conflicted with state vehicle codes when tribal vehicles travel outside reservation boundaries.[4] In efforts to resolve these conflicts, courts have struggled to determine whether state or tribal codes should prevail once vehicles leave reservations.[5]

Tribal vehicle licensing and registration codes may require tribal registration and titles for all vehicles owned either by tribal governments or by tribal members residing on reservations.[6] Registration involves issuing license plates and validation stickers to vehicles, and titling involves issuing proof of ownership.[7] States have similar statutes that require state-issued registration and titling for all vehicles traveling within a state's jurisdiction.[8] States exempt non-residents from these requirements through recognition provisions in state statutes.[9] Recognition provisions either explicitly exempt residents of particular jurisdictions from a state's registration requirements[10] or allow states to enter into reciprocity agreements with other jurisdictions.[11] These reciprocity

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3. *See* Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1237 (10th Cir. 2001); Cabazon Band of Mission Indians v. Smith, 249 F.3d 1101, 1103–04 (9th Cir. 2001), *withdrawn*, 271 F.3d 910 (9th Cir. 2001); Queets Band of Indians v. Washington, 765 F.2d 1399, 1402 (9th Cir. 1985), *vacated as moot* 783 F.2d 154 (9th Cir. 1986); Red Lake Band of Chippewa Indians v. State, 248 N.W.2d 722, 724 (Minn. 1976); *see also* COLVILLE INDIAN RESERVATION, WASH., LAW AND ORDER CODE § 3-3-100 (1983), *available at* http://www.tribalresourcecenter.org/ccfolder/colville_lawandorder_CHPT3-3.html.

4. *See Potawatomi*, 253 F.3d at 1237.

5. *See id.*

6. *Id.* (quoting PRAIRIE BAND OF POTAWATOMI INDIANS, KAN., PRAIRIE BAND MOTOR VEH. CODE, § 17-10-1(b) (1999)).

7. *Id.*

8. *See, e.g.*, KAN. STAT. ANN. § 8-127 (2001); WASH. REV. CODE ANN. § 46.16.010 (West 2001).

9. *See, e.g.*, WIS. STAT. ANN. §§ 341.05, .40 (West 1999).

10. *See, e.g., id.* §§ 341.05, .40, .409.

11. *See, e.g.*, KAN. STAT. ANN. § 8-127(a):

> Every owner of a motor vehicle . . . intended to be operated upon any highway in this state, whether such owner is a resident of this state or another state, . . . shall, before any such vehicle is operated in this state, apply for and obtain registration in this state . . . *except as otherwise provided by law or by any interstate contract, agreement, arrangement or declaration* . . . .

agreements mutually exempt the residents of each jurisdiction from the other's registration and titling requirements.[12] For example, a reciprocity agreement between Kansas and Colorado would exempt residents of Kansas from Colorado's registration and licensing requirements on the condition that Kansas similarly exempt residents of Colorado from Kansas's registration and licensing laws.[13] Nothing requires states to enact reciprocal provisions or reciprocity agreements, but states do so out of comity.[14]

If a state's statute does not exempt residents of a specific jurisdiction from the state's registration and licensing requirements and a reciprocity agreement does not exist between two jurisdictions, then a nonresident traveling in a foreign state faces penalties and fines for failing to comply with the foreign state's vehicle code.[15] Therefore, when states' vehicle codes do not include reciprocal recognition exemptions for tribal licensing schemes and no reciprocity agreement exists, tribes and tribal members face penalties when they drive tribally registered vehicles outside reservation boundaries.[16]

Although some state legislatures have avoided these conflicts by including tribes in states' reciprocal recognition statutes, [17] not all states housing Indian reservations have

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(emphasis added). Often the statutes authorize the state director of motor vehicles or the secretary of state to enter into such agreements. *See, e.g.*, WIS. STAT. ANN. § 341.41(1).

12. *See* Kane v. New Jersey, 242 U.S. 160, 168 (1916) ("Such a provision promotes the convenience of owners and prevents the relative hardship of having to pay the full registration fee for a brief use of the highways.").

13. *See* KAN. STAT. ANN. § 8-138(a) ("Such nonresident owners, when duly licensed in the state of residence, are hereby granted the privilege of operation of any such vehicle within this state to the extent that reciprocal privileges are granted to residents of this state by the state of residence of such nonresident owner."). Tribal vehicles codes contain similar reciprocity provisions. *See* Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1252–53 (10th Cir. 2001) (quoting PRAIRIE BAND OF POTAWATOMI INDIANS, KAN., PRAIRIE BAND MOTOR VEH. CODE, § 17-10-5(I) (1999)).

14. *Kane*, 242 U.S. at 168 ("[Reciprocal provisions have] become common in state legislation . . . . But it is not an essential of valid regulation. Absence of it does not involve discrimination against nonresidents; for any resident similarly situated would be subjected to the same imposition.").

15. *See Potawatomi*, 253 F.3d at 1238.

16. *Id.*; Cabazon Band of Mission Indians v. Smith, 249 F.3d 1101, 1103 (9th Cir. 2001), *withdrawn*, 271 F.3d 910 (9th Cir. 2001).

17. *See, e.g.*, MINN. STAT. ANN. § 168.181 (West 2001); OKLA. STAT. ANN. tit. 47, § 1136 (West 2001); S.D. CODIFIED LAWS § 32-5-42 (Michie 2002); WASH. REV.

incorporated such provisions into their statutes.[18] When reciprocal recognition statutes do not specifically exempt tribal vehicle codes, questions arise whether states must honor tribal laws or whether the tribal laws must give way to state laws.[19]

The question of which laws prevail—a tribe's or a state's—differs from the issues typically arising in the area of Indian law because it involves a state's authority to regulate the activities of both individual members and tribes as sovereign entities.[20] The question of a state's authority to regulate tribal activities usually arises only in a few legal areas, such as taxation. Case law in the taxation area defines the extent to which a state can impose taxes either on nonmembers' on-reservation activities or tribal members' off-reservation activities.[21] States generally lack the power to regulate the on-reservation activities of tribal members,[22] but may regulate

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CODE ANN. §§ 46.16.020, .022 (West 2001); WIS. STAT. ANN. § 341.409 (West 1999).

18. *See, e.g.*, KAN. STAT. ANN. § 8-127 (2001). In conflicts between state and tribal vehicle codes, the critical determination is whether the state housing the reservation recognizes tribal vehicle licensing and registration. Authority requires a state to recognize a tribe's licensing and registration if the state extends reciprocity to the tribe's home state and the home state recognizes the tribe's vehicle licensing and registration. State v. Wakole, 959 P.2d 882, 883 (Kan. 1998) ("We believe the better view is that Sac and Fox tribe members are citizens and residents of Oklahoma. If Oklahoma recognizes its citizens' license plates, we reason that [Kansas's reciprocity provision] requires Kansas to do so.") (citations omitted). This authority, however, only applies to conflicts arising when a state other than the tribe's home state refuses to honor the tribal code.

19. *See generally Potawatomi*, 253 F.3d at 1234; *Cabazon*, 249 F.3d at 1104–05. Some state statutes explicitly refuse to recognize tribal vehicle licensing and registration. *See* ARIZ. REV. STAT. ANN. § 28-2003 (West 1998).

20. This issue involves states' authority over tribes as sovereign entities when attempting to regulate tribally licensed vehicles owned by the tribal government, such as police vehicles, ambulances, and tribal services vehicles.

21. *See, e.g.*, Okla. Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114 (1993); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980); Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

22. *Colville*, 447 U.S. at 162–64 (holding that the state lacked authority to tax tribally owned vehicles used on reservations); *see* Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976) (holding that a state lacked authority to tax member-owned property located within reservations, to tax on-reservation cigarette sales between members, and to impose vendor license fees on member merchants operating on reservations); McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164 (1972) (holding that a state lacked power to tax income of tribal member working and living on reservations). *But see* Puyallup Tribe v. Dep't of Game, 433 U.S. 165 (1997) (allowing state regulation of on-reservation of tribal fishing).

some of tribes' off-reservation activities.[23] Therefore, by permitting states only to regulate tribal members' off-reservation activities, the taxation decisions strongly rely on reservation boundaries to define the limits of state authority.[24]

The issues implicated by state regulation of vehicles differ from those generally implicated by state taxation in two crucial ways. First, unlike taxation, reservation boundaries do not clearly confine the regulated activity. Instead, cars subject to tribal registration laws frequently leave and return to reservations and thus travel in and out of tribes' exclusive regulatory authority.[25] Second, unlike the taxation area, competing vehicle codes render concurrent jurisdiction logistically impossible[26] because vehicles do not normally display two sets of registration at once.[27] Because concurrent jurisdiction is impractical, the situation becomes one of functionally exclusive jurisdiction.

This functionally exclusive jurisdiction would effectively allow states to regulate tribal members' activities inside

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23. *See, e.g.*, *Colville*, 447 U.S. at 163 (noting that a state "may well be free to levy a tax on the use outside the reservation of Indian-owned vehicles"); *Mescalero*, 411 U.S. at 147–55 (allowing a state to tax tribally owned resort located off of reservation).

24. Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 450 (1995); *Mescalero*, 411 U.S. at 145.

25. *See* Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1237 (10th Cir. 2001); Cabazon Band of Mission Indians v. Smith, 249 F.3d 1101, 1103 (9th Cir. 2001), *withdrawn*, 271 F.3d 910 (9th Cir. 2001). Of course, state taxes imposed on cars owned by tribal members residing on reservations face the problem of cars passing in and out of reservation boundaries. The Supreme Court has required states to apportion such taxes based on off-reservation use. *Colville*, 447 U.S. at 162–64.

26. *Potawatomi*, 253 F.3d at 1252 ("[W]ithout the preliminary injunction [requiring the state of Kansas to recognize tribal registration], the tribe's registration and titling would likely have come to an end."); Red Lake Band of Chippewa Indians v. State, 248 N.W.2d 722, 727–28 (Minn. 1976) ("The motor vehicle registration ordinance adopted by the Red Lake Band will be rendered ineffective if owners of vehicles subject to its terms are required to have an additional license from the State of Minnesota as a condition for use on Minnesota's highways.").

27. *See Chippewa*, 248 N.W.2d at 728 ("It seems evident that the ordinance would not have been adopted in the first instance and cannot now effectively continue to operate if everyone, or almost everyone, subject to its provisions is required to secure a second license from the State . . . ."). For example, passenger vehicles only accommodate one set of license plates; *see also* American Association of Motor Vehicle Administrators, *Policy Positions*, *available at* http://www.aamva.org/news/nwsPoliciesMotorCarrier.asp ("AAMVA disapproves of the multiple titling of vehicles operating in interstate commerce and approves single registration under reciprocal agreements.").

reservation boundaries.[28] If states do not recognize tribal licenses and registration, they essentially nullify the tribal codes.[29] Therefore, when states regulate off-reservation driving and render tribal codes ineffective, they indirectly regulate the tribes' on-reservation activities, even though states generally lack power to regulate the on-reservation activities of tribal members. Tribes, recognizing that the off-reservation imposition of state law stymies their ability to regulate this on-reservation activity, have challenged application of state vehicles codes in court.[30]

Two cases addressing this issue arose nearly simultaneously in the U.S. Courts of Appeals for the Ninth and Tenth Circuits in 2001: *Cabazon Band of Mission Indians v. Smith*[31] and *Prairie Band of Potawatomi Indians v. Pierce*.[32] In *Cabazon*, the Ninth Circuit considered, in a withdrawn opinion, whether California could impose its vehicle code against tribally owned police vehicles traveling off of the tribe's reservation and determined that such action was within the state's authority.[33] In *Potawatomi*, the Tenth Circuit considered whether Kansas could be enjoined from imposing its vehicle code against vehicles registered and titled under tribal vehicle codes and affirmed a preliminary injunction barring

28. *See Potawatomi*, 253 F.3d at 1252; *Chippewa*, 248 N.W.2d at 727–28.

29. *Chippewa*, 248 N.W.2d at 728 ("To sustain the position of the state on this appeal, as a practical matter, would be to nullify the Red Lake Band ordinance.").

30. *See Potawatomi*, 253 F.3d at 1238; *Cabazon*, 249 F.3d at 1103; Queets Band of Indians v. Washington, 765 F.2d. 1399, 1399 (9th Cir. 1985), *vacated as moot*, 783 F.2d 154 (9th Cir. 1986); *Red Lake*, 248 N.W.2d at 722.

31. 249 F.3d 1101, *withdrawn*, 271 F.3d 910 (9th Cir. 2001).

32. 253 F.3d 1234.

33. *Cabazon*, 249 F.3d at 1103. The Court of Appeals withdrew its decision after the Cabazon tribe and the Bureau of Indian Affairs entered into a deputation agreement. *Cabazon*, 271 F.3d at 911. The agreement conferred federal law enforcement commissions upon the tribal police department. *Hearing on Contemporary Tribal Governments: Challenges in Law Enforcement Related to the Rulings of the United States Supreme Court Before the Senate Comm. on Indian Affairs*, 2002 WL 20318826, 106th Cong. (2002) [hereinafter *Hearing on Contemporary Tribal Governments*] (statement of Thomas B. Heffelfinger, U.S. Attorney for the Dist. of Minn.). Notably, the U.S. District Court for the Central District of California held that the agreement "does not convert the Cabazon Public Safety Department into a federal agency, or an arm of the BIA." *Cabazon Band of Mission Indians v. Smith*, No. CV974687CAS(JGX), 2002 WL 32065673, at *7 (C.D. Cal. Oct. 16, 2002). Furthermore, the court held that the agreement did not constitute federal law that preempted state law. *Id.* at *8.

Kansas from exercising such authority.[34] The opposite outcomes of these two cases resulted from the different analyses the courts applied. The Ninth Circuit distinguished between the on-reservation and off-reservation activities of tribal members and interpreted existing case law to allow state regulation of the tribe's off-reservation activity.[35] The Tenth Circuit supported the application of federal preemption analysis, with its balancing of tribal and state interests, to determine which laws should prevail.[36]

The inconsistent decisions from the Ninth and Tenth Circuits do not resolve the issue of conflicting vehicle codes. Rather, because the *Cabazon* court withdrew its decision,[37] no clear precedent governs this issue within the Ninth Circuit.[38] Similarly, the *Potawatomi* court did not decide the merits of the issue of conflicting vehicle codes, but only decided whether the lower court abused its discretion in issuing a preliminary injunction.[39] Therefore, both courts may reconsider the issue of conflicting vehicle codes should the states fail to enact legislation resolving these issues.

This Comment discusses which of the analyses applied in the *Cabazon* and *Potawatomi* cases most appropriately determines whether states may apply their vehicle codes to tribal vehicles traveling outside reservation boundaries. The Comment concludes that neither analysis flawlessly resolves the unique doctrinal questions that conflicting state and tribal vehicle codes present and suggests alternative judicial and legislative solutions. Part I explains the principles of taxation jurisprudence, which the *Cabazon* and *Potawatomi* courts later borrowed. Part II describes the *Cabazon* and *Potawatomi* cases and traces each court's analysis. Part III balances the tribal and state interests implicated in vehicle licensing and

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34. *Potawatomi*, 253 F.3d at 1237. The court affirmed a preliminary injunction pending a decision on the merits.

35. *See Cabazon*, 249 F.3d at 1110.

36. *See Potawatomi*, 253 F.3d at 1250–57.

37. *Cabazon*, 271 F.3d at 911.

38. The Court of Appeals has not considered the effect of the cross-deputation agreement between the Cabazon Tribe and the BIA. A lower court, however, has held that the agreement does not preempt state law under traditional federal preemption analysis and thus does not constitute an "express federal law to the contrary" under *Mescalero*. *See Cabazon Band of Mission Indians v. Smith*, No. CV974687CAS(JGX), 2002 WL 32065673, *8 (C.D. Cal. Oct. 16, 2002).

39. *See Potawatomi*, 253 F.3d at 1237.

registration and concludes that tribal interests outweigh state interests. Part IV argues that the *Potawatomi* court correctly concluded that preemption analysis appropriately applies to the situation of conflicting vehicle codes but identifies drawbacks to applying preemption analysis. Finally, Part V proposes forms of preemption analysis that best protect tribal interests in the unique situation of conflicting vehicles. This Part advocates that, to best protect tribal sovereignty, tribes resolve issues of state reciprocal vehicle recognition through legislative, rather than judicial, solutions.

I. THE COMPETING ANALYSES OF *CABAZON* AND *POTAWATOMI*

The primary conflict between the decisions in *Cabazon* and *Potawatomi* lies in the dispute over whether states may regulate all off-reservation tribal activities or whether balancing of state and tribal interests should govern whether states may regulate tribal activities occurring both within and outside reservation boundaries.[40] In *Cabazon*, the Ninth Circuit interpreted *Mescalero Apache Tribe v. Jones*[41] to allow states to regulate off-reservation tribal activities.[42] In *Potawatomi*, however, the Tenth Circuit weighed state and tribal interests under the preemption analysis of *White Mountain Apache Tribe v. Bracker*[43] to disallow state regulation of tribally registered vehicles.[44] Although *Mescalero* and *White Mountain* both addressed the extent of states' regulatory authority, neither case addressed states' authority to regulate tribal activities that occur both within and outside reservation boundaries.

A. Mescalero Apache Tribe v. Jones[45] *and State Regulation of Off-reservation Tribal Activities*

The *Cabazon* court interpreted *Mescalero* to allow states to regulate tribes' off-reservation activities.[46] In *Mescalero*, the U.S. Supreme Court considered whether New Mexico possessed

40. *See id.* at 1255 n.9.
41. Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).
42. *Cabazon*, 271 F.3d at 1105.
43. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).
44. *Potawatomi*, 253 F.3d at 1255–56.
45. *Mescalero*, 411 U.S. at 145.
46. *Cabazon*, 271 F.3d at 1105.

the authority to tax a ski resort owned by the Mescalero Apache Tribe but located on land outside the reservation.[47] The Court began its analysis by acknowledging that states do not have the authority to tax land or income deriving from activities within the reservation.[48] The Court then explained that activities occurring outside reservation boundaries "present[ed] different considerations" than those activities occurring within reservations because "[s]tate authority over Indians is yet more extensive over activities . . . not on any reservation."[49] The Court noted that state criminal law extends over off-reservation acts by tribal members[50] and that states have authority to regulate off-reservation tribal fishing.[51] Drawing on this precedent, the Court stated that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State."[52] Relying on this principle, the Court held that New Mexico possessed the authority to tax the off-reservation tribal enterprise.[53]

Courts have since relied on *Mescalero* to authorize taxation and regulation of off-reservation tribal enterprises.[54] For

47. *Mescalero*, 411 U.S. at 146.

48. *Id.* at 147–48 (citing McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164 (1973)). Courts often cite the language of *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), for the principle that Indian nations are "distinct political communities, *having territorial boundaries, within which their authority is exclusive* . . . ." *Id.* at 557 (emphasis added).

49. *Id.* at 148 (quoting Organized Village of Kake v. Egan, 369 U.S. 60, 75 (1962)).

50. *Id.* (citing Ward v. Race Horse, 163 U.S. 504 (1896)).

51. *Id.* (citing Puyallup Tribe v. Dep't of Game, 391 U.S. 392, 398 (1968)).

52. *Id.* at 148–49 (citing *Puyallup*, 391 U.S. at 398; *Organized Village of Kake*, 369 U.S. at 75–76; Tulee v. Washington, 315 U.S. 681, 683 (1942); Shaw v. Gibson–Zahniser Oil Corp., 276 U.S. 575 (1928); *Ward*, 163 U.S. at 504).

53. *Id.* at 149.

54. *See, e.g.*, Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 168 (1980); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 480–81 (1976); Salt River Pima-Maricopa Indian Cmty. v. Yavapai County, 50 F.3d 739, 740 (9th Cir. 1995) (authorizing state taxation of off-reservation tribal commercial property). The Supreme Court decided *Mescalero* on the same day as its companion case, *McClanahan v. Ariz. State Tax Comm'n.*, 411 U.S. 164 (1973). The holdings of *Mescalero* and *McClanahan* work together to distinguish between off-reservation member activities, which states may tax, and on-reservation member activities, which states may not tax. *See Colville*, 447 U.S. at 162. In *McClanahan*, the Court held that the state could not tax the income of a tribal member who resided on the reservation and earned her income entirely on the reservation. 411 U.S. at 164.

example, in *Washington v. Confederated Tribes of Colville Indian Reservation*,[55] the Court considered whether a state could impose an excise tax on motor vehicles owned by tribal members residing on the reservation.[56] The State of Washington imposed the tax "for the privilege of using the vehicle[s] in the State."[57] The Court struck down the tax because the state sought to apply it to personal property both used on the reservation and owned by tribal members residing on the reservation.[58] The Court, however, suggested that it might have allowed the tax under *Mescalero* if the state had "tailored its tax to the amount of actual off-reservation use."[59] Therefore, *Colville* stands as an example of the Court's reliance on *Mescalero* to distinguish between states' authority to regulate on-reservation and off-reservation activities.[60]

Although *Mescalero* permitted states to regulate some off-reservation activities of tribes and tribal members, it did not address state regulation of nonmember activities occurring within reservation boundaries. In *White Mountain Apache Tribe v. Bracker*, the Supreme Court articulated its analysis for determining when states may regulate on-reservation nonmember activities.[61]

B. White Mountain Apache Tribe v. Bracker *and Federal Preemption Analysis*

Like *Mescalero*, *White Mountain Apache Tribe v. Bracker* addressed states' taxation authority.[62] The U.S. Supreme Court balanced state, tribal, and federal interests to strike down a state tax applied to nonmembers conducting business on a reservation.[63]

In *White Mountain*, Arizona sought to impose motor-carrier license and use fuel taxes on a logging enterprise

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55. 447 U.S. 134.
56. *Id.* at 162.
57. *Id.*
58. *See id.* at 163 (citing *Moe*, 425 U.S. at 480–81).
59. *Id.*
60. *Id.*; *see also McClanahan*, 411 U.S. at 165–73.
61. 448 U.S. 136 (1980). Although *White Mountain* articulated analysis for when states may regulate nonmembers' on-reservation activities, the Court first allowed such regulation by states in *Colville*. *See generally Colville*, 447 U.S. at 150–62.
62. *See id.* at 137.
63. *Id.* at 152.

composed of two non-Indian corporations operating completely within a reservation.[64] At the outset, the Supreme Court noted that "there is no rigid rule by which to resolve the question of whether a particular state law may be applied to an Indian reservation or to tribal members."[65] The Court, however, cited preemption by federal law as a barrier to a state's assertion of regulatory authority.[66]

The Court explained that federal preemption in Indian law differs from preemption in other areas of law due to the "unique historical origins of tribal sovereignty."[67] Although traditional preemption analysis requires an express statement of congressional intent to preempt, courts interpreting and applying federal laws that regulate tribes will "generously" construe ambiguities in federal law "to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence" in the absence of a statement of intent to preempt.[68] Therefore, the Court reasoned, the determination of whether federal law preempts state authority with respect to tribal interests "call[s] for a particularized inquiry into the nature of the state, federal and tribal interests at stake" and does not depend "on mechanical or absolute conceptions of state or tribal sovereignty."[69] These interests, the Court explained, include fundamental principles of Indian sovereignty, the federal interest in promoting tribal self-government, and the state's regulatory interest.[70]

The Court then employed preemption analysis to determine whether Arizona could tax non-Indian logging enterprises operating on a reservation.[71] In doing so, the Court examined several factors. First, the Court reasoned that because the federal government extensively regulated the tribal timber industry, taxing the logging company would interfere with general federal policies underlying the

64. *Id.* at 137–38.

65. *Id.* at 142.

66. *Id.* at 142–43 (citing Warren Trading Post Co. v. Ariz. State Tax Comm'n, 380 U.S. 685 (1965); McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164 (1973)).

67. *White Mountain*, 448 U.S. at 143.

68. *Id.* at 144 (citing *McClanahan*, 411 U.S. at 174–75).

69. *Id.* at 145.

70. *Id.* at 143–44; *see also* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333–36 (1983) (emphasizing similar factors when applying preemption analysis).

71. *White Mountain*, 448 U.S. at 143–44.

regulations.[72] Additionally, the Court noted that Arizona's only justification for the tax was to raise revenues.[73] Finally, the Court stressed that the activities subject to taxation occurred entirely within the reservation boundaries. The Court noted that it "has repeatedly emphasized that there is a significant geographical component to tribal sovereignty."[74] Although this geographical component is "not absolute," it is "highly relevant" and an "important factor to weigh in determining whether state authority has exceeded the permissible limits."[75] The Court then concluded that federal and tribal interests outweighed the state's interests and thereby preempted the state's authority.[76] By imposing a balancing test, the Court harmonized both the state and tribal interests with "a firm federal policy of promoting tribal self-sufficiency and economic development."[77]

Since its decision in *White Mountain*, the Supreme Court has repeatedly applied preemption analysis to determine whether states may regulate the on-reservation conduct of nonmembers.[78] For example, in *California v. Cabazon Band of Mission Indians*,[79] the Court employed preemption balancing to find that state regulation of non-member on-reservation gambling would "impermissibly infringe on tribal government."[80] Alternatively, the Court has applied

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72. *Id.*

73. *Id.* at 151.

74. *Id.*

75. *Id.*

76. *Id.* at 152.

77. *Id.* at 143. Apart from emphasizing the importance of the "geographical component" to tribal sovereignty, the Court did not indicate whether it weighed one factor more heavily than another factor:

> Where, as here, the Federal Government has undertaken comprehensive regulation of the harvesting and sale of tribal timber, where a number of the policies underlying the federal regulatory scheme are threatened by the taxes respondents seek to impose, and where respondents are unable to justify the taxes except in terms of a generalized interest in raising revenue, we believe that the proposed exercise of state authority is impermissible.

Id. at 151.

78. *See* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989); Rice v. Rehner, 463 U.S. 713 (1983); Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue, 458 U.S. 832 (1982).

79. 480 U.S. 202 (1987).

80. *See id.* at 221–22 ("[T]he State's interest in preventing the infiltration of the tribal bingo enterprises by organized crime does not justify state regulation of the tribal bingo enterprises in light of the compelling federal and tribal interests

preemption analysis and upheld both a state's ability to regulate on-reservation sales of liquor by non-members[81] and a state's ability to tax on-reservation oil and gas production by non-Indian lessees even when tribes also taxed the production.[82] The Court has hesitated to apply preemption balancing to situations other than those in which states seek to regulate on-reservation nonmember activity.[83]

The facts of neither *White Mountain* nor *Mescalero* parallel the situation presented by conflicting vehicle codes. In *White Mountain*, the Supreme Court applied preemption balancing to determine whether a state could regulate nonmembers' on-reservation activities. In *Mescalero*, the Court allowed a state to regulate certain tribal activities occurring entirely off reservations.[84] The Court has yet to consider the unique situation in which a state seeks to regulate tribal activity occurring both within and outside reservation boundaries, such as tribally registered vehicles that leave reservations and travel in state jurisdictions. Therefore, the *Mescalero* and *White Mountain* cases fail to provide courts with clear guidance as to how to analyze this circumstance. In *Cabazon*[85] and *Potawatomi*[86] the Ninth and Tenth Circuits wrestled with this issue, applied different tests, and reached opposite conclusions.

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supporting them."). Notably, the Court has also used preemption analysis to deny a state's attempt to tax a non-Indian construction company employed by a tribal school board. *Ramah Navajo Sch. Bd.*, 458 U.S. at 846–47.

81. *Rice*, 463 U.S. at 734–35 ("Application of the state licensing scheme does not 'impair a right granted or reserved by federal law' . . . . On the contrary, such application of state law is 'specifically authorized by . . . Congress . . . and [does] not interfere with federal policies concerning the reservations.'").

82. *Cotton Petroleum*, 490 U.S. at 187 ("Any impairment to the federal policy favoring the exploitation of on-reservation oil and gas resources by Indian tribes that might be caused by these effects, however, is simply too indirect and too insubstantial to support Cotton's claim of pre-emption.").

83. *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331–32 (1983) (stating that states may regulate on-reservation fishing by tribes in "exceptional circumstances").

84. *See supra* text accompanying notes 46–53.

85. Cabazon Band of Mission Indians v. Smith, 249 F.3d 1101 (9th Cir. 2001), *withdrawn*, 271 F.3d 910 (9th Cir. 2001).

86. Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234 (10th Cir. 2001).

II. THE CONFLICTING CASES: *CABAZON BAND OF MISSION INDIANS V. SMITH* AND *PRAIRIE BAND OF POTAWATOMI INDIANS V. PIERCE*

Two recent cases tackled the issue of the conflicting state and tribal vehicle codes. In *Cabazon*, the Ninth Circuit questioned whether a state could impose its vehicle code against tribally owned police vehicles traveling outside reservation boundaries.[87] Similarly, in *Potawatomi,* the Tenth Circuit considered whether a state could impose its vehicle code against vehicles registered and titled under tribal vehicle codes that traveled outside reservation boundaries.[88] In *Cabazon*, the Ninth Circuit interpreted *Mescalero* to uphold application of state vehicle codes on tribally registered vehicles traveling outside reservation boundaries.[89] Notably, however, the Ninth Circuit reached an opposite conclusion when it addressed this question in *Queets Band of Indians v. Washington*,[90] a vacated decision preceding *Cabazon*. In *Potawatomi*, the Tenth Circuit applied *White Mountain*'s preemption balancing test, weighed tribal and federal interests against state interests, and determined that the state lacked authority to impose its vehicle code on tribally registered vehicles traveling off the reservation.[91]

The fact that the *Cabazon* and *Potawatomi* courts adopted conflicting approaches, both deriving from the Supreme Court's taxation decisions, indicates the rules of the taxation cases may not resolve tribal vehicle codes cases. The Ninth Circuit's differing conclusions in *Cabazon* and *Queets* only strengthens this argument. Therefore, resolution of conflicting vehicle codes may require an analysis different from that of *Mescalero* or *White Mountain* and tailored toward the unique issues posed by conflicting vehicle codes.

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87. *Cabazon*, 249 F.3d at 1104–05.
88. *Potawatomi*, 253 F.3d at 1237.
89. *Cabazon*, 249 F.3d at 1103.
90. 765 F.2d 1399 (9th Cir. 1985), *vacated as moot* 783 F.2d 154 (9th Cir. 1986).
91. *Potawatomi*, 253 F.3d at 1234.

A. Cabazon Band of Mission Indians v. Smith

Cabazon involved California's application of its vehicle code to police vehicles owned by the Cabazon Band of Mission Indians and traveling on state highways located outside the Cabazon reservation.[92] Members of the Riverside County, California, Sheriff's Department stopped and cited the Cabazon Public Safety Department vehicles because of the emergency light bars attached to the vehicles' roofs.[93] The California Vehicle Code prohibited use of emergency light bars except by "authorized emergency vehicles."[94] Tribal police vehicles, however, did not fall within the Vehicle Code's definition of "authorized emergency vehicles."[95] Therefore, the tribe could not drive its police vehicles off the reservation without violating the California Vehicle Code.

Because of the reservation's geography, however, the tribe could not police its reservation without traveling on off-reservation state highways. The Cabazon Indian Reservation is not one parcel, but rather consists of several noncontiguous sections separated by as many as thirteen miles.[96] Thus, to provide law enforcement services to the entire reservation, the Cabazon police vehicles had to travel off the reservation via state highways.[97] Prior to the suit, the Riverside County Sheriff's Department cited Cabazon police officers on several occasions for displaying light bars on police vehicles when

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92. *Cabazon*, 249 F.3d at 1103.

93. *Id.*

94. *Id.* (citing CAL. VEH. CODE §§ 25251(a)(4), 25252, 25258, 25259, 27606 (West 2000)). Emergency light bars are the multi-colored, flashing light strips regularly attached to the roofs of police cars and ambulances.

95. *Id.* (citing CAL. VEH. CODE § 165). On appeal, the Tribe did not dispute that its police vehicles did not fall within the definition of "authorized emergency vehicles" under the California Vehicle Code. *Id.* at 1104.

96. *Id.* at 1103. *See also* Cabazon Band of Mission Indians, *Map*, *at* http://cabazonindians.com/map.html (last visited Nov. 11, 2002). Sources differ as to the precise number of noncontiguous parcels that comprise the reservation. The Ninth Circuit opinion describes the reservation as made up of three parcels of land. *Cabazon*, 249 F.3d at 1103. The district court opinion describes the reservation as consisting of "four separate sections of land." Cabazon Band of Mission Indians v. Smith, 34 F. Supp. 2d 1201, 1203 (C.D. Cal. 1998). On appeal, the dissenting opinion also asserts that the reservation consists of four sections. *Cabazon*, 249 F.3d at 1110 (Browning, J., sitting by designation, dissenting). The Cabazon Tribe described the reservation as composed of five separate pieces. Spirit to Serve, *supra* note 1.

97. *Cabazon*, 249 F.3d at 1103.

driving on the public highway between the different sections of the reservation.[98]

The Cabazon tribe brought an action against the local sheriff's department in the U.S. District Court for the Central District of California, seeking declaratory and injunctive relief. The tribe argued that the Cabazon police vehicles "should be treated like those of other law enforcement agencies operating in California."[99] It sought a declaration that its sovereign authority to establish a police department and provide law enforcement services to the reservation preempted the portions of the California Vehicle Code governing emergency light bar use.[100] The tribe also sought an injunction preventing the sheriff from stopping and citing Cabazon police officers traveling between sections of the reservation in tribal police vehicles.[101]

The district court denied the tribe's motion for summary judgment.[102] In ruling for the state, the court applied *White Mountain* preemption analysis and stated that "[s]tate 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."[103] The court then balanced the state's public safety interests against the tribe's interests in carrying out law enforcement activities and the federal policies promoting tribal law enforcement activities.[104] Concluding that the state had sufficient interests

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98. *Id.* Notably, in one incident in which the state cited a tribal police vehicle, the tribal officer was attempting to reach a section of the reservation where a person died. *Id.* at 1111 (Browning, J., sitting by designation, dissenting).

99. *Id.* at 1103 (quoting *Cabazon*, 34 F. Supp. 2d at 1204).

100. *Id.* at 1103–04.

101. *Id.* at 1104.

102. *Cabazon*, 34 F. Supp. 2d at 1208.

103. *Cabazon*, 34 F. Supp. 2d at 1206 (quoting New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983)).

104. *Id.* at 1206–07. The district court cited the tribe's interests as including the ability to respond to emergencies, "community relations . . . in confirming the officers' status as law enforcement officials with those individuals that the officers come in contact with on a day-to-day basis," and the inconvenience and delay caused by covering light bars when patrol cars leave the reservation. *Id.* at 1206 (citing and quoting statements of Paul D. Hare, Director, Cabazon Public Safety Department). The court described the state's interests in its regulations as "reflect[ing] important public safety interests" and necessary to both "prevent confusion by the public" and "regulat[e] those persons authorized to operate emergency vehicles." *Id.* at 1206–07. The court concluded that in

to overcome both tribal and federal interests, the court found that the federal and tribal interests involved did not preempt the state's ability to regulate this off-reservation activity.[105]

The Ninth Circuit affirmed the district court's holding, but disagreed with its analysis by distinguishing between the state's authority over "on-reservation" and "off-reservation" tribal activities.[106] The court of appeals classified the tribe's activity—Cabazon police vehicles traveling on public highways outside reservation boundaries—as an "off-reservation" activity because this activity "gave rise to the dispute" and occurred off the reservation.[107] The court then rejected the district court's application of federal preemption analysis, reasoning it was "not applicable to off-reservation activity."[108] The court explained that because the tribal activity occurred outside reservation boundaries, the *Mescalero* principle applied: "absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State."[109] The court then concluded that because no "express federal law to the contrary" existed, the provisions of the California Vehicle Code regulating emergency light bar use applied to Cabazon police vehicles traveling on public highways outside reservation boundaries.[110]

The dissenting judge, however, challenged the majority's interpretation of *Mescalero* as authorizing state regulation of

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absence of showing that the operation of police vehicles without light bars has interfered with the Tribe's law enforcement activities, the requirement that Cabazon Public Safety Department vehicles cover their light bars when leaving the reservation does not constitute a substantial imposition on plaintiffs' right to self-government and tribal law enforcement.

Id. at 1207.

105. *Id.* at 1207–08.

106. *Cabazon*, 249 F.3d at 1106–07.

107. *Id.* at 1109.

108. *Id.* at 1106. The court noted that preemption applies when "a State asserts authority over the conduct of *non-Indians* engaging in activity *on* the reservation. In such cases we have . . . conducted a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Id.* at 1107 (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144–45 (1980)) (emphasis added).

109. *Cabazon*, 249 F.3d at 1105 (quoting Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148–49 (1973)).

110. *Id.* The parties did not dispute that the California Vehicle Code was a "non-discriminatory state law otherwise applicable to all citizens of the State." *Id.*

tribal police vehicles traveling outside reservation boundaries.[111] He argued that in *Mescalero*, the Supreme Court only intended the off-reservation application of state law to be "a generality and not carved in stone on Mt. Sinai."[112] Therefore, he explained, the status of the activity as on-reservation or off-reservation neither precluded application of preemption balancing nor dictated application of the *Mescalero* principle.[113]

The dissenting judge argued that, instead, the court should apply the preemption analysis of *White Mountain*[114] to determine whether state or tribal law prevailed.[115] Although *White Mountain* involved an on-reservation activity,[116] he explained that the *White Mountain* Court had noted that "the extent of tribal sovereignty . . . clearly involves more than simple geographical limits."[117] The dissenting judge further argued that, since it first articulated preemption balancing in *White Mountain*, the Supreme Court has emphasized the flexibility of the analysis and has never restricted its use to on-reservation conduct, despite failing to apply it to off-reservation conduct.[118] Using preemption analysis, the dissenting judge then balanced the state's interest in regulating emergency light bar use against the tribe's interest in operating an effective police department.[119] He argued that the state had a minimal interest at stake while the tribe had a "compelling" interest in public safety.[120] The dissenting judge then concluded that the tribe's interest in using the emergency light bars preempted the state's interest in regulating tribal vehicles traveling outside reservation boundaries.[121]

Later, the Ninth Circuit withdrew its decision in *Cabazon* and remanded the case to the district court following a

111. *Id.* at 1111 (Browning, J., sitting by designation, dissenting).
112. *Id.* at 1112.
113. *Id.*
114. 448 U.S. 136 (1980).
115. *Cabazon,* 249 F.3d at 1111–12.
116. *Id.* at 1111.
117. *Id.* (citing Cabazon Band of Mission Indians v. Smith, 34 F. Supp. 2d 1201, 1207 (C.D. Cal. 1998)).
118. *Id.* at 1112. (citing Cotton Petroleum v. New Mexico, 490 U.S. 163, 176–77 (1989); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333–34 (1983); Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue, 458 U.S. 832, 838 (1982)).
119. *Id.* at 1113–14.
120. *Id.*
121. *Id.*

deputation agreement between the U.S. Bureau of Indian Affairs and the tribe that granted federal law enforcement commissions to the Cabazon Public Safety Department.[122] As a result, no clear precedent exists in the Ninth Circuit regarding the question of whether a state may impose its vehicle codes on tribal vehicles traveling outside reservation boundaries.[123] Yet not only does this question remain unanswered in the Ninth Circuit, conflicting persuasive authority exists within the circuit that further muddles the issue.

B. Queets Band of Indians v. Washington

Eight years before *Cabazon*, the Ninth Circuit considered a similar issue and reached an entirely different conclusion in *Queets,* a vacated decision.[124] In *Queets*, the court prohibited the state of Washington from enforcing its motor vehicle licensing and registration laws against vehicles owned and registered by the Queets Tribe once these vehicles left the tribe's reservation.[125]

In reaching this holding, the *Queets* court did not consider the location of the tribal activity in its decision to apply preemption analysis and did not classify the activity as on-reservation or off-reservation,[126] even though the same court in

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122. Cabazon Band of Mission Indians v. Smith, 271 F.3d 910 (9th Cir. 2001); *Hearing on Contemporary Tribal Governments*, *supra* note 33. Cross-deputation agreements "usually comprise the qualifications for becoming a peace officer, the criteria for training, and measures to protect officers from personal liability." CONFERENCE OF W. ATTORNEY GENS., AMERICAN INDIAN LAW DESKBOOK 413 (2d ed. 1998). The Indian Law Enforcement Reform Act of 1990, 25 U.S.C. § 2804(a) (2000), authorizes the Secretary of the Interior to enter into cross-deputation agreements with Tribes. *Id.*

123. In the subsequent decision holding that the cross-deputation agreement between the BIA and the Cabazon Tribe did not constitute federal law that preempted state law, the U.S. District Court for the Central District of California applied traditional federal preemption analysis. The tribe had argued that under *Mescalero* analysis, the agreement constituted "an express federal law" in conflict with state law and thus required preemption. *Cabazon Band of Mission Indians v. Smith*, No. CV974687CAS(JGX), 2002 WL 32065673, at *8 (C.D. Cal. Oct. 16, 2002). The court, however, stated in dictum that it would reach "the same result" under *White Mountain* preemption balancing. *Id.* at *8 n.12. The Ninth Circuit Court of Appeals has not considered this question.

124. Queets Band of Indians v. Washington, 765 F.2d 1399, 1408 (9th Cir. 1985), *vacated as moot*, 783 F.2d 154 (9th Cir. 1986).

125. *See generally Queets*, 765 F.2d at 1399. The *Queets* court did not explicitly determine whether the state could enforce its vehicle laws against individually owned, tribally registered vehicles. *See id.* at 1409.

126. *Id.* at 1405–09.

Cabazon emphasized the location of the activity at issue. Instead, the court simply applied preemption analysis and weighed the Queets Tribe's interests against the state's interests.[127]

The Ninth Circuit later vacated the decision at the request of the parties when legislation rendered the issue moot.[128] Thus, the case only serves as persuasive authority[129] and has received mixed reactions from courts. The *Cabazon* dissent relied heavily on *Queets* as an example of "appropriate application" of preemption analysis.[130] Similarly, in *Potawatomi*, the Tenth Circuit cited *Queets* as a case in which "a state was compelled to extend recognition to [tribal] motor vehicle registrations."[131] The *Cabazon* majority, however, dismissed the persuasive power of *Queets* and stated that the decision "provides no support" because it was vacated as moot.[132] Still other courts have distinguished *Queets* on its facts[133] by emphasizing that the case only addressed the question of whether state vehicle license and registration laws applied to vehicles owned by a tribe—not by individual tribal members—traveling off the reservation.[134] Courts can thus easily disregard *Queets* because of either its facts or its judicial history. Nevertheless, *Queets* stands as an example of the Ninth Circuit's willingness to apply preemption balancing and require states to recognize tribal vehicle codes. Furthermore, the case provides an important backdrop against which to analyze both *Cabazon* and *Potawatomi*.

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127. *Id.* at 1407–08.

128. *Queets*, 783 F.2d at 154. Notably, the Ninth Circuit Court of Appeals did not renounce the result of *Queets* or its rationale. Cabazon Band of Mission Indians v. Smith, 249 F.3d 1101, 1112 (9th Cir. 2001), *withdrawn*, 271 F.3d 910 (9th Cir. 2001).

129. Harrison v. State, 791 P.2d 359, 362 n.5 (Alaska Ct. App. 1990).

130. *Cabazon*, 249 F.3d at 1112.

131. Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1257 (10th Cir. 2001).

132. *Cabazon*, 249 F.3d at 1108 n.38. The Ninth Circuit vacated *Queets* after Washington passed legislation to permit tribal vehicle registration and licensing. *See Queets*, 783 F.2d 154; *see also* WASH. REV. CODE ANN. § 46.16.022 (West 2001).

133. *See Harrison*, 791 P.2d at 362 n.5.

134. *Id.*; *see also* Queets Band of Indians v. Washington, 765 F.2d 1399, 1402–03 (9th Cir. 1983), *vacated as moot*, 783 F.2d 154 (9th Cir. 1986).

C. Prairie Band of Potawatomi Indians v. Pierce

Unlike the *Cabazon* court, the Tenth Circuit has expressed support for the *Queets* rationale.[135] In *Powatomi,* the court rejected the Ninth Circuit's holding in *Cabazon* and instead indicated that states could not regulate tribal vehicles traveling outside reservation boundaries.[136]

In *Potawatomi*, the Tenth Circuit reviewed Kansas's application and enforcement of its motor vehicle registration and titling laws against tribal members operating vehicles registered and licensed under the Potawatomi Nation's vehicle code outside the Potawatomi reservation.[137] The Kansas vehicle code required that all vehicles operating in Kansas have state-issued registrations and titles.[138] In 1999, however, the Potawatomi Nation enacted the Prairie Band Motor Vehicle Code, which required tribal registrations and titles for all vehicles owned either by the tribal government or by tribal members residing on the reservation.[139] A few months after the Potawatomi Nation enacted its code, state officials cited tribal members for driving tribally licensed and registered vehicles outside the reservation boundaries in violation of the Kansas motor vehicle code.[140]

The tribe filed for a temporary restraining order and a preliminary injunction, requesting that the district court enjoin the state from enforcing its motor vehicle registration and titling laws against the tribe and members operating or owning a vehicle registered and titled pursuant to the Prairie Band Motor Vehicle Code.[141] To receive a preliminary injunction, the tribe had to establish four elements, including the likelihood of

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135. *Potawatomi*, 253 F.3d at 1257.

136. *Id.*

137. *Id.* at 1237 (citing PRAIRIE BAND MOTOR VEH. CODE § 17 (1999)).

138. *Id.* (citing KAN. STAT. ANN. § 8-142 (2001)). The code, however, provided an exception for nonresidents holding proper registration and title in their state of residence, as long as the state of residence granted reciprocal recognition to Kansas-issued registration and titles. *Id.* at 1238 (citing KAN. STAT. ANN. § 8-138a).

139. *Potawatomi*, 253 F.3d at 1237.

140. *Id.* at 1238. The Tribe registered nineteen vehicles, owned either by individual tribal members or the tribal government, under the tribal regulations. Appellee's Brief at 3–4, *Potawatomi*, 253 F.3d 1234 (No. 99-3324).

141. *Potawatomi*, 253 F.3d at 1239.

the tribe's success on the merits.[142] The U.S. District Court for the District of Kansas held that the tribe satisfied all four elements and granted both the temporary restraining order and the preliminary injunction.[143]

The Tenth Circuit concluded that the lower court did not abuse its discretion by issuing the preliminary injunction and affirmed the district court's decision.[144] Under the deferential abuse of discretion standard, the court merely held that there were "questions going to the merits . . . so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation."[145] In reaching its conclusion, the court suggested that it did not adhere to the Ninth Circuit's interpretation of *Mescalero* that allowed state regulation of tribally licensed and registered vehicles. The court hesitated to distinguish so starkly between state authority over on- and off-reservation tribal activity.[146] Instead, the court indicated that federal preemption may bar the state's assertion of regulatory authority.[147]

First, the court expressly disagreed with the Ninth Circuit's conclusion in *Cabazon* that, "under *Mescalero*, no balancing of interests takes place once the tribal activity takes place off-reservation."[148] The court conceded that "*Mescalero* is undoubtedly an important decision to be considered," but indicated that it may not apply to all off-reservation conduct.[149]

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142. *Id.* at 1246–47. Under the Tenth Circuit test to receive a preliminary injunction:

> The requesting party must demonstrate (1) that it has a substantial likelihood of prevailing on the merits; (2) that it will suffer irreparable harm unless the preliminary injunction is issued; (3) that the threatened injury outweighs the harm the preliminary injunction might cause the opposing party; and (4) that the preliminary injunction if issued will not adversely affect the public interest.

Id. at 1246 (citing Fed. Lands Legal Consortium v. United States, 195 F.3d 1190, 1194 (10th Cir. 1999)). If the requesting party demonstrates the latter three factors, it need not prove a "substantial" likelihood of success on the merits but only "questions going to the merits . . . so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Id.* at 1253 (quoting *Fed. Lands Legal Consortium*, 195 F.3d at 1194).

143. *Id.* at 1247.

144. *Id.* at 1250, 1257.

145. *Id.* at 1253 (alteration in original).

146. *See id.* at 1255.

147. *Id.* at 1254.

148. *Id.* at 1255 n.9.

149. *Id.* at 1255.

The court "questioned" whether *Mescalero* applied in "broad strokes" to allow state regulation of all off-reservation conduct "without taking into consideration the specific facts that animated the case."[150] Instead, the court noted that the dissenting judge in *Cabazon* "had the better of it"[151] and characterized the on-reservation/off-reservation distinction as "not necessarily dispositive" of whether preemption analysis should apply.[152] The court regarded off-reservation activity as merely a factor to consider under the balancing analysis that "*generally* tips the balancing test in favor of the state."[153]

Next, in support of its application of preemption analysis, the Tenth Circuit questioned whether tribally registered vehicles traveling outside reservation boundaries should be classified as "off-reservation" conduct.[154] The court characterized the on-reservation tribal activity of registering and titling vehicles as the "essential conduct" at issue.[155] The court regarded the driving of tribally registered cars outside reservation boundaries as a mere "ancillary consequence" of the on-reservation conduct.[156] Thus, by characterizing the activity's essential conduct as on-reservation, the court allowed preemption balancing even under the Ninth Circuit's broad interpretation of *Mescalero*. Paralleling the analysis employed in *Cabazon*'s dissenting opinion and the *Queets* opinion, the *Potawatomi* court concluded that under preemption balancing analysis, a state likely could not impose its vehicle code against a tribal vehicle traveling outside reservation boundaries.[157]

Cabazon, *Potawatomi*, and *Queets* present different approaches to determine whether a state may impose its vehicle codes on tribal vehicles traveling outside reservation boundaries. *Cabazon*'s majority classified the activity as off-reservation and broadly interpreted *Mescalero* to allow the

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150. *Id.*
151. *Id.* at 1255 n.9.
152. *Id.* at 1256.
153. *Id.* at 1255 n.9.
154. *Id.* at 1255 n.10.
155. *Id.* at 1256 (quoting *In re* Blue Lake Forest Prods., 30 F.3d 1138, 1141 (9th Cir. 1994)).
156. *Id.* at 1255.
157. *Id.* at 1256 ("Which sovereign's interests are more important is not at this point a matter appropriate for our consideration. Instead, we merely note that *Mescalero's* distinction between on- and off-reservation activities is not necessarily dispositive, especially in light of the doctrine of Indian sovereign .").

state to impose its regulations.[158] The *Queets* court applied preemption analysis regardless of where the activity occurred and held that tribal and federal interests preempted state interests.[159] The *Potawatomi* court and *Cabazon*'s dissenting judge interpreted *Mescalero* more narrowly than the *Cabazon* majority to allow preemption balancing, under which the tribes' interests prevailed.[160] Additionally, the *Potawatomi* court suggested looking to where the "essential conduct" of the activity occurred in assessing whether to balance state and tribal interests.[161] Finally, *Cabazon*'s district court adopted an intermediary position by employing preemption analysis, but finding the tribal and federal interests insufficient to preempt state regulation.[162]

III. BALANCING OF FEDERAL, TRIBAL, AND STATE INTERESTS UNDER *WHITE MOUNTAIN* PREEMPTION ANALYSIS

Under preemption analysis, courts weigh federal and tribal interests against state interests to determine if states may regulate the conduct in question.[163] *Queets*, *Potawatomi*, *Cabazon*'s district court decision, and *Cabazon*'s dissenting opinion all weighed tribes' interest in registering vehicles against states' enforcement of their vehicle codes.[164] As three of these courts concluded, tribes likely can show sufficient federal interests to justify preemption of state regulation under balancing analysis. Furthermore, tribes' interests in establishing vehicle codes outweigh states' interests in controlling their highways. Thus, under preemption analysis, tribes will likely prevail so that states cannot regulate tribal vehicles outside reservation boundaries.

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158. Cabazon Band of Mission Indians v. Smith, 249 F.3d 1101, 1105 (9th Cir. 2001), *withdrawn*, 271 F.3d 910 (9th Cir. 2001).

159. Queets Band of Indians v. Washington, 765 F.2d 1399, 1407–09 (9th Cir. 1985), *vacated as moot*, 783 F.3d 154 (9th Cir. 1986).

160. *Potawatomi*, 253 F.3d at 1256; *Cabazon*, 249 F.3d at 1113.

161. *Potawatomi*, 253 F.3d at 1256.

162. Cabazon Band of Mission Indians v. Smith, 34 F. Supp. 2d 1201, 1206–07 (C.D. Cal. 1998).

163. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143–44 (1980).

164. *See Potawatomi*, 253 F.3d at 1253–57; *Cabazon*, 249 F.3d at 1113–14 (Browning, J., sitting by designation, dissenting); *Cabazon*, 34 F. Supp. 2d at 1206–08; *Queets*, 765 F.2d at 1406–08.

A. Federal Interests Considered in Preemption Balancing

The Supreme Court stated that *White Mountain* preemption analysis requires a "particularized inquiry into the nature of the state, federal, and tribal interests at stake" to determine whether federal law has preempted state regulatory authority.[165] Generally, state authority is preempted if it "interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."[166]

The Court has considered several factors when assessing state, tribal, and federal interests to determine whether states are preempted from regulating nonmember, on-reservation activities. First, the Court has looked at whether state jurisdiction would "threaten" a "comprehensive" federal regulatory scheme.[167] Additionally, the Court has asked whether state regulations would "nullify" or act "wholly to supplant" tribal regulations.[168] Furthermore, the Court has emphasized that the tradition of tribal sovereignty over the reservation and its members serves as a "crucial 'backdrop' against which any assertion of state authority must be assessed."[169] Finally, the Court has stressed Congress' commitment to promoting tribal self-government, including "Congress' overriding objective of encouraging tribal self-government and economic development."[170]

Tribes likely can demonstrate the latter three elements to establish that state regulation is preempted. Tribes may have difficulty, however, demonstrating strong federal interests in tribal vehicle codes because federal regulation in the area of tribal vehicle codes is not "comprehensive." In cases that held that federal law preempted state authority, the Supreme Court found the federal regulation at issue to be "comprehensive and pervasive."[171] For example, in *White Mountain*, the Court determined that federal regulation of the tribal timber

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165. *White Mountain*, 448 U.S. at 149.
166. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983).
167. *White Mountain*, 448 U.S. at 148–49.
168. *Mescalero*, 462 U.S. at 338.
169. *Id.* at 334 (*quoting White Mountain*, 448 U.S. at 143).
170. *Id.* at 341.
171. Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue, 458 U.S. 832, 839 (1982); *see Mescalero*, 462 U.S. at 324; Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 176–87 (1989); *White Mountain*, 448 U.S. at 136.

industry—including the various Acts of Congress, the Secretary of the Interior's regulations over tribal timber resources, and the Bureau of Indian Affairs's supervision—was "so pervasive as to preclude the additional burdens sought to be imposed" by Arizona.[172]

Similarly in *Ramah Navajo School Board v. Bureau of Revenue*,[173] the state sought to tax a nonmember contractor's gross receipts received from a tribal school board for the construction of a school.[174] The Court concluded that the tax would interfere with the "comprehensive federal scheme regulating the creation and maintenance of educational opportunities for Indian children and on the express federal policy of encouraging Indian self-sufficiency in the area of education."[175] Since *White Mountain*, the Court has yet to find that federal law preempts state law where a "pervasive" federal scheme does not exist.[176]

In the vehicle licensing and tribal policing areas, however, no federal statutes or policies address tribal vehicle licensing regimes or emergency vehicles.[177] Here, the differences between tribal vehicle licensing and the use of emergency vehicles are significant, because arguably tribal emergency vehicles fall within a more pervasive federal scheme. Federal statutes establish tribal justice systems[178] and affirm tribes' criminal jurisdiction over tribal members for lesser crimes.[179] A tribe's ability to police its reservation, a function linked to the development of tribal governments as encouraged by federal regulations,[180] depends upon the existence of police

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172. *White Mountain*, 448 U.S. at 148.

173. 458 U.S. 832.

174. *Id.* at 835.

175. *Id.* at 845.

176. *See Ramah Navajo Sch. Bd.*, 458 U.S. at 832; *White Mountain*, 448 U.S. at 136.

177. In dictum, the U.S. District Court for the Central District of California noted that the cross-deputation agreement between the Cabazon Tribe and the BIA did not tip balancing analysis toward federal and tribal interests because the tribe did not show that state regulation "prejudice[d] . . . any of the Cabazon Band's law enforcement efforts." *Cabazon Band of Mission Indians v. Smith*, No. CV974687CAS(JGX), 2002 WL 32065673, at *8 n.12 (C.D. Cal. Oct. 16, 2002).

178. 25 U.S.C. § 3611 (2000).

179. 18 U.S.C. § 1152.

180. *See* Indian Self-Determination and Education Assistance Act of 1975 (codified at 25 U.S.C. § 450a(b) (2000)) ("Congress declares its commitment to . . . a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians

vehicles.[181] State regulation, therefore, would hinder the objective of such statutes. In contrast, no such statutes exist that encompass tribal vehicle registration. Several federal statutes, however, promote tribal self-sufficiency and development of tribal governments,[182] and arguably the development of governmental functions such as vehicle registration and titling fall within these goals. Therefore, although no federal statutes directly address tribal licensing regimes or emergency vehicles, these governmental functions are necessary elements of the larger federal policy encouraging tribal self-sufficiency. Thus, although tribes may struggle to establish that federal regulation in the area of tribal vehicle codes is "comprehensive," tribes can likely show a strong federal interest in tribal self-sufficiency and government to justify preemption of state regulation.

B. Balancing of State and Tribal Interests

The Supreme Court noted that the tradition of tribal sovereignty should be used as a "backdrop" against which to weigh tribal and state interests when making preemption determinations.[183] In cases of conflicting vehicle codes, tribes' interests in sovereignty and self-government outweigh states' interests in regulating their highways.

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to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services."); Indian Financing Act of 1974, (codified at 25 U.S.C. § 1451) ("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.").

181. Cabazon Band of Mission Indians v. Smith, 249 F.3d 1101, 1113 (9th Cir. 2001), *withdrawn*, 271 F.3d 910 (9th Cir. 2001) (Browning, J., sitting by designation, dissenting) (quoting the public safety director for the tribe: "Emergency lights play an important role both in safely responding to emergency situations and from a community relations standpoint in confirming the officers' status as law enforcement officials.").

182. *See* Indian Self-Determination and Education Assistance Act, § 450a(b); Indian Financing Act, § 1451; Indian Gaming Regulation Act, 25 U.S.C. § 2701(4) ("a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government").

183. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980).

1. The Tribes' Interests

Two substantial interests support tribes' off-reservation use of police vehicles and enforcement of vehicle registration codes. First, the Cabazon and Potawatomi tribes perform essential government functions when operating police vehicles and promulgating titling and licensing requirements, and off-reservation state regulation would impair these functions. Second, the tribes, as sovereigns, own the police vehicles and tribally registered vehicles that states sought to regulate.

Off-reservation state regulation of tribal police vehicles and tribally licensed vehicles would prevent tribes from performing essential government functions. Tribal police vehicles allow tribes to fulfill their "federally mandated duties" of providing police services to members.[184] Similarly, tribes' "traditional governmental functions" include vehicle registration.[185] Furthermore, both the Cabazon and Potawatomi tribes' on-reservation enterprises demand performance of these government functions. The Cabazon Tribe described its need for law enforcement services as a "duty" to the increasing number of non-members visiting the reservation.[186] Likewise, the growing vehicle traffic and increasing number of vehicles owned by nonmembers within the Potawtomi reservation prompted the Potawatomi Nation to enact its motor vehicle code.[187]

States' off-reservation regulation of these activities would impede the tribes' ability to carry out these functions within reservation boundaries. Because the Cabazon reservation consists of several noncontiguous pieces, Cabazon police

184. *Cabazon*, 249 F.3d at 1111, *withdrawn*, 271 F.3d 910 (9th Cir. 2001) (Browning, J., sitting by designation, dissenting).

185. Crow Tribe of Indians v. Montana, 650 F.2d 1104, 1110 (9th Cir. 1981) (citing Red Lake Band of Chippewa Indians v. Minnesota, 248 N.W.2d 722 (Minn. 1976)).

186. Cabazon Band of Mission Indians, *Issues*, *at* http://cabazonindians.com/issues.html (last visited Nov. 11, 2002). The Tribe operates a casino on the reservation that attracts more than a million visitors annually. Fantasy Springs Casino, *Fantasy Springs Casino—Bigger & Better*, *at* http://www.fantasyspringsresort.com (last visited Apr. 15, 2002). For a description of the Tribe's economic enterprises, see Cabazon Band of Mission Indians, *Cabazon Enterprises*, *at* http://cabazonindians.com/enterprises.html (last visited Nov. 11, 2002).

187. Appellee's Brief at 5, Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234 (10th Cir. 2001) (No. 99-3324) (quoting PRAIRIE BAND MOTOR VEH. CODE § 17-10-1 (1999)).

vehicles cannot patrol the entire reservation without traveling on state highways. Thus, imposition of state law would prohibit Cabazon police from attaching light bars to their vehicles. This restriction would hinder the tribe's ability to effectively patrol the reservation and "safely respond to emergency situations."[188] Furthermore, nothing offsets a tribe's inability to effectively police its reservation because the states do not "duplicate" police services within reservations.[189]

Similarly, imposition of state law on vehicles titled and registered under the Potawatomi motor vehicle code would effectively quash the tribal code. Tribal members occasionally must leave the reservation with tribally titled and registered vehicles and thus risk receiving citations from the state. Facing the impractical options of confining vehicles to the reservation or continuing to attract state citations, the Potawatomi Nation must abandon exercising this traditional governmental function.[190]

Notably, the states in both *Cabazon* and *Potawatomi* sought to impose their vehicle codes on tribally owned vehicles,[191] as compared to vehicles owned by tribal members. Because the states seek to regulate the tribes as sovereigns, "the tribal interests in licensing governmental vehicles are substantially more compelling than private tribal members' vehicles."[192] Nonetheless, whether state vehicle codes seek to regulate tribes as either sovereigns or tribal members, tribes' have strong interests in using police vehicles and promulgating their own vehicle codes.

2. The States' Interests

In contrast, the states' interest in imposing their vehicle codes on tribally owned and tribally registered vehicles is

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188. *Cabazon*, 249 F.3d at 1113 (Browning, J., sitting by designation,dissenting) (quoting Paul D. Hare, Director of Public Safety, Cabazon Band).

189. *See* Queets Band of Indians v. Washington, 765 F.2d 1399, 1408 (9th Cir. 1985), *vacated as moot*, 783 F.3d 154 (9th Cir. 1986).

190. *See id.* ("[A] failure to comply with the state's registration and licensing laws could result in the seizure of tribal vehicles and denial of the tribes' abilities to carry out governmental functions.").

191. *Cabazon*, 249 at 1103; Appellee's Brief at 4, *Potawatomi*, 253 F.3d 1234 (No. 99-3324). In *Potawatomi*, both the tribe and individual tribal members owned the tribally registered vehicles. *Id.*

192. *Queets*, 765 F.2d at 1408.

relatively weak.[193] States' sovereign rights include control of their territory, and the inability to impose their codes on tribal vehicles would "bar [the states'] principal officers from exercising their governmental powers and authority over [state] lands, roads and highways."[194] Additionally, state "regulatory laws reflect important public safety interests,"[195] which courts have favored. [196] In titling and registration cases, states assert interests in identifying vehicles traveling on their highways.[197] Furthermore, in *Cabazon*, California defended its interest in maintaining standards for the qualifications of drivers of emergency vehicles by contending it would otherwise lack authority over the qualifications of tribal drivers.[198]

States' numerous exceptions in their vehicle codes and reciprocity agreements with other states, however, undercut these arguments. For example, vehicle codes often exempt privately owned emergency vehicles and vehicles from neighboring states from prohibitions against light bars.[199] Furthermore, California's vehicle code allows the Washoe Tribe to display light bars on tribal vehicles.[200] Similarly, states have reciprocity agreements with nearly all other states, as do the states neighboring Canada and Mexico.[201] Additionally, some states' reciprocity statutes exempt tribal vehicles.[202]

Because states' interests in regulating their highways are minimal and tribes' interests in carrying out essential governmental functions are great, the federal and tribal interests in vehicle codes preempt state authority. The next

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193. *Id.*

194. Appellant's Brief at 27, *Potawatomi*, 253 F.3d 1234 (No. 99-3324).

195. Cabazon Band of Mission Indians v. Smith, 34 F. Supp. 2d 1201, 1206 (C.D. Cal. 1998).

196. *Id.* at 1206–07.

197. *Queets*, 765 F.2d at 1408.

198. *Cabazon*, 34 F. Supp. 2d at 1207.

199. *See, e.g.*, CAL. PENAL CODE § 830.39 (West 2001) (designating certified privately owned ambulances as "authorized emergency vehicles"); CAL. VEH. CODE § 165 (West 2001) (designating law enforcement officers of Oregon, Nevada, and Arizona as California peace officers under particular circumstances).

200. *See* CAL. PENAL CODE § 830.8(e)(2). The state penal code allows the Washoe tribe's vehicles to use light bars off the reservation for emergencies. Because of this exemption, the Tribe may have argued that the California law is discriminatory, because it is not imposed equally on similarly situated groups.

201. *See* CAL. PENAL CODE § 830.39.

202. *See, e.g.*, MINN. STAT. ANN. § 168.181 (West 2001); OKLA. STAT. ANN. tit. 47, § 1136 (West 2001); S.D. CODIFIED LAWS § 32-5-42 (Michie 2002); WASH. REV. CODE ANN. §§ 46.16.020, .022 (West 2001); WIS. STAT. ANN. § 341.409 (West 2001).

Part argues that, contrary to the *Cabazon* decision, courts must apply balancing analysis to resolve conflicts between state and tribal vehicle codes.

IV. EVALUATION OF THE ANALYSES EMPLOYED IN *CABAZON* AND *POTAWATOMI*

The Supreme Court decided *Mescalero* and *White Mountain* to resolve situations where states sought to tax activities occurring either entirely outside or entirely within reservation boundaries. Because tribal vehicle codes regulate activities that occur both on and off of reservations, the *Cabazon* and *Potawatomi* courts struggled in determining how to apply *Mescalero* and *White Mountain*. The *Cabazon* court incorrectly held that *Mescalero* did not allow balancing of state and tribal interests when states sought to regulate off-reservation tribal activities. The *Potawatomi* court correctly concluded that preemption analysis should determine whether states could impose their motor vehicle codes on tribal vehicles outside reservation boundaries.

Some lower courts have modified preemption analysis to specifically address activities that occur both on and off of reservations by focusing on the place where the activity's "essential conduct" took place. Yet in these situations—where states seek to regulate tribal activities occurring both within and outside reservation boundaries—neither the *White Mountain* preemption analysis nor the modified preemption analysis adequately protects interests of tribal sovereignty. Instead, these analyses may allow states to regulate on-reservation tribal activity in some circumstances. Therefore, the repercussions of this approach may arguably damage tribal sovereignty more than the Ninth Circuit's interpretation of *Mescalero*.

A. Mescalero *Allows Balancing of State and Tribal Interests*

The Ninth Circuit incorrectly concluded that *Mescalero* does not allow for balancing of state and tribal interests and allowed California to impose its vehicle code on tribal police vehicles. In *Cabazon*, the Ninth Circuit interpreted *Mescalero* as authorizing state regulation of all tribal activities occurring outside reservation boundaries, noting that "tribal activities

conducted outside the reservation present different considerations than those on the reservation."[203]

This interpretation, however, improperly broadens the principle articulated in *Mescalero*. First, this interpretation ignores the Court's qualified statement in *Mescalero*: "absent express federal law to the contrary, Indians going beyond reservation boundaries have *generally* been held subject to nondiscriminatory state law."[204] With this statement, the Court did not foreclose the possibility that states lacked authority to regulate some off-reservation tribal activities. Second, the Ninth Circuit's interpretation of *Mescalero* disregards the differences between the facts of that case and those of *Cabazon*. As the Tenth Circuit noted in *Potawatomi*, "the tribal activity in *Mescalero*—the operation of a ski resort located outside reservation land—was conduct clearly and exclusively beyond the reservation."[205] In contrast, the activities at issue in *Cabazon*—tribal law enforcement programs and the subsequent travel of tribal police vehicles outside reservation boundaries—occurred both on and off of the reservation. Finally, the tribal activity at issue in *Mescalero*—the operation of a ski resort—was not a traditional governmental function, unlike the Cabazon Tribe policing its reservation.[206] Thus, analogizing the activity in *Mescalero* to the activity in *Cabazon* ignores that the activity in the latter case implicated greater tribal interests. These reasons prompted the Tenth Circuit to "question whether [*Mescalero*] can be applied in [such] broad strokes . . . without taking into consideration the specific facts that animated the case."[207]

The Tenth Circuit correctly suggested that the *Mescalero* principle contemplates balancing state and tribal interests even when the tribal activity occurs outside reservation boundaries. In *Mescalero*, the Court did not articulate a *per se* rule authorizing state regulation of off-reservation tribal activities. Rather, *Mescalero* stands for the idea that "if the

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203. Cabazon Band of Mission Indians v. Smith, 249 F.3d 1101, 1105 (9th Cir. 2001) (quoting Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973)).

204. *Mescalero*, 411 U.S. at 148–49 (emphasis added).

205. Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1255 (2001).

206. *See id.* at 1256.

207. *Id.* at 1255.

tribal activity is off-reservation that fact *generally* tips the balancing test in favor of the state."[208]

Notably, however, the Court has hesitated to apply preemption analysis beyond the situation in which a state seeks to regulate nonmember, on-reservation conduct.[209] The Court's reluctance to extend this analysis may indicate a reluctance to adopt a broader rule. Indeed, in *Arizona Department of Revenue v. Blaze Construction Co.*,[210] the Court explicitly indicated an unwillingness to apply preemption balancing to anything other than situations in which state seek to regulate on-reservation conduct of nonmembers.[211] The Court instead expressed a preference for bright-line rules that establish the extent of states' regulatory authority.[212] Therefore, because the Court has failed to extend the application of preemption analysis, courts may hesitate to apply such analysis to determine whether states may regulate tribal and tribally registered vehicles outside reservation boundaries. Yet although the Court declined to apply balancing analysis in *Blaze*, the decision does not alter *Mescalero*'s failure to authorize state regulation of all off-reservation tribal activities. Thus, *Mescalero* permits courts to perform balancing to determine over which off-reservation tribal activities states lack regulatory authority.

B. The Blue Lake *Approach: Classification of the Tribes' Activities as On-reservation, Followed by Preemption Balancing*

Some courts have avoided the argument that *Mescalero* allows states to regulate off-reservation tribal activities by distinguishing activities occurring both within and outside reservations from the tribal activity in *Mescalero*, which

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208. *Id.* at 1255 n.9.

209. *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331–32 (1983) (limiting state regulation of on-reservation tribal fishing to "exceptional circumstances"); Puyallup Tribe v. Dep't of Game, 433 U.S. 165 (1977) (allowing state regulation of on-reservation tribal fishing).

210. 526 U.S. 32 (1999).

211. *Id.* at 37.

212. *Id.* ("[W]e have never employed this balancing test in a case such as this one where a State seeks to tax a transaction between the Federal Government and its non-Indian private contractor. We decline to do so now. Interest balancing in this setting would only cloud the clear rule established by our decision in *New Mexico*.").

occurred entirely off the reservation. In two cases in which the tribal activity occurred both within and outside reservation boundaries, courts classified the primary tribal activity, or "essential conduct," as occurring on the reservations. These courts then applied preemption analysis and determined that federal and tribal interests preempted the state's ability to regulate the on-reservation tribal activities.[213] Because federal and tribal interests would likely outweigh state interests under preemption analysis,[214] tribal interests would preempt states from regulating tribally owned and tribally registered vehicles, both within and outside reservation boundaries, under the essential conduct approach.[215]

People v. McCovey[216] employed analysis similar to the essential conduct approach, and In re *Blue Lake Forest Products, Inc.* actually articulated the essential conduct analysis.[217] Citing these cases, the Tenth Circuit Court of Appeals indicated in *Potawatomi* that the essential conduct approach might appropriately apply to the context of tribal vehicle laws.[218]

People v. McCovey laid the foundation for *Blue Lake*'s essential conduct approach.[219] *McCovey* involved California's attempt to regulate off-reservation sales by nonmembers of certain fish, including the sale of fish caught on reservations by tribal members.[220] Although the activity that the state sought to regulate—the sale of fish by nonmembers—occurred off the reservation, the California Supreme Court classified the sale of fish as an on-reservation activity because it "involve[d] on-reservation fishing followed by an off-reservation sale."[221] The court then distinguished the activity from the conduct in *Mescalero*, which "occurred entirely off the reservation," and applied preemption analysis.[222] Balancing state, federal, and tribal interests, the court concluded that federal and tribal

213. *See In re* Blue Lake Forest Products, Inc., 30 F.3d 1138, 1142 (9th Cir. 1994); People v. McCovey, 685 P.2d 687, 696 (Cal. 1984).

214. *See infra* text accompanying notes 183–202.

215. *See Blue Lake*, 30 F.3d at 1141–42; *McCovey*, 685 P.2d at 697.

216. *McCovey*, 685 P.2d at 697.

217. *Blue Lake*, 30 F.3d at 1141.

218. Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1255–56 (10th Cir. 2001).

219. *McCovey*, 685 P.2d 687.

220. *Id.* at 688.

221. *Id.* at 697.

222. *Id.*

interests preempted the state from regulating the off-reservation sale of fish caught on the reservation by member Indians.[223]

In re *Blue Lake Forest Products, Inc.* built on *McCovey* and expressly introduced the "essential conduct" principle.[224] In *Blue Lake*, a tribally owned logging company contracted to sell lumber harvested on the reservation to a non-Indian buyer.[225] After the tribe shipped the lumber to the buyer, the buyer filed for bankruptcy[226] and both the tribe and a bank claimed the proceeds from the lumber sale.[227] Tribal law conflicted with the state's Uniform Commercial Code as to whether the tribe or the bank was entitled to the proceeds.[228] To determine whether tribal or state law applied, the Ninth Circuit Court of Appeals applied preemption balancing, "even though [the] case implicate[d] an off-reservation relationship."[229] The court reasoned that the activity was on-reservation "for the purposes of preemption because the essential conduct at issue occurred on the reservation: the severance of the timber and its removal without proper compensation."[230] The court also distinguished the *Blue Lake* situation from the activities of *Mescalero*, recognizing that "the Indian enterprise at the heart of [the *Blue Lake*] dispute—the timbering lands—is located on, not off, the reservation."[231] Applying preemption balancing analysis, the court determined that federal and tribal interests preempted the application of state law and thus barred state regulation.[232] Arguably, a court could employ this analysis to similarly bar states from imposing their vehicle codes on tribally registered vehicles off of reservations.

In *Potawatomi* and *Cabazon*, the Ninth and Tenth Circuits disagreed as to whether the essential conduct rationale could extend to the situations at issue in *Cabazon* and *Potawatomi*. The courts' conflict partly lay in their characterizations of the "essential conduct at issue." In *Potawatomi*, the Tenth Circuit

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223. *Id.* at 696.
224. *In re* Blue Lake Forest Products, Inc., 30 F.3d 1138, 1141 (9th Cir. 1994).
225. *Id.* at 1140.
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.* at 1141.
230. *Id.*
231. *Id.*
232. *Id.* at 1142.

suggested that *Blue Lake*'s essential conduct principle could apply to vehicle codes conflicts to allow for preemption balancing.[233] The court noted that "the activity conducted by the tribe was the registration and titling of vehicles" and that "this activity occurred within the reservation, not beyond."[234] The court regarded the off-reservation driving of tribally registered vehicles as merely "an ancillary consequence"[235] that courts should consider when weighing tribal, state, and federal interests.[236] Therefore, the court indicated, because the essential conduct occurred on the reservation, preemption balancing could apply under *Blue Lake*'s rationale.[237]

In *Cabazon*, however, the Ninth Circuit focused on the off-reservation driving of tribal vehicles as the primary conduct, rather than on the tribe's policing of the reservation.[238] The court indicated that the *Blue Lake* principle did not apply to *Cabazon*'s facts because "*Blue Lake* merely stands for the proposition that, when determining whether to apply *White Mountain*'s preemption analysis, a court should focus on the location of the tribal activity which gave rise to the dispute over application of state law."[239] The court reasoned that the *Blue Lake* situation differed from the facts of *Cabazon*, because in *Blue Lake*, the conduct that gave rise to the dispute occurred on the reservation.[240] In *Cabazon*, however, the off-reservation driving of tribal police vehicles was the conduct that led to the dispute.[241] This characterization allowed the court to interpret and apply *Mescalero*.[242]

Despite the Ninth Circuit's conclusion in *Cabazon*, the tribal activities in *Potawatomi* and *Cabazon* may be classified as on-reservation under the *Blue Lake* analysis. In both cases,

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233. *See* Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1255 (10th Cir. 2001).

234. *Id.*

235. *Id.* at 1255.

236. *Id.* at 1256. ("[W]e merely note that *Mescalero*'s distinction between on- and off-reservation activities is not necessarily dispositive . . . .").

237. *Id.*

238. *See* Cabazon Band of Mission Indians v. Smith, 249 F.3d 1101, 1109 (9th Cir. 2001), *withdrawn*, 271 F.3d 910 (9th Cir. 2001).

239. *Id.*

240. *See id.*

241. *See id.* ("[T]he Tribe's activity that gave rise to this dispute over application of certain sections of the California Vehicle Code occurred off-reservation. Thus nothing in *Blue Lake* requires us to reach a different result here.").

242. *Id.*

the "essential conduct" of the tribal activities occurred on the reservations, as in *Blue Lake*.[243] Like the timbering lands at issue in *Blue Lake*, the Potawatomi Tribe's registration and titling system was the "Indian enterprise at the heart" of the dispute in *Potawatomi*.[244] All registration and titling took place on the reservation.[245] Additionally, the Tribe's vehicle registration and titling system comprised part of a motor vehicle code specifically enacted to manage increased vehicle traffic on the reservation.[246] The off-reservation travel of tribally licensed vehicles inevitably resulted from the tribe's "essential conduct" of managing its reservation.

Likewise, the essential conduct, or "conduct giving rise to the dispute," in *Cabazon* was the Cabazon Tribe's policing of the reservation, not the off-reservation driving of tribal police vehicles. The police vehicles allow officers to patrol the reservation and respond to emergencies.[247] Like the title and registration system in *Potawatomi*, the Cabazon Tribe's police force is part of the tribe's larger scheme to maintain order on its reservation and provides an essential government service to the reservation. Additionally, in order to effectively police the reservation, tribal police vehicles must travel off of the reservation to reach the noncontiguous sections of the reservation.[248] This result is a mere unavoidable "ancillary consequence" of the tribe's on-reservation activity of policing its reservation. Therefore, because the "essential conduct" in both *Cabazon* and *Potawatomi* occurred on the reservation, the rationale of *Blue Lake* would allow preemption balancing to determine whether the state may regulate the tribe's on-reservation conduct.

C. *Repercussions of Applying Preemption Analysis*

Substantial drawbacks exist to applying *White Mountain* preemption balancing or adopting *Blue Lake*'s "essential conduct" approach because either route may ultimately injure tribal sovereign interests. First, because both analyses use

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243. *See* Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1255 (10th Cir. 2001).

244. *Id.* at 1256.

245. *Id.*

246. *Id.* at 1237.

247. *See Cabazon*, 249 F.3d at 1104.

248. *Id.* at 1103.

traditional preemption balancing, they fail to sufficiently account for the heightened tribal interests implicated when tribal activities occur both within and outside the reservation boundaries. Second, both analyses allow states to regulate the on-reservation conduct of tribal members, which states traditionally cannot regulate. Under either approach, a state could regulate on-reservation member activity if the state's interests outweigh tribal and federal interests under the balancing analysis.

When states seek to regulate tribes and tribal members by attempting to impose their vehicle codes, the state action implicates greater tribal sovereignty interests than when states try to regulate nonmember, on-reservation conduct. Yet because the Court articulated preemption analysis to address whether states can regulate on-reservation conduct of nonmembers,[249] rather than whether states may regulate tribal activities, this analysis does not account for the heightened tribal interests. Tribes' defeats under preemption balancing evidences the inadequacy of traditional preemption analysis. First, tribes may have difficulty simply showing that their interests outweigh those of states. For example, the district court in *Cabazon* weighed state, federal, and tribal interests and concluded that state interests were not preempted.[250] Additionally, tribes have not always demonstrated that the state regulatory authority "interferes or is incompatible with federal and tribal interests reflected in federal law,"[251] mainly because the tribes often cannot show "that federal law imposed a comprehensive regulatory scheme."[252] Therefore, traditional

249. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 135 (1980); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1979).

250. Cabazon Band of Mission Indians v. Smith, 34 F. Supp. 2d 1201 (C.D. Cal. 1998).

251. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983).

252. See *supra* text accompanying notes 165–82. In *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 185 (1989), the Court allowed a state to tax nonmember oil and gas producers with operations on reservations by reasoning that tribal and federal interests did not preempt state interests. *Id.* at 193. The Tribe had argued that the state tax would impair a federal policy favoring tribal exploitation of oil and gas resources embodied in the Indian Mineral Leasing Act of 1938, 25 U.S.C.A. § 396 et seq (2000). *Id.* at 177. The Court disagreed, and reasoned that "a purpose of the 1938 Act is to provide Indian tribes with badly needed revenue, but find[s] no evidence for the further supposition that Congress intended to remove al barriers to profit maximization." *Id.* at 180. Similarly, in *Rice v. Rehner*, 463 U.S. 713 (1983), the Court allowed a state to require traders

preemption analysis, announced to determine when state may regulate nonmembers' on-reservation conduct, may not adequately protect the heightened tribal sovereignty interests implicated when states seek to regulate on-reservation tribal activity.

Thus far, the Supreme Court has indicated a reluctance to allow state regulation of on-reservation member activity.[253] Instead, it has attempted to protect tribal sovereignty by limiting state regulation of member activity to those activities occurring outside reservation boundaries.[254] More specifically, the Court has also indicated in dictum an unwillingness to apply preemption analysis should a state attempt to regulate on-reservation member activity.[255] Therefore, by allowing states to regulate on-reservation member activity where the Court has previously limited such regulation, application of preemption analysis might create an incursion into tribal sovereignty.

Applying preemption balancing to determine whether states may regulate tribal members' on-reservation conduct

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operating stores on reservations to obtain state liquor licenses. *Id.* at 735. The Court reasoned that federal and tribal interests did not preempt the state interests because "[i]n the area of liquor regulation, we find no 'congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development.'" *Id.* at 724 (quoting *White Mountain Apache Tribe*, 448 U.S. at 143).

253. The Court has allowed state regulation of on-reservation member activity in a unique circumstance. In *Puyallup Tribe v. Department of Game*, 433 U.S. 165 (1977), the Court allowed the state of Washington to regulate a tribe's on-reservation fishing. *Id.* The Court, however, later described the case as presenting "exceptional circumstances." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331–32 (1983). It noted that "the dispute centered on lands which . . . no longer belonged to the Tribe; all but 22 of the 18,000 acres had been alienated in fee simple." *Id.* The Court also explained that the decision rested 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' and on the State's interest in conserving a scare resource." *Id.*

254. *See Colville*, 447 U.S. at 162–64 (refusing to allow a state to tax tribal members' on-reservation use of motor vehicles but allowing state to "tailor" tax to amount of off-reservation use); Moe v. Confederated Salish & Kootenai Tribes; 425 U.S. 463 (1976) (holding that state lacked power both to impose personal property taxes on on-reservation property owned by members and to tax on-reservation sales by members to members); McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164 (1972) (striking down application of state income tax to member residing on the reservation when entire income earned on the reservation).

255. *White Mountain*, 448 U.S. at 144 ("When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest.").

with off-reservation effects could change key tenets of tribal sovereignty. In contrast, the Ninth Circuit's interpretation of *Mescalero* and its on/off-reservation distinction, though incorrect, arguably preserve a greater degree of tribal sovereignty because they reinforce the principle that states cannot regulate on-reservation activities of tribes and tribal members. Therefore, applying preemption analysis may create a doctrinal inroad into tribal sovereignty where none previously existed.

V. JUDICIAL AND LEGISLATIVE ALTERNATIVES

The analyses presented by the *Cabazon* and *Potawatomi* courts do not necessarily provide tribes with desirable options to resolve conflicting vehicle code cases. On one hand, if a court adheres to the reasoning of *Potawatomi* and applies some form of preemption analysis, it may result in an incursion into tribal sovereignty by allowing states to regulate the on-reservation activities of tribes and tribal members. On the other hand, if a court adopts the Ninth Circuit's interpretation of *Mescalero*, it will effectively nullify tribes' vehicle codes. Rather than promoting either of these approaches, tribes can better protect their sovereign interests by advocating judicial solutions other than those suggested in *Cabazon* and *Potawatomi*. Alternatively, tribes can seek legislative, rather than judicial, solutions.

A. Judicial Alternatives

Rather than following the approach of the *Potawatomi* or *Cabazon* court, a court may attempt to resolve conflicting state and tribal vehicle codes by adopting one of two alternative solutions. Though unexplored by courts, both solutions more effectively preserve tribal sovereignty than traditional preemption analysis or the Ninth Circuit's rigid interpretation of *Mescalero*. The first alternative combines balancing analysis with the Ninth Circuit's broad interpretation of *Mescalero*. The second alternative responds to the failure of traditional preemption balancing to account for the heightened tribal sovereignty at stake when tribal activities occur both within and outside reservation boundaries.

1. A Hybrid Approach: Classification of the Tribes' Activities as On-Reservation, Followed by Application of a Broad Interpretation of *Mescalero*

Courts could employ an alternative that combines *White Mountain*'s balancing element with the Ninth Circuit's interpretation of *Mescalero* to determine whether states may regulate tribal activity that occurs both within and outside reservation boundaries. Rather than using balancing analysis to determine whether states may regulate on-reservation conduct with off-reservation effects, courts could balance state and tribal interests to determine whether the conduct at issue primarily occurs on or off of reservations. Then, if the balancing determines that the conduct at issue primarily occurs within reservation boundaries, the Ninth Circuit's interpretation of *Mescalero* would prevent state regulation of the on-reservation activity. Conversely, if the balancing determines that the conduct at issue primarily occurs outside reservation boundaries, a broad interpretation of *Mescalero* would allow state regulation of the off-reservation activity. Although this analysis resembles the approach used in *Blue Lake*, the court in that case balanced state and tribal interests *after* it classified the conduct at issue as occurring on the reservation. In contrast, the hybrid approach balances state and tribal interests to determine *whether* the conduct occurred on the reservation.

This approach presents three advantages over other forms of analysis employed. First, unlike preemption analysis, this approach leaves tribal sovereignty intact, at least in the abstract, because it does not allow states to regulate activity primarily occurring within reservation boundaries. Second, unlike the Ninth Circuit's interpretation of *Mescalero*, it does not allow a state to impair essential government services that tribes provide on reservations. Finally, this analysis does not deviate far from existing principles of *Mescalero* and *White Mountain* but instead combines the *Mescalero*, *White Mountain*, and *Blue Lake* approaches.

2. A Presumption of Preemption

Instead of applying traditional preemption analysis or even "essential conduct" analysis to activities occurring both on and off reservations, courts could adopt a "presumption of

preemption." Professor Laurie Reynolds has proposed the presumption of preemption and advocated its application, rather than the traditional preemption analysis of *White Mountain*, because the presumption emphasizes interests of tribal sovereignty in determining whether states can regulate areas of tribal interest.[256] The *White Mountain* preemption analysis only considers tribal sovereignty as a "backdrop" against which to measure state interests.[257] *White Mountain* preemption analysis does not, as Professor Reynolds noted, "require the state to adopt the least restrictive regulation possible, nor does it require the state to show that on-reservation state regulation is necessary to further an important state interest."[258] Instead, the presumption of preemption would "force[] the state to articulate more clearly the factors justifying infringement on tribal sovereignty"[259] Professor Reynolds argued that requiring the state to articulate its regulatory need would "ensure[] that the state regulation imposed will be carefully tailored to advance that need in the manner least intrusive on tribal sovereign powers."[260]

To defeat the presumption of preemption, Professor Reynolds suggested that states must demonstrate four factors:

> (1) that [the state] has a heightened regulatory interest in the activity it seeks to regulate; (2) that the regulation is aimed at activity with a substantial off-reservation nexus; (3) that the regulation would not interfere with a comprehensive federal plan; and (4) that the state regulation is necessary to the furtherance of the objective.[261]

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256. Laurie Reynolds, *Indian Hunting and Fishing Rights: The Role of Tribal Sovereignty and Preemption*, 62 N.C. L. REV. 743 (1984). Although Professor Reynolds proposed the presumption of preemption to address problems arising from overlapping state and tribal regulatory jurisdiction in the context of tribal hunting and fishing rights, she called for courts to apply the presumption "any time a state attempts to regulate in an area otherwise left to the tribes in the proper exercise of their sovereignty," regardless of whether the activity occurs on or off the reservation or by a member or non-member. *Id.* at 787–88.

257. *White Mountain*, 448 U.S. at 143 (quoting McClanahan, 411 U.S. at 172).

258. Reynolds, *supra* note 256, at 788.

259. *Id.* at 790.

260. *Id.* at 793.

261. *Id.* at 788.

A court adopting the presumption of preemption approach, however, may not choose to consider Professor Reynolds's specific factors. Instead, a court applying the presumption of preemption arguably could rely on any factors that would "ensure that the state articulate a well-defined need to implement an important regulatory policy in the most limited way possible."[262]

Application of the presumption arguably would mitigate the failure of preemption analysis to account for the heightened tribal interests implicated when states seek to regulate on-reservation activities of tribes and tribal members. Although the presumption, like preemption analysis, potentially could allow states to regulate on-reservation tribal conduct, it would require states to define a higher need for regulation than under preemption analysis. Additionally, unlike preemption analysis, the presumption would not require tribes to demonstrate that state regulatory authority "interferes or is incompatible with federal and tribal interests reflected in federal law."[263] Therefore, the presumption would prevent states from regulating tribal members' on-reservation activites whenever such conduct occurred both within and outside reservation boundaries.

B. A Legislative Alternative

Tribes optimally seek a judicial judgment affirming that their inherent sovereignty prevents states from imposing their vehicle codes on tribally registered vehicles traveling outside reservation boundaries. Yet in the interest of preserving tribal sovereignty, tribes may choose not to risk an adverse judgment and thus refrain from litigating their cases. The Supreme Court recently issued a decision unfavorable to tribal sovereignty interests,[264] which followed a series of decisions in which the Court curbed tribes' sovereign authority.[265] Rather

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262. *See id.* at 789.

263. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983).

264. Nevada v. Hicks, 533 U.S. 353 (2001) (holding tribal court lacked jurisdiction over tort case against state officials investigating off-reservation activities by searching tribal trust lands).

265. *See, e.g., id.* at 353; Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001) (holding that the tribe lacks authority to impose tax on nonmembers located on non-Indian fee land within reservation); Ariz. Dep't of Revenue v. Blaze Constr. Co., 526 U.S. 32 (1999) (holding that state possesses authority to tax non-

than chance a decision that might impair tribes' right to self-governance, such as the *Cabazon* decision, tribes might opt for a safer legislative alternative.

1. Possible Implications of *Nevada v. Hicks*[266]

The recent Supreme Court decision in *Nevada v. Hicks* clouded existing analysis for determining the extent of tribes' jurisdictional authority.[267] *Hicks* arose when member of the Fallon Paiute-Shoshone Tribe residing on the reservation brought tort claims against state officials in their individual capacities in tribal court.[268] State officials had executed a search warrant in the tribal member's home for evidence of an off-reservation crime pursuant to a search warrant from a state court and had not obtained permission from the tribal court.[269] The Court held the tribal court lacked authority over state officials investigating off-reservation violations of state law on reservations.[270] Although *Hicks* addressed the narrow issue of tribes' civil authority over state officers,[271] the case also

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member contractor employed by federal government to work on tribal lands). *See generally* David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001).

266. 533 U.S. 353.

267. *See generally* Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 229–34 (2002); N. Bruce Duthu & Dean B. Suagee, *Supreme Court Strikes Two More Blows Against Tribal Self-Determination*, 16 NAT. RESOURCES & ENV'T 118 (2001); Melanie Reed, Note, *Native American Sovereignty Meets A Bend in the Road: Difficulties in* Nevada v. Hicks, 2002 B.Y.U. L. REV. 137; *cf.* Amy Crafts, Note, Nevada v. Hicks *and Its Implication on American Indian Sovereignty*, 34 CONN. L. REV. 1249 (2002).

268. *Hicks*, 533 U.S. at 356–57. The tribal member alleged trespass to land and chattels, abuse of process, and violations of civil rights under 42 U.S.C. § 1983 (2000) resulting from the execution of the warrant against the state officials in their individual capacities. *Id.*

269. *Id.*

270. *Id.* at 374. In reaching this holding, the Court applied the rule of *Montana v. United States*, 450 U.S. 544 (1981), that "[w]here nonmembers are concerned, the 'exercise of tribal power *beyond what is necessary to protect tribal self-government or to control internal relations* is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.'" *Id.* at 358–59 (quoting *Montana*, 450 U.S. at 564) (emphasis in original). The Court previously had only applied *Montana* to determine whether a tribe possessed civil authority over a nonmember on land owned by a nonmember within a reservation. *Id.*

271. The Court limited its holding to "the question of tribal-court jurisdiction over state officers enforcing state law" and did not address the

involved the competing interests of state and tribal police authorities. Through its analysis and dicta, the *Hicks* Court expressed a willingness both to find tribal interests subordinate to state sovereignty interests in balancing analysis and to narrowly define a tribe's police powers.

First, the Court stated that tribal sovereignty does not necessarily bar assertions of state authority within reservation boundaries. It explained:

> Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border. Though tribes are often referred to as "sovereign" entities, it was "long ago" that "the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries.'"[272]

Furthermore, the Court suggested that state interests may trump tribal interests in a balancing analysis. It noted that when "state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land."[273] Despite the limited holding of *Hicks*, the court potentially could extend this forceful language and its underlying rationale to other conflicts between state and tribal sovereignty, such as state and tribal vehicle codes.

Second, the Court articulated a narrow view of tribes' sovereign police powers when it stated that tribal civil jurisdiction over state officers acting on reservations was not "necessary to protect tribal self-government or to control internal relations."[274] Particularly, the Court did not consider whether a tribe's ability to regulate the conduct of persons entering the reservation—a basic element of policing behavior that affects the tribe and its members—was fundamental to a tribe's self-government.[275] Instead, the Court only cited a tribe's "authority '[to punish tribal offenders,] to determine tribal members, to regulate domestic relations among

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question of a tribe's general authority over nonmember defendants. *Hicks*, 533 U.S. at 358 n.2.

272. *Id.*, at 361 (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 (1980)).

273. *Id.* at 362.

274. *Id.* at 360–65.

275. *See id.*

members, and to prescribe rules of inheritance'" as "necessary to protect tribal self-government or to control internal relations."[276] This narrow view of functions "necessary to protect self-government" may suggest that the Court perceives tribal governments as possessing only a limited authority to police their reservations.

Arguably *Hicks* does not alter the analysis to resolve conflicting state and tribal vehicle codes because it did not address a state's ability to regulate tribal members' off-reservation activities. Furthermore, underlying concerns for federalism and the liability of state officers, rather than attitudes toward tribes' sovereign authority, may have driven the Court's decision.[277] Nonetheless, dicta in *Hicks* indicate that a decision by the Court resolving the issues presented in *Cabazon* and *Potawatomi* may not favor tribes. First, because the Court suggested that states potentially could regulate tribal members' on-reservation activities, the Court may support a narrow interpretation of *Mescalero* that could nullify tribal law enforcement programs. Second, even if the Court chose to apply preemption analysis, the Court's prioritization of state interests over tribal interests suggests that tribal interests may not prevail under balancing analysis. Finally, the Court's failure to consider a tribe's interest in law enforcement in *Hicks* indicates it may not find a tribe's interest in law enforcement significant with regard to vehicle codes.

Notably, in *Prairie Band of Potawatomi Indians v. Richards*, [278] the United States District Court of Kansas concluded that *Hicks* did not alter the outcome of *Potawatomi I*.[279] The court had considered the Potawatomi Tribe's petition for declaratory and injunctive relief to require the State of Kansas to extend reciprocity to tribal licensing and registration.[280] The court characterized *Hicks* as relating to

276. *Id.* at 361 (quoting Montana v. United States, 450 U.S. 544, 564 (1981)).

277. *See* Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1235 (2001); Richard E. James, Comment, *Sanctuaries No More: The United States Supreme Court Deals Another Blow to Indian Tribal Court Jurisdiction*, 41 WASHBURN L.J. 347, 361 (2002).

278. Prairie Band of Potawatomi Indians v. Richards, No. 99-4136-DES, 2002 WL 215996 (D. Kan. Feb. 8, 2002).

279. *Id.* at *3.

280. *Id.* at *1. The Tribe ultimately withdrew its motion for summary judgment. *Id.* at *3.

tribal authority of nonmembers and distinguished the tribal vehicle code context as relating to tribal authority over members.[281] The court concluded that *Mescalero*, rather than *Hicks*, governed issues of tribal vehicle codes.[282]

Despite the district court's conclusion in *Potawatomi II*, *Hicks* stands as an example of the Court's willingness to find that state sovereignty supersedes tribes' police powers. With *Hicks* looming above tribes' litigation choices, tribes may choose to instead pursue alternatives to litigation.

2. The Safer Route of Legislation

Tribes can avoid the conflicts between state and tribal vehicle codes encountered in *Cabazon* and *Potawatomi* through action in legislatures rather than the courts. The problems in these cases arose because California's vehicle code does not exempt tribal police vehicles from state laws prohibiting light bars on vehicles[283] and Kansas's vehicle code does not extend reciprocal registration recognition to tribally registered and titled vehicles.[284] Including provisions exempting tribes from the relevant provisions of the states' vehicle codes would resolve the conflicts.[285]

The scope of tribes' sovereign authority should not be a function of state legislatures. Admittedly, tribes would benefit most from court judgments affirming their inherent authority. Yet given the lower courts' schizophrenic treatment of this issue and the Supreme Court's recent decisions regarding tribes, tribes may risk adverse judgments by choosing to litigate this issue. Therefore, legislation may produce a desired

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281. *Id.* at *3. Kansas had argued that *Hicks* "so altered the legal landscape that the Tenth Circuit's opinion in *Potawatomi I* should be given little to no weight." *Id.* at *2.

282. *Id.* at *3.

283. CAL. VEH. CODE §§ 25251(a)(4), 25252, 25258, 25259, 25260 (West 2000). Notably, a bill that would have resolved the conflict in *Cabazon* was introduced in the California Senate. *See* S.B. 911, 2001 Gen. Assem., Reg. Sess. (Cal. 2001). California's General Assembly did not enact the bill.

284. *See* KAN. STAT. ANN. § 8-127 (2001).

285. "Extensions of reciprocity, government to government, are a matter of diplomacy and public policy, best left to be negotiated by the executive and legislative branches—'the theory that the imposition of a reciprocity requirement is not a matter for courts to decide independently is generally sound.'" Appellant's Reply Brief at 6, Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234 (10th Cir. 2001) (No. 99-3324) (quoting Wilson v. Marchington, 127 F.3d 805, 812 (9th Cir. 1997)).

result—states would honor tribal vehicle codes—with less risk to tribal sovereignty than litigation.[286] Several states currently have provisions either exempting tribal and tribally owned vehicles from state vehicle codes or extending reciprocal recognition to the tribes.[287] California's statutes, for example, recognize the Washoe Tribe's law enforcement vehicles.[288] Notably, such legislation resolved the conflict between state

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286. Additionally, legislation may resolve these issues more quickly than litigation. For example, the *Potawatomi* litigation commenced in 1999 and continues today. *See Cabazon Band of Mission Indians v. Smith*, No. CV974687CAS(JGX), 2002 WL 32065673 (C.D. Cal. Oct. 16, 2002); *Cabazon Band of Mission Indians v. Smith*, 249 F.3d 1101 (9th Cir. 2001), *withdrawn*, 271 F.3d 910 (9th Cir. 2001); *see also* Prairie Band of Potawatomi Indians v. Richards, No. 99-4136-DES, 2002 WL 215996 (D. Kan. Feb. 8, 2002); Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1239 (10th Cir. 2001).

287. *See, e.g.*, MINN. STAT. ANN. § 168.181 (West 2001); OKLA. STAT. ANN. tit. 47, § 1138 (West 2001); S.D. CODIFIED LAWS § 32-5-42 (Michie 2002); WASH. REV. CODE ANN. § 46.16.022 (West 2001); WIS. STAT. ANN. § 341.409 (West 2001). For example, a provision from the Revised Code of Washington exempting tribal governmental vehicles from Washington's vehicle code reads:

> The provisions of this chapter relating to licensing of vehicles by this state, including the display of vehicle license number plates and license registration certificates, do not apply to vehicles owned or leased by the governing body of an Indian tribe located within this state and recognized as a governmental entity by the United States Department of the interior, only when:
>
> (a) The vehicle is used exclusively in tribal government service; and
>
> (b) The vehicle has been licensed and registered under a law adopted by such tribal government.

WASH. REV. CODE ANN. § 46.16.022 (West 2001).

Similarly, Wisconsin's vehicle code extends reciprocity to tribally licensed vehicles and reads:

> The secretary with the approval of the joint committee on finance may enter into a reciprocal registration exemption agreement with the governing body of any federally recognized Indian tribe or band. The reciprocal agreement may exempt designated classes of vehicles registered by the Indian tribe or band from the registration requirements of this state if:
>
> (a) The vehicle carries a registration plate showing valid registration by the Indian tribe or band.
>
> (b) The Indian tribe or band registering the vehicle allows reciprocal privileges to similar classes of vehicles registered in this state under conditions substantially as favorable to this state as the Indian tribe or band.

WIS. STAT. ANN. § 341.409 (West 2001).

288. CAL. PENAL CODE § 830.8(e) (West 2003) (including the Washoe Tribe's law enforcement vehicles under statutory definition of "emergency vehicles").

and tribal laws in *Queets*, rendering the issue moot and leading to the Ninth Circuit vacating the decision.[289]

Enacting such legislation may be best for tribes in the long term. As tribal governments provide more services and enact more regulations,[290] the "spillover" effects, such as tribal vehicles traveling outside reservations boundaries, likely will increase. Negotiation with states, rather than litigation, fosters amicable relations and reduces the possibility of a court decision that diminishes tribes' sovereign powers. By bringing these conflicts before legislatures, tribes preserve their powers to manage their affairs on reservations.

CONCLUSION

Courts struggle to resolve conflicts between state vehicle codes and tribal vehicle codes because precedent provides courts with little guidance as to which analysis to apply. *Cabazon*, *Potawatomi*, and *Queets* demonstrate the erratic outcomes. The *Cabazon* court interpreted *Mescalero* broadly to improperly allow state regulation of tribal vehicles. In contrast, the *Potawatomi* court suggested that *White Mountain* preemption balancing applied to resolve these conflicts and indicated that tribal interests would preempt state interests.

Application of *White Mountain* preemption analysis to conflicts between state and tribal vehicle codes, however, may yield results as problematic as those presented by the Ninth Circuit's interpretation of *Mescalero*. Because *White Mountain* preemption analysis initially served as a means of determining whether states could regulate nonmembers'—rather than members'—on-reservation activities, application of this analysis could allow states to regulate on-reservation tribal conduct. Furthermore, this preemption analysis fails to adequately account for the heightened tribal interests

289. Queets Band of Indians v. Washington, 765 F.2d 1399 (9th Cir. 1983), *vacated as moot*, 783 F.2d 154 (9th Cir. 1986).

290. For example, the Prairie Band Potawatomi Nation, like the Cabazon Band of Indians, has an emergency services program and a law enforcement program. Prairie Band Potawatomi Nation, Enterprises, Protective Services, *available at* http://www.pbindiantribe.com/proser.htm (last accessed Apr. 15, 2002). Additionally, the tribe has a Department of Planning & Environmental Protection that develops plans for land use, wetlands, and watershed management. Prairie Band Potawatomi Nation, Public Works, *available at* http://www.pbindiantribe.com/pworks.htm (last accessed Apr. 15, 2002). These services and regulatory programs possibly could also conflict with state authority.

implicated should states attempt to regulate tribes' on-reservation activities. Thus, a court attempting to resolve conflicts between state and tribal with balancing analysis should apply a different form of preemption analysis that more adequately safeguards tribal interests.

Yet by litigating this issue, tribes run the risk of an outcome such as that in *Cabazon*, where the state's authority to regulate off-reservation conduct of tribal members is affirmed. Should the Supreme Court address this issue, an outcome like that in *Cabazon* could curb tribes' ability to police themselves and create grave implications for tribal sovereignty in other contexts. Thus, although tribes may optimally seek a decision affirming their inherent sovereign authorities, tribes' best option may be to pursue a statutory exception or reciprocity agreement.